# NORTH CAROLINA REPORTS

## VOL. 167

CASES ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

**FALL TERM, 1914**

(IN PART)

BY

ROBERT C. STRONG

STATE REPORTER

ANNOTATED

The numbers in parenthesis following the annotation indicate the number of the digest in the case annotated which is discussed in the case cited. The letters following the numbers indicate the treatment in the cited case: c indicates cited; cc, cited as controlling; d, distinguished; j, cited in concurring or dissenting opinion; l, limited; o, overruled; p, parallel; q, questioned.

RALEIGH
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1953

# CITATION OF REPORTS

Rule 62 of the Supreme Court is as follows:

Inasmuch as all the volumes of Reports prior to the 63rd have been reprinted by the State, with the number of the volume instead of the name of the Reporter, counsel will cite the volumes prior to 63 N. C., as follows:

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| 3 and 4 Dev. and Bat. Law | " | 20 | " |
| 1 Dev. and Bat. Eq. | " | 21 | " |
| 2 Dev. and Bat. Eq. | " | 22 | " |
| 1 Iredell Law | " | 23 | " |
| 2 Iredell Law | " | 24 | " |
| 3 Iredell Law | " | 25 | " |
| 4 Iredell Law | " | 26 | " |
| 5 Iredell Law | " | 27 | " |
| 6 Iredell Law | " | 28 | " |
| 7 Iredell Law | " | 29 | " |
| 8 Iredell Law | as | 30 | N. C. |
| 9 Iredell Law | " | 31 | " |
| 10 Iredell Law | " | 32 | " |
| 11 Iredell Law | " | 33 | " |
| 12 Iredell Law | " | 34 | " |
| 13 Iredell Law | " | 35 | " |
| 1 Iredell Equity | " | 36 | " |
| 2 Iredell Equity | " | 37 | " |
| 3 Iredell Equity | " | 38 | " |
| 4 Iredell Equity | " | 39 | " |
| 5 Iredell Equity | " | 40 | " |
| 6 Iredell Equity | " | 41 | " |
| 7 Iredell Equity | " | 42 | " |
| 8 Iredell Equity | " | 43 | " |
| Busbee Law | " | 44 | " |
| Busbee Equity | " | 45 | " |
| 1 Jones Law | " | 46 | " |
| 2 Jones Law | " | 47 | " |
| 3 Jones Law | " | 48 | " |
| 4 Jones Law | " | 49 | " |
| 5 Jones Law | " | 50 | " |
| 6 Jones Law | " | 51 | " |
| 7 Jones Law | " | 52 | " |
| 8 Jones Law | " | 53 | " |
| 1 Jones Equity | " | 54 | " |
| 2 Jones Equity | " | 55 | " |
| 3 Jones Equity | " | 56 | " |
| 4 Jones Equity | " | 57 | " |
| 5 Jones Equity | " | 58 | " |
| 6 Jones Equity | " | 59 | " |
| 1 and 2 Winston | " | 60 | " |
| Phillips Law | " | 61 | " |
| Phillips Equity | " | 62 | " |

In quoting from the *reprinted* Reports counsel will cite always the marginal (*i.e.*, the *original*) paging, except 1 N. C. and 20 N. C., which are repaged throughout, without marginal paging.

# JUSTICES

OF THE

# SUPREME COURT OF NORTH CAROLINA

---

CHIEF JUSTICE:

WALTER CLARK.

---

ASSOCIATE JUSTICES:

PLATT D. WALKER,
GEORGE H. BROWN,
WILLIAM A. HOKE,
WILLIAM R. ALLEN.

---

ATTORNEY-GENERAL:

T. W. BICKETT.

---

ASSISTANT ATTORNEY-GENERAL:

T. H. CALVERT.

---

SUPREME COURT REPORTER:

ROBERT C. STRONG.

---

CLERK OF THE SUPREME COURT:

JOSEPH L. SEAWELL.

---

OFFICE CLERK:

W. T. SMITH.

---

MARSHAL AND LIBRARIAN:

ROBERT H. BRADLEY.

# JUDGES

OF THE

# SUPERIOR COURTS OF NORTH CAROLINA

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

# SOLICITORS

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

## LICENSED ATTORNEYS.

Names of licensed attorneys for Spring Term, 1915, will appear in Vol. 168, where decisions for that term commence.

## ERRATA.

In the list of licensed attorneys for the Fall Term, 1914, the name of Basil Frank Brittain of Randolph should have appeared.

The trial judge in the cases of *S. v. Lane*, 166 N. C., 334, and *S. v. Gaddy*, 166 N. C., 341, was *Judge Adams* instead of Judge Lane, as therein reported.

# CALENDAR OF COURTS

TO BE HELD IN

# NORTH CAROLINA DURING THE FALL OF 1915.

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## SUPREME COURT.

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

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

| | | |
|---|---|---|
| First District | August | 31 |
| Second District | September | 7 |
| Third District | September | 14 |
| Fourth District | September | 21 |
| Fifth District | September | 28 |
| Sixth District | October | 5 |
| Seventh District | October | 12 |
| Eighth and Ninth Districts | October | 19 |
| Tenth and Eleventh Districts | October | 26 |
| Twelfth District | November | 2 |
| Thirteenth District | November | 9 |
| Fourteenth District | November | 16 |
| Fifteenth and Sixteenth Districts | November | 23 |
| Seventeenth and Eighteenth Districts | November | 30 |
| Nineteenth District | December | 7 |
| Twentieth District | December | 14 |

# SUPERIOR COURTS, FALL TERM, 1915

The changes of judges holding the Courts appear in accordance with chapter 15, Public Laws of 1915, dividing the State into two judicial divisions.

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

**THIS CALENDAR IS UNOFFICIAL**

### FIRST JUDICIAL DISTRICT.

FALL TERM, 1915—*Judge Cooke.*

Pasquotank—July 5 (1); †Sept. 20 (2); Nov. 15 (1).
Camden—†July 19 (1); Nov. 8 (1).
Gates—Aug. 2 (1); Dec. 13 (1).
Washington—Aug. 9 (1).
Perquimans—†Aug. 16 (1); Nov. 1 (1).
Currituck—Sept. 6 (1).
Chowan—Sept. 13 (1); Dec. 6 (1).
Beaufort—†Oct. 4 (2); Nov. 22 (1); †Dec. 20 (1).
Hyde—Oct 18 (1).
Dare—Oct. 25 (1).
Tyrrell—Nov. 30 (1).

### SECOND JUDICIAL DISTRICT.

FALL TERM, 1915—*Judge Rountree.*

Nash—Aug. 30 (1); Oct. 11 (1); Nov. 29 (2).
Wilson—Sept. 6 (1); Oct. 4 (1); †Nov. 15 (2); *Dec. 20 (1).
Edgecombe—*Sept. 13 (1); †Nov. 1 (2).
Martin—Sept. 20 (2); Dec. 13 (1).

### THIRD JUDICIAL DISTRICT.

FALL TERM, 1915—*Judge Lyon.*

Northampton—‡Aug. 2 (1); Nov. 1 (2).
Halifax—Aug. 23 (2); Nov. 29 (2).
Bertie—Sept. 6 (1); Nov. 15 (2).
Warren—Sept. 20 (2).
Vance—Oct. 4 (2).
Hertford—Oct. 18 (2).

### FOURTH JUDICIAL DISTRICT

FALL TERM, 1915—*Judge Devin.*

Lee—July 19 (2); †Oct. 25 (1); Nov. 8 (1).
Chatham—†Aug. 9 (1); Nov. 1 (1).
Johnston—*Aug. 16 (1); †Sept. 27 (2); Dec. 13 (2).
Wayne—Aug. 23 (2); †Oct. 11 (2); Nov. 29 (2).
Harnett—Sept. 6 (2); †Nov. 15 (2).

### FIFTH JUDICIAL DISTRICT.

FALL TERM, 1915—*Judge Bond.*

Jones—Aug. 16 (1); Dec. 6 (1).
Pitt—†Aug. 23 (1); *Aug. 30 (1); †Sept. 20 (1); †Oct. 4 (1); †Nov. 8 (1); *Nov. 15 (1); †Dec. 15 (1).
Craven—Sept. 6 (2); *Oct. 11 (1); †Nov. 22 (2).
Carteret—Oct. 18 (1).
Pamlico—Oct. 25 (2).
Greene—Dec. 20 (1).

### SIXTH JUDICIAL DISTRICT

FALL TERM, 1915—*Judge Connor.*

Onslow—†July 19 (1); Oct. 11 (1); †Dec. 6 (1)
Duplin—July 26 (1); †Aug. 30 (2); Sept. 13 (1); Nov. 22 (2); †Dec. 20 (1).
Sampson—Aug. 9 (2); †Sept. 20 (2); Oct. 25 (2).
Lenoir—*Aug. 23 (1); ‡Oct. 18 (1); †Nov. 8 (2); *Dec. 13 (1).

### SEVENTH JUDICIAL DISTRICT.

FALL TERM, 1915—*Judge Peebles.*

Wake—*July 12 (1); *Sept. 13 (1); †Sept. 20 (3); *Oct. 11 (1); †Oct. 25 (2); *Nov. 8 (1); †Nov. 29 (1); *Dec. 6 (1); †Dec. 13 (1).
Franklin—Aug. 30 (2); *Oct. 18 (1); †Nov. 15 (2).

### EIGHTH JUDICIAL DISTRICT.

FALL TERM, 1915—*Judge Daniels.*

Brunswick—†Aug. 23 (1); Oct. 11 (1).
Columbus—Aug. 30 (2); †Nov. 22 (2); *Dec. 20 (1).
New Hanover—Sept. 13 (2); †Oct. 25 (2); Nov. 15 (1); †Dec. 6 (2).
Pender—†Sept. 27 (2); Nov. 8 (1).

### NINTH JUDICIAL DISTRICT.

FALL TERM, 1915—*Judge Whedbee.*

Robeson—*July 5 (2); *Sept. 6 (1); †Sept. 13 (1); †Oct. (2); *Nov. 8 (2); Dec. 6 (2).
Bladen—†Aug. 9 (1); Oct. 18 (1).
Hoke—Aug. 16 (1); Nov. 29 (2).
Cumberland—*Aug. 30 (1); †Sept. 20 (2); †Oct. 25 (2); *Nov. 22 (1).

### TENTH JUDICIAL DISTRICT.

FALL TERM, 1915—*Judge Allen.*

Granville—Aug. 9 (1); Nov. 15 (2).
Person—Aug. 16 (1); Oct. 25 (1).
Alamance—*Aug. 23 (1); Sept. 13 (2); †Oct. 11 (2); *Nov. 29 (1).
Durham—*Aug. 30 (1); †Sept. 27 (2); †Nov. 8 (1); *Dec. 13 (1).
Orange—Sept. 6 (1); Dec. 6 (1).

### ELEVENTH JUDICIAL DISTRICT.

FALL TERM, 1915—*Judge Cline.*

Ashe—July 12 (2); Oct. 18 (1).
Forsyth—*July 26 (2); †Sept. 13 (2); Oct. 4 (2); †Nov. 8 (2); *Dec. 13 (1).
Rockingham—*Aug. 9 (2); †Nov. 22 (2); *Dec. 20 (1).
Caswell—Aug. 25 (1); Dec. 6 (1).
Surry—Aug. 30 (2); Oct. 18 (1); Oct. 25 (1).
Alleghany—Sept. 27 (1).

### TWELFTH JUDICIAL DISTRICT.

FALL TERM, 1915—*Judge Justice.*

Davidson—Aug. 2 (2); †Nov. 22 (2).

Guilford—†Aug. 16 (2); †Sept. 6 (2); *Sept. 20 (1); †Sept. 27 (1); Oct. 11 (2); †Nov. 8 (2); †Dec. 6 (1); *Dec. 13 (1); Dec. 20 (1).
Stokes—*Oct. 25 (1); †Nov. 1 (1).

**THIRTEENTH JUDICIAL DISTRICT.**

FALL TERM, 1915—*Judge Carter.*

Moore—July 5 (1); Aug. 16 (1); †Sept. 20 (1); Dec. 13 (1).
Stanly—July 12 (1); †Oct. 11 (1); Nov. 22 (1).
Richmond—*July 19 (1); †Sept. 6 (1); *Sept 27 (1); †Dec. 6 (1).
Union—*Aug. 2 (1); †Aug. 23 (2); Oct. 18 (2); †Dec. 20 (1).
Anson—*Sept. 13 (1); †Oct. 4 (1); †Nov. 15 (1).
Scotland—Nov. 1 (1); Nov. 29 (1).

**FOURTEENTH JUDICIAL DISTRICT.**

FALL TERM, 1915—*Judge Ferguson.*

Mecklenburg—†July 12 (2); *Aug. 30 (1); †Sept. 6 (2); *Oct. 4 (1); †Nov. 1 (2); *Nov. 15 (1); †Nov. 22 (2).
Gaston—*Aug. 23 (1); †Sept. 20 (2); *Oct. 25 (1); Dec. 6 (1).

**FIFTEENTH JUDICIAL DISTRICT.**

FALL TERM, 1915—*Judge Lane.*

Montgomery—*July 12 (1); †Sept 27 (2).
Randolph—†July 19 (2); *Sept. 6 (1); Dec. 6 (2).
Iredell—Aug. 2 (2); Oct. 18 (2).
Cabarrus—Aug. 16 (2); Nov. 1 (2)
Davie—Aug. 30 (1); Nov. 15 (1).
Rowan—Sept. 13 (2); †Oct. 13 (1); Nov. 22 (2).

**SIXTEENTH JUDICIAL DISTRICT.**

FALL TERM, 1915—*Judge Shaw.*

Lincoln—July 19 (1); Sept. 6 (1); Dec. 20 (1).
Cleveland—July 26 (2); Nov. 1 (2).
Burke—Aug. 9 (2); †Oct. 4 (2); †Dec. 6 (2).
Caldwell—Aug. 23 (2); Nov. 15 (2).
Polk—Sept. 20 (2).

**SEVENTEENTH JUDICIAL DISTRICT.**

FALL TERM, 1915—*Judge Adams.*

Catawba—July 12 (2); Nov. 1 (2).
Mitchell—†July 26 (2); Nov. 15 (2).
Wilkes—Aug. 9 (2); †Oct. 4 (2).
Yadkin—Aug. 23 (1); Nov. 29 (1).
Watauga—Sept. 6 (2).
Alexander—Sept. 20 (2).
Avery—Oct. 18 (2).

**EIGHTEENTH JUDICIAL DISTRICT.**

FALL TERM, 1915—*Judge Harding.*

McDowell—July 12 (2); Sept. 20 (2).
Rutherford—†Aug. 23 (2); Oct. 18 (2); †Dec. 13 (1).
Transylvania—Sept. 6 (2).
Henderson—*Oct. 4 (2); †Nov. 15 (2).
Yancey—Nov. 1 (2).

**NINETEENTH JUDICIAL DISTRICT.**

FALL TERM, 1915—*Judge Long.*

Buncombe—*July 12 (2); †Aug. 16 (2); *Sept. 20 (2); †Oct. 4 (3); †Oct. 25 (2); *Nov. 8 (1); Nov. 29 (3).
Madison—Sept. 6 (2); †Nov. 15 (2).

**TWENTIETH JUDICIAL DISTRICT.**

FALL TERM, 1915—*Judge Webb.*

Haywood—July 12 (2); Sept. 20 (2).
Swain—July 26 (2); Oct. 25 (2).
Cherokee—Aug. 9 (2); Nov. 8 (2).
Macon—Aug. 23 (2); Nov. 22 (2).
Graham—Sept. 6 (2); Dec. 6 (2).
Clay—Oct. 4 (1).
Jackson—Oct. 11 (2).

*Criminal cases. †Civil cases. ‡Civil and jail cases

# UNITED STATES COURTS FOR NORTH CAROLINA

## DISTRICT COURTS

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

## EASTERN DISTRICT

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

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

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

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

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

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

Terms of court for Laurinburg and Wilson are now created, but not definitely fixed.

OFFICERS.

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

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

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

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

LEO. D. HEARTT, Deputy Clerk, Raleigh.

## WESTERN DISTRICT

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

Greensboro, first Monday in June and December. J. M. MILLIKEN, Clerk, Greensboro.

Statesville, third Monday in April and October.

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

Charlotte, first Monday in April and October.

Salisbury, fourth Monday in April and October.

Wilkesboro, fourth Monday in May and November.

OFFICERS.

WILLIAM C. HAMMER, United States District Attorney, Ashboro.

CLYDE R. HOEY, Assistant United States District Attorney, Charlotte.

CHARLES A. WEBB, United States Marshal, Asheville.

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# CASES

ARGUED AND DETERMINED IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

AT

## RALEIGH.

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## FALL TERM, 1914

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WILLIAM J. RICE v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 7 October, 1914.)

1. **Courts—Pleadings—Amendments—Answer—Waiver.**

When a defendant answers an amended complaint which has been permitted by the court, his doing so is a waiver of any objection thereto he might otherwise have had.

2. **Railroads—Construction—Negligence—Drain Pipes—Ponding Water—Limitations of Actions.**

Where a plaintiff sues a railroad company for damages arising from sickness in his family alleged to have been caused by the negligence of the defendant in failing to properly keep open a culvert under its track to carry off accumulating or running waters, resulting in ponding the waters upon plaintiff's land under his dwelling-house, the negligence complained of is not barred by the five-year statute of limitations, running from the time the culvert was constructed, the damages sought having arisen from an alleged subsequent negligent act in connection with the drain.

3. **Railroads—Ponding Water—Malaria—Mosquitoes—Evidence.**

In an action to recover damages of a railroad company for malarial sickness alleged to have been caused in the plaintiff's family from the negligence of the defendant in not keeping a drain under its track properly cleaned out and open, thus ponding water under the plaintiff's dwelling, his physician testified that the ponded water bred mosquitoes whose bite caused the malaria, and it is held competent for plaintiff to testify as to the sickness of certain of his children thus caused.

4. **Same—Children—Value of Services—Observation of Jury—Witnesses—Evidence.**

Where damages are allowable to the parent by reason of the sickness of his children, caused by the act of defendant in ponding water under

his dwelling, and the children are exhibited to the jury, it is competent for the jury to take into their consideration in assessing the damages their own observation and knowledge of the value of such children to their parents in their own homes.

**5. Railroads—Drain Pipes—Ponding Water—Malaria—Negligence—Trials—Evidence—Burden of Proof—Instructions.**

Where a railroad company is sued for not keeping its drain pipe under its roadbed properly cleaned out, thus ponding water under the plaintiff's house, and causing sickness in his family, and there is evidence tending to show this resulted in the sickness complained of, it is competent to ask a witness whether the water would have been thus ponded had the drain been cleaned; and in this case it is held that the instruction of the judge as to the burden of proof was not objectionable to the defendant.

( 2 ) APPEAL by defendant from *Daniels, J.*, at June Term, 1914, of CARTERET.

This is an action for damages in diverting and ponding water by the defendant's embankment, causing sickness of plaintiff's children and the loss of their services and the expense of the doctor's bill and medicine.

Verdict and judgment for the plaintiff. Appeal by the defendant.

*Abernethy & Davis and C. R. Wheatley for plaintiff.*

*Moore & Dunn and I. F. Duncan for defendant.*

CLARK, C. J. The defendant's roadbed was constructed at this point in 1906. By reason of the embankment in the defendant's track in front of plaintiff's house surface water was ponded back under the house. To relieve this the defendant put a tile drain in this embankment in 1910. Before the embankment was placed there, there was a natural drainage of the surface water. The tile drain at first took the water off. Afterwards, in 1911, it became clogged, ponding water under the house, with the result, as witnesses testified, of causing plaintiff's children to have malarial fever. There was evidence of the cost of the doctor's bill and medicine and plaintiff's loss of the services of his children, who were 13, 15, and 18 years of age, respectively.

The original complaint was based upon damages sustained by the construction of the embankment in 1906. By the amended complaint the cause of action was based upon the failure to keep the pipe open since May, 1911, and the damages caused thereby. The demurrer *ore tenus* was properly overruled. If there had been any valid objection to amending the complaint, it had been waived by the amended answer
( 3 ) which had been filed, and the court ruled that only such damages could be recovered as resulted to the plaintiff by the stoppage of the drain under the roadbed, as alleged in the amended complaint. The

issues submitted were not for damages from the original construction of the embankment, but whether "the defendant negligently failed to keep open and maintain the drain pipe as alleged in the amended complaint," and, "If so, what amount of damages the plaintiff was entitled to recover by reason thereof."

This action can be maintained, as was held in *Duval v. R. R.*, 161 N. C., 448, and cases there cited. The action is not for damages from the original construction of the roadbed or permanent injuries, which would be barred in five years, but is for the subsequent injury caused by failing to keep the tile drain open within three years before amended complaint was filed.

Exceptions 2 to 9 are to the testimony relative to the drain pipe being allowed to clog up, and the damages sustained thereby. This was clearly competent. *Duval v. R. R., supra.*

Exceptions 10 to 13 are to the testimony that the sickness of the boys, the plaintiff's children, was caused by the ponding of the water, and was competent. Exceptions 4 and 16 are for the refusal to nonsuit, and need not be considered. Exceptions 17, 18, 19, 24, and 25 are to the refusal of instructions prayed by the defendant for the purpose of raising the question as to plaintiff's right to recover upon the evidence in this case, and likewise require no discussion. There was the testimony of the physician that the ponded water bred mosquitoes whose bite caused malaria.

Exception 15 was to the refusal of the court to exclude the following question asked on cross-examination: "If you clean that sewer out, will it drain the land?" We see no error in admitting the question.

Exceptions 21, 22, and 23 are to the refusal of the instruction asked. "The jury could not consider any element of damage save and except the expenses incurred by plaintiff for medicine and expenses." It was alleged and shown that the three boys, sons of the plaintiff, were incapacitated from rendering any services for several weeks. These boys were 13, 15, and 18 years of age. They were before the jury, and while there was no evidence of any special services rendered by them to their parents, the value of their loss of time was a matter to be taken into consideration by the jury.

Exception 26 was abandoned and exception 27 was because the court charged the jury that the plaintiff must satisfy them "upon the greater weight of the evidence of every essential fact necessary to prove his case, that this drainway was put in by the railroad and that it failed to maintain and keep it in proper order, and that by its failure in this duty the water was caused to be ponded on the premises of the ( 4 ) plaintiff. If so satisfied, to answer the first issue 'Yes.'" We do not see why the defendant should object to this charge.

Exception 28 was because the court charged the jury: "You can take into consideration your own personal observation of the children, who have been exhibited, as to their earning capacity, together with all the evidence in the case about what the children did and what their services would be worth to the father during the five weeks they were sick. What ever you find them to be worth, you will add to the amount of damages, if any you may find, under the second issue. You are also to consider whether their earnings have been diminished as a result of their sickness." It does not appear that the children were hired out, and what would be the reasonable value of their services around the home was a matter of common knowledge of which the jury could judge. It was not a matter of expert testimony.

It is now the accepted doctrine of the medical profession that malaria is transmitted by the bite of a certain kind of mosquito (*anopheles*), and that these mosquitoes are bred in standing water. The learned counsel for the defendant expressed his belief that mosquitoes were only bred in running water, and doubted the correctness of the doctrine that malaria was transmitted by their bite. But there was the testimony of the physician to this effect, and the court properly left the matter, being one of fact upon the testimony, to the jury. Indeed, there was no evidence to the contrary.

The other exceptions are merely formal. Indeed, the controversy seems to have been almost entirely over the facts. We find no error in the exceptions as to the law.

No error.

*Cited: Perry v. R. R.*, 171 N.C. 40 (2c); *Milling Co. v. Highway Com.*, 190 N.C. 697 (5c); *White v. Comrs. of Johnston*, 217 N.C. 333 (3c).

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R. D. CHRISTMAN ET AL. V. JESSE HILLIARD ET AL.

(Filed 30 September, 1914.)

**1. Trials—Evidence — Nonsuit — Conflicting Evidence — Plaintiff's Testimony.**

The rule that the evidence is to be considered in the light most favorable to the plaintiff upon a motion to nonsuit applies to his own testimony when material and conflicting, and also to his and the testimony of the other witnesses, taken as a whole.

**2. Limitations of Actions—Adverse Possession—Evidence—Taxes.**

A test of adverse possession, in an action involving the title to lands, is whether the acts in evidence are sufficient to expose the occupant to an

action of trespass; and while the listing and payment of taxes alone are insufficient, they may become a relevant fact in connection with other circumstances tending to show an adverse and hostile possession.

**3. Equity—Cloud on Title—Tax Deeds—Interpretation of Statutes.**

Revisal, sec. 1589, is highly remedial in its nature and should be construed liberally, and thereunder a suit may be maintained to cancel a tax deed as a cloud upon title to lands, without requiring that the plaintiff must have possession under his paper title as a condition precedent to his right of action.

APPEAL by plaintiffs from *Peebles, J.*, at April Term, 1914, of ( 5 ) JOHNSTON.

This action was brought under Revisal, sec. 1589, to determine the adverse claim of defendants to certain land described in the pleadings as adjoining B. D. Hilliard and others and containing 27½ acres and being part of a larger tract containing 100 acres. Plaintiff relied upon adverse possession of seven years under color of title, and also upon adverse possession for twenty years without color, the title being out of the State. R. D. Christman, one of the plaintiffs, testified that he could not state whether the 27½ acres of land was embraced by the description in the deed of Mrs. S. E. Hinnant to Pattie Christman, his wife and coplaintiff, that being one of the deeds introduced by plaintiff as color of title; but on cross-examination, in response to a question of the defendant's counsel, he testified that it was so embraced by the said description. The court nonsuited plaintiffs, and they appealed.

*R. C. Strong for plaintiffs.*

*Abell & Ward for defendants.*

WALKER, J., after stating the facts: We were told, on the argument before us, that the nonsuit was based on the ground that plaintiffs had not shown that the 27½-acre tract was included in the 100-acre tract. If this be true, the judge evidently erred, for the witness R. D. Christman had the right to change his mind, and it was for the jury to say which of the two statements made by him they would accept. He may have refreshed his memory, or, stimulated by the sharp cross-examination, he may have been awakened to a livelier sense of the truth in regard to the description and the location of the 27½-acre tract. At any rate, he so testified, it may be under the spur of the cross-examination, and the jury must judge of the fact. The conflict in the testimony only affected the credibility of the witness, and did not destroy his testimony. *Ward v. Mfg. Co.*, 123 N. C., 248; *Shell v. Roseman*, 155 N. C., 90. In the case last cited, *Justice Allen* says: "We are not inadvertent to the fact that the plaintiff made a statement on cross-examination as to a material matter,

apparently in conflict with his evidence when examined in chief; but this affected his credibility only, and did not justify withdrawing his evidence from the jury."

( 6 ) We cannot say, after reading the record and giving careful heed to the plaintiff's evidence as there stated, that there is none upon which he can recover; for it tends to show, in one view of it, adverse possession for the requisite time under color of title. There is some conflict in the testimony, especially in that of R. D. Christman, as to the nature of the possession of the land and the acts of ownership exercised over it, but we cannot say that there is no evidence of a sufficient possession to ripen the color of title into a good one. We forbear to comment on the evidence further, lest it may prejudice one or the other of the parties at the next trial.

It was not proper for the court to consider only a part of the testimony—that of Mrs. Pattie Christman, for example—but the whole of it, and it should have been construed most favorably to the plaintiffs before a nonsuit could be granted, and if, thus considered, there was any evidence to support their claim, the case should have gone to the jury; and in order to test the legal sufficiency of their proof, they were entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. *Alexander v. Statesville,* 165 N. C., 527; *Hicks v. Kenan,* 139 N. C., 346; *Britt v. R. R.,* 144 N. C., 243; *Settle v. R. R.,* 150 N. C., 644.

Without commenting upon the evidence, it may be well to reproduce a part of it, which is favorable to the plaintiffs, as to the possession.

R. D. Christman, one of the plaintiffs, testified: "We lived on part of the land, but not all the time; then we went to Wendell and have been renting it since then. We rented to Mr. Crawford some one year, and then we rented it to Wade Andrews, and have continued to rent it since then. My wife's mother, Mrs. S. E. Hinnant, was in possession of the 27½ acres of land before my wife's mother deeded it to my wife. She was in possession as much as ten or fifteen years. I cannot tell exactly how long, but I guess twenty-five years or probably longer. We sold the timber off the 27½ acres of land to C. R. Stott and made a deed for the timber. Of my own knowledge, I do not know of any claim that was made to the 27½ acres of land by any one else, and knew of no acts of ownership by any one else as owner of any part of this land at any time. The home, the yard, stables and barn cover no part of the 27½ acres in controversy. We lived about one-quarter of a mile from the 27½-acre tract, and this 27½-acre tract was all woodland. My wife and I have never exercised any acts of ownership of the 27½ acres of land, except to sell the timber off of it. That is the only thing I recollect, except we offered free wood and lightwood to the public generally. When I was

in Dunn I went back there every spring and fall in looking after the rent and going over the crop of the 100-acre tract. The only act of trespass I saw was one, and I told him that he could not clear there. He said he was going to build. He did not build, and from all ( 7 ) the signs from the road I could not tell of other trespass on the land."

C. R. Stott testified that he cut the timber off of the 27½ acres of land in controversy, in the fall or summer of 1909; that he paid the plaintiff for the timber, and that he was something like a month cutting it. "I told Mr. Crawford that I was going to cut the timber; that I had been to Smithfield and found nothing against it; that I had a good deed for it, and that there was no use in our falling out about it, and if it turned out to be his land I would pay him for it; that I would have it measured, and if he paid Crawford for it, he would get his money back out of Christman, if it turned out to be Crawford's land."

Deed from D. W. Adams to Mrs. S. E. Hinnant was put in evidence. It covered the 100 acres.

There was evidence as to the tax sale and deed, which plaintiffs alleged were defective and clouded their title. There was also evidence that Mrs. Hinnant had paid the taxes assessed against the 100 acres.

We think that all of this constituted some evidence from which the jury could find that there had been the requisite adverse possession. Even if it was not cogent proof, it certainly was not open to assault by nonsuit. Upon the question of what is evidence of adverse possession, with special reference to the facts of this case, the following cases may be profitably consulted: *Bryan v. Spivey,* 109 N. C., 57; *Boomer v. Gibbs,* 114 N. C., 76; *Vanderbilt v. Johnson,* 141 N. C., 370; *Simmons v. Box Co.,* 153 N. C., 257; *Ray v. Anders,* 164 N. C., 311; *Dobbins v. Dobbins,* 141 N. C., 210; *Berry v. McPherson,* 153 N. C., 4; *Locklear v. Savage,* 159 N. C., 236; *Coxe v. Carpenter,* 157 N. C., 557. The listing of the land and payment of taxes is a relevant fact, in connection with other circumstances, tending to show a claim of title and an adverse or hostile possession, though not sufficient by itself for the purpose. *Austin v. King,* 97 N. C., 339. A test of adverse possession is the exposure of the occupant to an action of trespass. *Boomer v. Gibbs, supra; Osborne v. Johnson,* 65 N. C., 26. But we think that there was evidence of an adverse holding by the plaintiffs, and those under whom they claim, for the requisite time, however the fact may be as hereafter found by the jury. We do not decide as to the true construction of Revisal, sec. 386, as it is not at present necessary to do so.

The tax deed is not set out in the record, and we do not know its contents; but if fatally defective or void because of failure to comply with essential provisions of the law in making the sale or in the proceedings

leading up to the deed, the plaintiffs, under the statute, Revisal, sec. 1589, may have the matter determined in this action, and the same may be said with regard to any other claim set up by defendant. Refer-
( 8 ) ring to a similar law of Nebraska, *Justice Fields,* in *Holland v. Chellen,* 110 U. S., 15, used this language: "Any person claiming title to real estate, whether in or out of possession, may maintain the suit against one who claims an adverse estate in it for the purpose of determining such estate and quieting his title. It is certainly for the interest of the State that this jurisdiction of the court should be maintained and that causes of apprehended litigation respecting real property necessarily affecting its use and enjoyment should be removed; for so long as they remain they will prevent improvement and consequent benefit to the public. It is a matter of everyday observation that many lots of land in our cities remain unimproved because of conflicting claims to them. It is manifestly to the interest of the community that conflicting claims to property thus situated should be settled so that it may be subject to use and improvement. To meet cases of this character, statutes like the one in Nebraska have been passed by several States, and they accomplish a most useful purpose." See, also, *Campbell v. Cronly,* 150 N. C., 457.

The statute has been said to be an extension of the remedy in equity theretofore existing for the removal of clouds on title, and is intended to afford an easy and expeditious mode of determining all conflicting claims to land, whether denied from a common source or from different and independent sources. It is highly remedial and beneficial in its nature, and should, therefore, be construed liberally. It is also a statute of repose, and also, for that reason, is entitled to favorable consideration. *Adler v. Sullivan,* 115 Ala. 582; *Walton v. Perkins,* 33 Minn., 357; *Holmes v. Chester,* 26 N. J. Eq., 81. It deprives the defendant of no right, but affords him every opportunity of defending the validity of his title; but in the interest of peace and the settlement of controversies, it allows his adversary to put it to the test of early judicial investigation, and does not compel plaintiff to wait on his pleasure as to the time when the inquiry shall be made, and thus give defendant an unfair advantage over him. *Jersey City v. Lembeck,* 31 N. J. Eq., 255. The plaintiff is not required to have possession as a condition precedent to his right of action, nor will the apparent invalidity of defendant's title deprive him of the statutory remedy. *Daniels v. Fowler,* 120 N. C., 14; *Rumbo v. Mfg. Co.,* 129 N. C., 9; *Beck v. Meroney,* 135 N. C., 532; *Campbell v. Cronly, supra.* The beneficial purpose of the statute is to free the land of the cloud resting upon it, and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion, instead of remaining idle and unre-

munerative. This case is within its letter and spirit, and plaintiff has a right to the relief he seeks, if he can make good his allegations.

The nonsuit was granted on plaintiff's testimony, and defend- ( 9 ) ant's evidence has not been heard. It may materially change the aspect of the case, or, on plaintiffs' own showing, the jury may draw an inference adverse to them, as it is their province to find the facts.

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

New trial.

*Cited: Lamb v. Perry,* 169 N.C. 442 (1c); *Smith v. Smith,* 173 N.C. 125 (3c); *Waldo v. Wilson,* 174 N.C. 628 (2c); *Power Co. v. Power Co.,* 175 N.C. 683 (3cc); *Rush v. McPherson,* 176 N.C. 565 (1c); *Patrick v. Ins. Co.,* 176 N.C. 665 (2c); *Alexander v. Cedar Works,* 177 N.C. 146, 147 (2c); *Stocks v. Stocks,* 179 N.C. 289 (3c); *Blanchard v. Peanut Co.,* 182 N.C. 22 (1cc); *Improvement Co. v. Brewer,* 183 N.C. 249 (1c); *Oil Co. v. Hunt,* 187 N.C. 159 (1c); *Forbes v. Deans,* 187 N.C. 167 (1c); *Hanes v. Utilities Co.,* 188 N.C. 466 (1c); *Manuel v. R. R.,* 188 N.C. 560 (1c); *Plotkin v. Bank,* 188 N.C. 715 (3c); *Lindsey v. Lumber Co.,* 189 N.C. 119 (1c); *Davis v. Long,* 189 N.C. 131 (1c); *Nash v. Royster,* 189 N.C. 410 (1c); *In re Fuller,* 189 N.C. 512 (1cc); *S. v. Sinodis,* 189 N.C. 567 (1c); *Williams v. R. R.,* 190 N.C. 367 (1c); *Barnes v. Utility Co.,* 190 N.C. 385 (1c); *Wimberly v. R. R.,* 190 N.C. 447 (1cc); *Southwell v. R. R.,* 191 N.C. 159 (1c); *Smith v. Coach Line,* 191 N.C. 591 (1cc); *Myers v. Kirk,* 192 N.C. 703 (1cc); *Harris v. Ins. Co.,* 193 N.C. 487 (1cc); *Moore v. Ins. Co.,* 193 N.C. 539 (1cc); *Evans v. Cowan,* 194 N.C. 275 (1cc); *Gore v. Wilmington,* 194 N.C. 452 (1c); *Johnson v. Fry,* 195 N.C. 834 (3c); *Goss v. Williams,* 196 N.C. 216 (1c); *Tilghman v. Hancock,* 196 N.C. 781 (2c); *Sears v. Braswell,* 197 N.C. 526 (3c); *Newbern v. Fisher,* 198 N.C. 388 (1cc); *Collett v. R. R.,* 198 N.C. 762 (1cc); *Smith v. Wharton,* 199 N.C. 249 (1c); *Dickerson v. Reynolds,* 205 N.C. 772 (1c); *Hancock v. Wilson,* 211 N.C. 134 (1cc); *Gunn v. Taxi Co.,* 212 N.C. 541 (1cc); *Ward v. Smith,* 223 N.C. 143 (1cc); *Perry v. Alford,* 225 N.C. 147 (2c); *Graham v. Spaulding,* 226 N.C. 89 (2c).

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W. T. BROWN v. ELM CITY LUMBER COMPANY.

(Filed 30 September, 1914.)

**1. Slander—Libel—Communications — Demands — Denials — Latitude — Proof—Trials—Evidence—Nonsuit.**

The purchaser of a car-load of hay, shipped bill of lading attached to draft, paid the draft, received the shipment from the carrier, and then

made claim on the seller for shortage of weight, which was refused, and the purchaser put the claim in the hands of his attorneys, who wrote to the seller, and in reply received a letter upon which the purchaser brought this action for libel, saying that the writer had personally superintended the weighing of the hay, that weight was correctly charged, and that it was only a case in which the purchaser "wanted to get $10 allowance on a car of hay." *Held*, more latitude is permitted in communications of this character, in reply to a demand made by the purchaser, and where a failure to answer may furnish evidence of the justness of the claim; and the admissions of the parties showing that the statement complained of was at least partly true, and believed to be so by the defendant, the plaintiff's action cannot be maintained.

**2. Slander—Libel—Qualified Privilege—Malice—Publication—Appeal and Error.**

In this action of slander it is held that defendant's answer to a letter written by the plaintiff's attorney or agent, denying a claim made for shortage in weights of a shipment of hay, etc., is one of qualified privilege, requiring proof of defendant's malice to sustain the action, and the evidence showing that the defendant believed the truth of his statement complained of, the action cannot be maintained. This result will not be disturbed on appeal because of the fact that the trial judge, erroneously holding that the letter to the attorney was not a publication, dismissed the action upon a wrong ground.

APPEAL by plaintiff from *Ferguson, J.*, at April Term, 1914, of PERQUIMANS.

This is an action to recover damages for an alleged libel. The plaintiff and plaintiff's witnesses testified substantially to the following facts: That in October, 1912, the plaintiff purchased from the Elm City Lumber Company, through correspondence with N. E. Mohn, a car-load of hay. That the hay was shipped with bill of lading and draft
( 10 ) attached, and plaintiff had to pay for same, before inspecting or weighing it. That hay was purchased "weight guaranteed." That upon inspecting same, plaintiff found a part of it to be of inferior quality, and also a shortage of 867 pounds in weight. That he thereupon sent a statement to the Elm City Lumber Company, containing various items, all of which were settled, except the plaintiff's claim for shortage, which he sent to Moore & Dunn, attorneys, of New Bern, N. C., for collection. It is admitted in said company's answer that plaintiff's claim for shortage was presented to said company by Moore & Dunn. Whereupon the defendant company, through defendant N. E. Mohn, wrote to said Moore & Dunn the letter upon which this action is based, in words and figures as follows:

MESSRS. MOORE & DUNN, *New Bern, N. C.*

DEAR SIRS:—We have your favor of the 5th, and note your remarks in regard to the claim against us sent you by W. T. Brown of Hertford,

N. C. This claim for which Mr. Brown contends is for a difference of weight on car of hay that we shipped this party some time ago. He gave us the weights as he states he received them from the car, whereas both the writer and the party who shipped this car of hay for us tallied the car when it was loaded at Shippensburg, Pa. We wrote Mr. Brown when he made this claim that he must be mistaken in his tally, from the fact that we know that the hay as invoiced to him was absolutely correct. This car was shipped to W. T. Brown last October, when the writer was in Pennsylvania, and personally looked after this shipment. Had this not been the case, we would have then entertained Mr. Brown's claim. It is just a case where we think Mr. Brown wanted to get $10 allowance on a car of hay.

Yours very truly,

ELM CITY LUMBER COMPANY.

Upon receipt of this letter, Moore & Dunn wrote the plaintiff, declining to further prosecute his claim.

The jury found the issues submitted for the plaintiff and returned a verdict for $200. This verdict his Honor set aside, not as a matter of discretion, but as a matter of law, and the plaintiff excepted and appealed.

*P. W. McMullan and Ward & Thompson for plaintiff.*

*Charles Whedbee and Moore & Dunn for defendants.*

ALLEN, J. A libel, as applicable to individuals, is a malicious publication expressed either in printing or writing, or by signs, or pictures, tending either to blacken the memory of one dead or the reputation of one alive, and to expose him to public hatred, contempt, or ( 11 ) ridicule. It is any written slander, though merely tending to render the party liable to disgrace, ridicule, or contempt, and it need not impute any definite infamous crime. *Simmons v. Morse,* 51 N. C., 7.

Tested by this rule, there is no libel in the letter written by the agent of the defendant unless it is contained in the last sentence, as all the remaining part of the letter is a statement of facts, couched in respectful language.

The letter was not written voluntarily, but in reply to a demand for payment of a claim, and more latitude is permissible in communications of this character where a failure to answer may furnish some evidence of the justice of the claim.

*Lord Denman*, speaking of a letter written in reply to one refusing payment of rent, said in *Tuson v. Evans,* 12 Adolph and E., 175: "Some remark from the defendant on the refusal to pay the rent was perfectly justifiable, because his silence might have been construed into an ac-

quiescence in that refusal, and so might have prejudiced his case upon any future claim; and the defendant would, therefore, have been privileged in denying the truth of the plaintiff's statement. But, upon consideration, we are of the opinion that the learned judge was quite right in considering the language actually used as not justified by the occasion. Any one, in the transaction of business with another, has a right to use language *bona fide* which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another; and this is the principle on which privileged communication rests; but defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule. It was enough for the defendant's interest, in the present case, to deny the truth of the plaintiff's assertion. To characterize that assertion as an attempt to defraud, and as mean and dishonest, was wholly unnecessary. This case, therefore, was properly left to the jury; and there will be no rule."

In the construction of publications alleged to be libelous, "The general rule is that words are to be taken in the sense which is most obvious and natural and according to the ideas that they are calculated to convey to those to whom they are addressed. The principle of common sense which now governs in the construction of words requires that courts shall understand them as other people would. The question always is, How would ordinary men naturally understand the language?

"It is not the ingeniously possible construction, but the plainly normal construction, which determines the question of libel or no libel, and in ascertaining whether the words are actionable or not the court will not
( 12 ) resort to any technical construction of the language or consider its grammatical structure, but, instead of measuring the injury by the literal force of the words, will look solely to the meaning which the words were naturally calculated to convey. . . . In determining the actionable quality of words the entire conversation or writing must be considered. In ascertaining the meaning of a particular phrase or sentence it must be construed in connection with the remainder of the publication of which it forms a part. A single phrase, if standing alone or used in a different connection, may be capable of a meaning of which it is not susceptible in the connection in which it is actually used." 18 A. and E. Enc., 974 *et seq.* "The fact that supersensitive persons, with morbid imaginations, may be able by reading between the lines of an article to discover some defamatory meaning therein is not sufficient to make it libelous." *Reid v. Providence Journal Co.*, 20 R. I., 120.

If these rules of construction are applied to the letter in controversy the language may be distorted into a charge of fraud; but considered naturally, the last sentence is nothing but another form of denying lia-

bility. The defendant had the right to say he had weighed the hay and there was no shortage, and that therefore he would not pay the claim, and this statement of fact implied dishonesty, if there is any such implication in the letter, as much as the statement in the last sentence to the effect that the writer thought it was just a case where the plaintiff wanted an allowance on a car of hay.

The sentence complained of is strictly true, as both the plaintiff and the defendant agree that the plaintiff did want an allowance upon the car of hay, and the evidence of the plaintiff, if we understand it correctly, tends strongly to prove that at least a part of the claim made against the defendant was unfounded.

The plaintiff testified: "The bill of lading and freight bill for the movement of the shipment showed the weight of the car to be 21,600 pounds, and it was invoiced and paid for by me as 21,495 pounds." And again: "There is usually an allowance of 1 per cent for weights on hay. These weights are guaranteed to be within 1 per cent. I never made any reduction for this 1 per cent; they never asked me. I wrote them a letter in which I stated to them that I weighed the hay myself and after making an allowance of 1 per cent charged them with the balance. As a matter of fact, I never made any such allowance of 1 per cent, and continued to send the statement for shortage of 867 pounds. I did not know of this 1 per cent until after the statement was sent."

If this evidence is true—and the plaintiff cannot complain that it should be acted on, as it is his own—he wrote the defendant that he had made a deduction of 1 per cent, or 216 pounds if calculated according to the bill of lading and freight bill, or 214 pounds if calculated on the invoice, when he had not done so, and he was making a claim ( 13 ) for a shortage of 867 pounds when upon his own showing it ought to have been reduced by 214 or 216 pounds.

In the light of these circumstances and considering the occasion and the letter as a whole, we are of opinion that the plaintiff cannot maintain his action upon his showing.

If, however, the publication was libelous, there is another fatal defect in the plaintiff's case.

It is admitted in the plaintiff's brief, and the authorities all sustain the position, that the occasion of writing the letter by the agent of the defendant was one of qualified privilege, and as was said in *Ramsay v. Cheek,* 109 N. C., 274, "In this class of cases, an action will lie only where the party is guilty of falsehood and express malice. 13 A. and E. Enc., *supra.* Express malice is malice in fact, as distinguished from implied malice, which is raised as a matter of law by the use of words libelous *per se,* when the occasion is not privileged.

"Proof that the words are false is not sufficient evidence of malice unless there is evidence that the defendant knew, at the time of using them, that they were false. *Fountain v. Boodle,* 43 E. C. L., 605; *Odgers, supra,* 275. That the defendant was mistaken in the charges made by him on such confidential or privileged occasion, is, taken alone, no evidence of malice. *Kent v. Bongartz,* 2 Am. St., 870, and cases cited.

"We do not assent to the opposite doctrine which would seem to be laid down by *Pearson, J.,* in *Wakefield v. Smithwick,* 49 N. C., 327, which is not supported by the authority he cites, and, doubtless, intended to follow; for if the words are true, a defendant does not need the protection of privilege. It is when they are false that he claims it. To strip him of such protection there must be falsehood and malice. To hold that falsehood is itself proof of malice in such cases reduces the protection to depend on a presumption of the truth of the charges."

There is in the plaintiff's evidence a total failure of proof of malice, and there is nothing in the record or in the letter which shows or has a tendency to prove that the defendant did not act in good faith and did not believe the statements he made to be true.

We are inclined to disagree with his Honor in the ruling that the sending of the letter to the attorneys of the plaintiff was not a publication. The case of *Dickson v. Hathaway,* 122 La., 644, seems to sustain the ruling, although it does not clearly appear from the statement of facts that the letter in that case was read by the attorneys, and the case of *R. R. v. Brooks,* 30 A. S. R., 529, holds to the contrary.

(14) Being of opinion, however, that the judgment is correct, it will not be disturbed, because based upon a reason to which we do not give our assent. *Hughes v. McNider,* 90 N. C., 248; *Hughes v. Hodges,* 94 N. C., 56.

Affirmed.

*Cited: Lewis v. Carr,* 178 N.C. 580 (1c); *Hall v. Hall,* 179 N.C. 573 (2c); *Hedgepeth v. Coleman,* 183 N.C. 312, 313 (2c); *Pentuff v. Park,* 194 N.C. 154 (2c); *Hartsfield v. Hines,* 200 N.C. 361 (2c); *McKeel v. Latham,* 202 N.C. 320 (1p); *Stevenson v. Northington,* 204 N.C. 693 (2c); *Harrell v. Goerch,* 209 N.C. 742 (2c); *Davis v. Retail Stores,* 211 N.C. 553 (2c); *Flake v. News Co.,* 212 N.C. 786 (2e).

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

(Filed 30 September, 1914.)

**Railroads—Federal Employers' Liability Act—"Next of Kin"—"Dependent"—State Laws—Interpretation of Statutes.**

Within the intent of the Federal Employers' Liability Act, the meaning of the words "next of kin" depending upon the employee, who are given a right of action against a railroad company for his wrongful death, when he has no surviving widow or husband or children, is dependent upon the State law regulating inheritances; and in this State our statute, Revisal, sec. 137, controls, and thereunder the half-brothers of the deceased employee, an illegitimate child, may maintain the action when born in lawful wedlock of the same mother; and it is further held, in this case, that evidence of the tender age of such next of kin, being without estate, is sufficient to be submitted to the jury as being "dependent" upon the deceased employee.

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

APPEAL by defendant from *Connor, J.*, at May Term, 1914, of BERTIE.

*Winston & Matthews for plaintiff.*
*Murray Allen for defendant.*

CLARK, C. J. This is an action for wrongful death under the Federal employers' liability act by the administrator of an illegitimate child.

The Federal statute provides that such action shall be maintained "for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee." The mother of the intestate is dead, but left two sons and a daughter of tender age and dependent, born in wedlock.

The sole contention of the defendant requiring our consideration is that the expression "next of kin" as used in section 1 of this act is to be construed by the common law, disregarding the State law defining those words. Rev., 137, provides: "Illegitimate children, born of the same mother, shall be considered legitimate as between themselves and their representatives, and their personal estate shall be distributed in the same manner as if they had been born in lawful wedlock. And ( 15 ) in the case of the death of any such child or his issue, without leaving issue, his estate shall be distributed among his mother and all such persons as would be his next of kin if all such children had been born in lawful wedlock." To same purport, Rev., 1556, Rule 10. *Powers v. Kite,* 83 N. C., 156; *McBryde v. Patterson,* 78 N. C., 412.

The Federal statute provides that this action may be brought in our courts. It is very clear that in North Carolina the two half-brothers and the sister of the intestate are his next of kin. It seems to us immaterial whether it were formerly otherwise in this State either by statute or the common law before any statute. The question is, Who was the "next of kin" at the time of such death in the State where the wrongful death occurred?

In *Hutchinson Investment Co. v. Caldwell,* 152 U. S., 65, the Court held: "In States whose laws permit illegitimate children, recognized by the father in his lifetime, to inhert from him, such children are 'heirs' within the meaning of U. S. Rev. Stat., sec. 2269, which provides that when a party entitled to claim the benefits of the preëmption laws of the United States dies before consummating his claim, his executor or administrator may do so, and the entry in such case shall be made in favor of his heirs, and the patent, when issued, inures to them as if their names had been specially mentioned."

In that case it was contended that the word "heirs" was used in the common-law sense. The Court said: "Undoubtedly the word 'heirs' was used as meaning, as at common law, those capable of inheriting; but it does not follow that the question as to who possessed that capability was thereby designed to be determined otherwise than by the law of the State, which was both the *situs* of the land and the domicile of the owner." It has been often held that there is no common law for the Federal courts. The contention that the next of kin must be the same in all the States is not in accordance with the intent of the act. Indeed, there could be no uniformity if that was desirable, for there is no common law in Louisiana, and the common law is much modified in some of the States which we acquired from Mexico and France, and on many subjects the rule of the common law has been held differently in the different States. This case cites *U. S. v. Fox,* 94 U. S., 315, and is cited *Moen v. Moen,* 16 S. D., 214.

In *Cutting v. Cutting,* 6 Fed., 268, where the act of Congress prescribed that the heirs of a married settler should receive a patent where he had not taken it out, it was held: "Who are the *heirs* of Charles Cutting is a matter to be determined by the local law—the law of Oregon—as is also the question who is his *wife.* Both these are left to the local law of Oregon," quoting from *Lamb v. Starr,* 1 Deady, 358: "Who would be entitled to claim as heir (or wife) of the deceased would in all cases depend upon the law of Oregon at the time of the death."

( 16 )

The same ruling was made as to "next of kin" being governed by the law of the domicile in *McCool v. Smith,* 66 U. S., (1 Black), 459.

The object of the act of Congress was to permit a recovery for wrongful death or injuries on interstate railroads, and that the recovery should

go to the next of kin in the cases specified, the next of kin being determined by the law of the State in which the action is brought; for the status of the citizen, and the statute regulating descent and distribution, are purely State matters, with which Congress has no concern. By the reasoning in the case above cited the words "next of kin" are taken, like the word "heirs," as meaning those to whom the property would go; but who are the heirs and who are the next of kin are matters solely for State regulation.

The decision in *Taylor v. Taylor,* 232 U. S., 363, decided February, 1914, holds that the right of action given to the employee survives to his personal representative for the benefit of his parents only when there is no widow, and that the act of Congress prescribing what class are the beneficiaries, and the order in which they take, controls, though the State statute fixes a different order of succession. But there is nothing in this decision which militates against the holding in *Hutchinson v. Caldwell, supra,* that who are the "heirs" or the "next of kin" is regulated by State statute.

The evidence as to the tender age of the children and their being without estate was sufficient evidence to be submitted to the jury on the question of their being dependent. And the fact has been found by the jury, who evidently gave due weight to the evidence of the earning capacity of intestate, as may be inferred from the smallness of the verdict. The exception to evidence need not be discussed.

No error.

WALKER, J., concurring: It seems to me that this case is governed by *McCool v. Smith,* 1 Black (66 U. S.), 459, in which the question arose as to the law by which is to be determined who are the "next of kin" of a person, as those words were used in a Federal statute. The Court there held that the law of the domicile controlled, and not the common law; and in *Hutchinson v. Investment Co.,* 152 U. S., 65, relied on by plaintiff, it is said that in the *McCool case* the Court decided that the common law governed simply because the State of Illinois, where the parties were domiciled, had adopted the common law by statute, and, therefore, the term "next of kin" was construed by the local law, or law of the domicile, and that was the rule of the common law, as Illinois had then only the common law in force. She afterwards enacted a statute of distributions. In the *Hutchinson case* the same rule was applied as ( 17 ) to the meaning of the word "heirs," and the question was decided by the *lex loci rei sitæ*—the law of the State where the land was situated. In the cases cited by defendant and also in the dissenting opinion, the Court was referring to the common law as applicable, when deciding upon the legal rights of the parties—such, for instance, as the question of neg-

ligence, where there is no Federal statute defining those rights, or, rather, the principles by which they are to be determined. The Court, therefore, held in the *McCool case* that the "next of kin," as referred to in the Federal statute, are those who answer to that description under the State law where the parties are domiciled, and not by the common law, unless that be the law of the particular State.

BROWN, J., dissenting: 1. It is admitted that this action is brought under the Federal employers' liability act by the administrator of Bob Isaac Capehart, deceased, for the benefit of his next of kin. I admit that under the statute in this State it is not necessary to allege or prove who are the next of kin in order to recover for the negligent killing of a person. But the language of the Federal statute is different, and the action is brought by the personal representative of the decedent "for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee."

The right to recover damages for wrongful death is purely statutory, and did not exist at common law, and it follows that the provisions of the statute under which the particular action is brought must control it.

Under the Federal act it seems to be settled by the current of recent authority that the existence of beneficiaries, such as are named in the statute, must be pleaded and proved. Where a statute gives a right of action for death by wrongful act, if no such persons or class of persons exist as are described in the statute, as the beneficiary of the recovery, the action cannot be maintained. 13 Cyc., 335.

The liability of the defendant is made contingent upon the existence of one or more beneficiaries, or the fund recovered goes to the beneficiaries, not by virtue of the law of succession, but because it is given them by the statute. Therefore, if there is no beneficiary which meets the description of the statute, there is no right of action. *Melzner v. R. R.*, 127 Pac., 1002.

In *Illinois Central R. R. v. Doherty*, 155 S. W., p. 1121, the Court of Appeals of Kentucky distinguishes the Kentucky statute, which is very much like ours, from the Federal act, and holds that under the act of Congress, if there is no one for whom a recovery can be had, there
( 18 ) can be no recovery. This Federal act is supreme in all actions brought to recover for the death of an employee in interstate commerce, and supersedes all State statutes creating a right of action for death by wrongful act. *R. R. v. Birch*, 224 U. S., 547.

2. His Honor instructed the jury: "If the jury shall find from the evidence that Bob Isaac Capehart, Sills Hardy, Joe Hardy, and Nettie Hardy were all the children of the same mother, then I charge you that at the death of Bob Isaac Capehart the said Sills Hardy, Joe Hardy,

and Nettie Hardy are next of kin of said Capehart, it being admitted that the mother was dead, that Bob Isaac Capehart was an illegitimate child, and that he left no wife or child surviving him, and the jury should answer this issue 'Yes.'"

I am of opinion that the words "next of kin," as used in the Federal act, are not to be defined by the various and differing statutes of the many States of this Union, but are to be construed in the light of the common law. It is not to be supposed that this act, intended for the benefit and protection of employees engaged in interstate commerce, should be administered differently in every State in the Union.

Mr. Doherty says: "It is inconceivable that the power of Congress to create a fund for the benefit of the widows and orphans of railroad employees, and to determine the beneficiaries of this fund or to make the personal representative trustee for its distribution in the manner set forth in the statute, is in any manner impaired or affected by the laws of a State governing the distribution of the estate of the deceased." Doherty Liability of Railroads to Interstate Employees, p. 241.

In its sphere the Federal act is complete, and in matters of substance it is not to be added to or changed by State regulations. In *Michigan Central R. R. v. Vreeland,* 33 Sup. Ct. Rep., 192, the late *Justice Lurton* says: "We may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the States."

It seems to be pretty well settled by the decisions of the Supreme Court of the United States that in the construction of the laws of Congress rules of the common law furnish the true guide. *Rice v. R. R.,* 66 U. S., 374; *U. S. v. Sanges,* 144 U. S., 311; *Charles River Bridge v. Warren Bridge,* 11 Peters., 420; *Standard Oil case,* 221 U. S., 1; *American Tobacco Co. case,* 221 U. S., 106.

"The principles of the common law are operative upon all interstate transactions except so far as they are modified by congressional enactment." *Western Union Tel. Co. v. Call Publishing Co.,* 181 U. S., 92.

In *S. A. L. Ry. v. Horton,* 34 Sup. Ct. Rep., 635, *Mr. Justice Pitney* says: "It is not to be conceived that, in enacting a general ( 19 ) law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several States to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to State control two of the essential factors that determine the responsibility of the employer."

The learned judge further says that "The adoption of the opposite view would in effect leave the several State laws and not the act of Congress to control the subject-matter." See, also *Southern Railway v. Crockett,* 34 Sup. Ct. Rep., 897.

I am unable to see anything in the case relied upon by the plaintiff and cited in the opinion of the Court, *Hutchinson Investment Co. v. Caldwell,* which militates against this position. In that case the Court was passing upon the rights of certain parties to preëmpt land, and it was in respect to local laws that the Court was speaking. The Court held, what is universally known, that in respect to the designation of heirs the matter is to be determined by the *situs* of the land and the domicile of the owner. The construction which the majority opinion gives to the Federal statute in this case is opposed to the decision of the Supreme Court in the recent case of *Taylor v. Taylor,* 34 Sup. Ct. Rep., 350, in which it is held that nothing in the State statute for the distribution of personal property can affect the right of the childless widow of an interstate railway employee, who was fatally injured while employed by the carrier in interstate commerce, to the entire net proceeds of a judgment for the resulting damages recovered by her as administratrix in an action against the carrier.

We think the elementary principles of statutory construction, applied to the act of Congress, compel the conclusion that in the use of the words "next of kin" Congress must have had in mind the well known meaning of those words according to the common law.

"It is a well settled principle that if a statute makes use of a word, the meaning of which is well known, and which has a definite sense at common law, it shall be received in that sense, unless for some reason it clearly appears that it was intended to use the word in a different signification." *S. v. Engle,* 21 N. J. Law, 360; *Adams v. Turrentine,* 30 N. C., 147.

"It is a sound rule that whenever a legislature in this country uses a term without defining it, which is well known in the English law, it must be understood in the sense of the English law." *McCool v. Smith,* 66 U. S., 459; *Kitchen v. Tyson,* 7 N. C., 314.

(20) Any other construction of the act would bring disorder and confusion in its administration, as the laws of the State differ in so many particulars. In North Carolina illegitimate children, born of the same mother, by statutory enactment are rendered legitimate as between themselves. In Alabama one illegitimate child can inherit from another of the same mother; in Missouri he cannot. In Tennessee and Vermont legitimate children inherit from illegitimate children, but illegitimate children do not inherit from legitimate children of the same mother. In Pennsylvania illegitimate children inherit from the mother

and the mother from the children, but the children cannot inherit from each other. In Kentucky, when an illegitimate child dies intestate without issue, leaving no mother surviving, the legitimate children of his mother cannot inherit his estate. In North Carolina they can.

If the laws of the States governing the distribution of personal property are to determine who are next of kin, then in the event the deceased was a resident of another State at the time of his death, our courts would have to look to the law of the domicile to determine for whose benefit the action can be maintained, because "the law of the decedent's domicile governs the distribution of his personal estate." *Smith v. Howard,* 41 Am. St. Rep., 537, and note; *Leak v. Gilchrist,* 13 N. C., 75; *Alvany v. Powell,* 55 N. C., 51; *Medley v. Dunlop,* 90 N. C., 527.

In the present case it appears that the deceased was a resident of Boykins, Va., at the time of his death, and we would have to look to the law of Virginia to determine whether an illegitimate child can leave next of kin as defined by the Federal act.

At common law the words "parent," "child," "next of kin," and words of similar import were held not to include illegitimates.

"By the rules of the common law, terms of kindred, when used in a statute, include only those who are legitimate, unless a different intention is clearly manifested." *McCool v. Smith,* 66 U. S., 459.

After stating this principle, the United States Supreme Court says: "This is conceded by the counsel for the defendant in error. The proposition is too clear to require either argument or authority to sustain it. The legal position of Alonzo Redman at the time of his death was what the common law made it. In the eye of the law he was *nullius filius.* He had neither father, mother, nor sister. He could neither take from nor transmit to those standing in such relations to him any estate by inheritance."

Prior to the enactment of Revisal, sec. 137, the courts of this State recognized the common-law rule that an illegitimate child can have no next of kin. In *Coor v. Starling,* 54 N. C., 243, *Chief Justice Nash* says: "Edwin Jones was a bastard, and by the common law no such consanguinity existed between him and his bastard brother as enabled the latter or his issue to claim any portion of his estate, real ( 21 ) or personal. A bastard can be heir to no one, nor can he have any heirs, but of his own body; for, being *nullius filius,* he is kin to no one."

It has been frequently held by the State courts in which the question has arisen that terms of kindred used in statutes based upon Lord Campbell's act relate exclusively to legitimate and not to illegitimate children.

In South Carolina the statute gives the right of action to the parent or parents. The Supreme Court of that State has held that "A mother can-

not recover as sole beneficiary under Lord Campbell's act for the wrongful death of her illegitimate child." *McDonald v. R. R.*, 71 S. C., 352.

When the right of action for death by wrongful act is given to a "child" or "children" of decedent, it has been held by the Supreme Court of Georgia to mean legitimate child, and the mother of a bastard was denied the right to recover, notwithstanding statutes of the State of Georgia provided that "bastards may inherit from their mother and from each other, children of the same mother, in the same manner as if legitimate." *Robinson v. R. R.*, 117 Ga., 168.

In *R. R. v. Johnson*, 77 Miss., 727, the Mississippi Supreme Court says: "An illegitimate daughter cannot maintain an action for damages caused by the wrongful killing of another illegitimate daughter of the same mother, since our statute creating causes of action for the death of a person, like Lord Campbell's act, confers the right to sue only on legitimate relatives."

"The father of an illegitimate child has no right of action for the child's death under Rev. Stat., 1894, sec. 267, giving a father a right of action for the death of a 'child,' although the mother is dead and the child had been acknowledged by the father and had no guardian or next of kin except him." *McDonald v. R. R.*, 144 Ind., 459.

There is nothing in the act of Congress which indicates that illegitimate children should be regarded as legitimate as between themselves and should take as beneficiaries under the act.

I am, therefore, constrained to hold, upon the admitted facts, that this action cannot be maintained.

HOKE, J., concurs in this dissent.

*Cited: In re Stone*, 173 N.C. 211 (c); *University v. Markham*, 174 N.C. 342 (d); *Horton v. R. R.*, 175 N.C. 478 (c).

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( 22 )

EMMA HARDY v. PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

(Filed 14 October, 1914.)

**1. Evidence—Depositions—Commissioner—Mistake in Name—Notices.**

Where the notice to take depositions correctly states the name of the commissioner appointed to take them, gives the time and place, and is otherwise regular, and it appears that the commission was issued to the commissioner with a slight error in the name—in this case "Brocks" for "Brooks"—it is error for the trial judge to exclude the depositions, as evidence, on that account, it appearing that the depositions were properly signed by the commissioner, etc.

**2. Evidence—Depositions—Irregularities—Waiver.**

Where a party agrees that depositions, which have been taken by his opponent, may be opened and read upon the trial, reserving only the right to object to incompetent testimony therein, he waives his right to object to the irregularity of taking the depositions.

**3. Insurance, Life—Evidence—Application—False Statements.**

Where a life insurance company resists recovery upon its policy and raises issues as to whether the insured had made false representations in his application for the policy, that he had never theretofore been examined for life insurance and rejected as an unsuitable risk, etc., it is error for the trial judge to exclude defendant's evidence directly bearing upon these issues, for such facts, if they existed, are material, as they would have had a substantial influence upon the insurer in deciding whether to issue the policy or not.

APPEAL by defendant from *Daniels, J.*, at May Term, 1914, of PITT.

This is an action upon a policy of life insurance issued to Isaac Carson Hardy for the benefit of the plaintiff, who is his daughter. The defense is that the said Isaac Hardy made false representations to the company, at and before the time of issuing the policy, in regard to the state of his health, the particular charge being that he falsely stated that he had never had consumption or rheumatism, and that he had never before been examined for insurance and rejected as an unsuitable risk. Issues were framed upon the averments of the answer as to these false representations, and submitted to the jury, and among others were these:

"12. Did the application falsely represent that the insured had never been examined for insurance, and rejected as an unsuitable risk?

"13. Had the said insured, prior to said application, applied for insurance in any company and had been rejected as unfit for insurance?"

Defendant proposed to read depositions of Dr. Clark W. Davis and George L. Williams, which had been taken before William E. Brooks, as commissioner, under a commission which issued to "William W. Brocks, Esq., notary public." The notice to plaintiff stated that the depositions would be taken "before William W. Brooks, notary public and commissioner, at the office of the Union Central Life Insurance ( 23 ) Company, in Cincinnati, Ohio, at 11 o'clock a. m. on 9 April, 1914. Upon objection by the plaintiff, the depositions were excluded by the court, and defendant excepted. It appears in the record that plaintiff waived irregularities in the deposition, consented that they might be opened, but reserved the right to object to incompetent testimony. Verdict and judgment for plaintiff, and appeal by defendant.

*W. F. Evans and Julius Brown for plaintiff.*

*Harry Skinner and Albion Dunn for defendant.*

WALKER, J., after stating the case: It is unnecessary to set forth the testimony of the two witnesses as it appears in the depositions, for it is sufficient to state that it was competent and relevant to issues 12 and 13, as it tended to show that Isaac Hardy had applied for insurance and had been rejected prior to the date of the policy issued by the defendant to him.

We were told on the argument that the court excluded the depositions because the commission was issued to W. W. Brocks, instead of W. W. Brooks, and signed and certified by W. E. Brooks; but this, we think, was not a good reason for their rejection. The person who was intended to act as commissioner was otherwise sufficiently identified, and plaintiff, if she had desired to be present, could easily have ascertained the place and time and the commissioner, by referring to the notice she received. Besides, she waived this irregularity and reserved only the right to object on the trial to the testimony as being incompetent. We are of the opinion that her agreement with the defendant amounted to a clear waiver of the defect, or misnomer, and it appears that she has not been prejudiced thereby. The objection was too technical and attenuated to be sustained. It should have been overruled and the depositions admitted. We do not say that all that is in the depositions is competent and relevant, but there is some such evidence there. The plaintiff has not yet specified her objections thereto, and its competency cannot be determined until she does so. She may fail to object to some or all of it, and thereby waive the incompetency of the evidence. If the court ruled that the testimony contained in the depositions was incompetent, and excluded them for that reason, there was error. It was material for the underwriter to know whether Mr. Hardy had before applied for insurance and been rejected. It would have had a substantial influence in deciding whether to issue the policy or not. *Fishblate v. Fidelity Co.*, 140 N. C., 589; *Bryant v. Ins. Co.*, 147 N. C., 183; *Alexander v. Ins. Co.*, 150 N. C., 536; *Gardner v. Ins. Co.*, 163 N. C., 367; *Schas v. Ins. Co.*, 166 N. C., 55.

This error entitles defendant to another jury.

New trial.

*Cited: Ins. Co. v. Woolen Mills,* 172 N.C. 539 (3c); *Howell v. Ins. Co.*, 189 N.C. 217 (3c); *Petty v. Ins. Co.*, 212 N.C. 160 (3c).

( 24 )

GEORGE H. DUVALL AND J. H. BELL v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 14 October, 1914.)

**Carriers of Goods—Bills of Lading—Stipulations—Live Stock—Written Notice—Waiver—Evidence.**

A stipulation in a bill of lading given by a common carrier for a shipment of live stock, requiring that written notice of claim for damages be given the delivering carrier before the live stock is removed or intermingled with other live stock, is a reasonable one to afford the carrier an opportunity of such examination as will enable it to protect itself from false or unjust claims, and will be upheld as a condition precedent to the right of recovery. And the mere fact that the claimant verbally notified someone employed by the carrier as a laborer, in the absence of the agent, of an injury to one of a car-load of mules, which had been transported by the carrier, before accepting and taking the mule away and intermingling it with other live stock, is neither a compliance with the terms of the stipulation by the claimant nor a waiver thereof on the part of the carrier. *Jones' case*, 148 N. C., 580, and *Southerland's case*, 158 N. C., 327, cited and distinguished.

APPEAL by defendant from *Whedbee, J.*, at December Term, 1913, of JONES.

This is a civil action to recover damages for injury to a mule, caused by the negligence of the defendant, the Norfolk Southern Railway. The jury found for the plaintiff and assessed the damages at $100, from which judgment the defendant appealed.

*Thomas D. Warren for plaintiff.*

*Moore & Dunn for defendant.*

BROWN, J. The evidence in this case tends to prove that the plaintiffs were owners of a certain mule, shipped to them over the defendant's road, 8 March, 1911, under a bill of lading containing the following clause: "That as a condition precedent to any right to recover any loss or damage to any live stock, notice shall be given in writing the agent of carrier actually delivering said live stock wherever said delivery may be made; such notice shall be so given within five days from said delivery and before said live stock shall have been intermingled with other live stock."

It is contended by the defendant that the animal was removed at once after arrival at New Bern, without giving any notice, as required in the bill of lading. The evidence tends to prove that when the stock was removed from the railroad station, they were carried to the stables of J. A. Jones, the consignee named in the bill of lading.

It seems that the mule had been purchased by the plaintiff Duvall in Richmond and shipped with other stock under the bill of lading
( 25 ) to Jones. The plaintiff Duvall received the mule at Jones' stables and carried it to Pollocksville, a distance of 14 miles, and delivered it to J. H. Bell. Both Duvall and Bell testified that on the way to Pollocksville the mule limped a little, but they paid no attention to the same, as they did not think the lameness amounted to anything. In several weeks the injured leg turned out to be serious, and the mule died.

It is admitted that no written or other claim was made on the defendant until 12 April, and that the affidavit as to the injury to the mule was not made until May, 1911. The plaintiff Duvall further testified that he saw the mule at Jones' stables before being driven to Pollocksville, and he did not call the attention of the agent of the defendant to any alleged injury.

It is well settled that a stipulation in a bill of lading, given by a common carrier for a shipment of live stock, requiring that written notice of claim for damages be given the delivering carrier before the live stock is removed or intermingled with other live stock, is a condition precedent to recovery, being merely a provision to protect the carrier against a false or unjust claim by affording it an opportunity for examination, is reasonable, and will be upheld.

The validity of such provision was affirmed in *Selby v. R. R.*, 113 N. C., 594. It has been fully discussed, elaborated, and enforced in *Austin v. R. R.*, 151 N. C., 137, and in *Kime v. R. R.*, 153 N. C., 400, in which last case the present *Chief Justice,* speaking for the Court, says: "We fully indorse the ruling in *Austin v. R. R.*, 151 N. C., 137, that a stipulation in a bill of lading requiring notice of a claim for damages be given the carrier before the live stock is removed or intermingled with other stock is a reasonable regulation to protect carriers against false or unjust claims by affording it an opportunity for examination."

But the plaintiff contends that there was a waiver, if not a substantial compliance, with the clause in the bill of lading. He bases this contention upon the testimony of one Brock, who received the stock for the consignee, Jones. Brock testifies that the agent of the Norfolk Southern Railroad Company was not personally present at the time the stock was unloaded, and that Brock "called the attention of a negro, working for the said railroad company, to the condition of the mule."

The plaintiff relies upon the case of *Jones v. R. R.*, 148 N. C., 580. The validity of such a clause in the bill of lading was fully recognized in that case, but the decision was based upon the fact, while the stock had been removed to a stable, it was still in the possession of the railroad company, as its agent had caused the stock to be removed to the stable, and where examination of the stock was made by the agent.

Nor is the case of *Southerland v. R. R.*, 158 N. C., 327, any authority for the plaintiff's position. In that case notice was given and the injury called to the attention of one who customarily acted for ( 26 ) the railroad company in delivering stock. In that case it is said: "It is true, the notice was given to one Lambert, who was in charge of the stock yards, but there is testimony tending to prove that he superintended the unloading of cattle for the railroads, that he was always present at such unloading, and worked for the railroad company in that way and looked after all the cattle for the railroad when they came in. From the evidence, we think the jury was fully warranted in inferring that Lambert was agent of the railroad in receiving and unloading cattle, and that being so, notice to him would be in all respects a compliance with the contract."

In the case at bar no notice whatever was given any agent of the defendant. The fact that Brock called the attention of some negro, who happened to be working for the defendant, to the condition of the mule, would certainly not be notice to the defendant.

The motion to nonsuit should have been allowed. It is so ordered.

Reversed.

*Cited: Mewborn v. R. R.*, 170 N.C. 210 (d); *Horse Exchange v. R. R.*, 171 N.C. 73 (d).

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R. W. DECKER ET AL. V. NORFOLK SOUTHERN RAILROAD COMPANY.

*(Filed 14 October, 1914.)*

**1. Courts—Discretion—Verdict Set Aside—Term—Waiver.**

The power of a judge of the Superior Court to set aside a verdict is confined to the term wherein the verdict was rendered; but by consent of the parties, expressed or implied, they may waive this legal right and give effect to an order rendered in vacation or at a subsequent term, setting the verdict aside.

**2. Same—Substitute Judgment—Compromise—Time Given for Consent—Intent—Interpretation—Practice—New Trial.**

Upon motion made in the Superior Court by a party defendant to set aside a verdict of the jury as being against the weight of the evidence, the judge said he would grant the motion as a matter in his discretion, but thought the plaintiff should recover something, stating if the defendant would pay a certain less amount and the plaintiff would take it, he would sign a judgment in that sum. Whereupon the attorneys for both parties requested time in which to communicate with their clients, and until Tuesday of the following week, a criminal term, was given for that purpose. The judge signed an order setting aside the verdict, which was

to stand if the parties did not agree, and also a judgment in the amount stated to be substituted for the order, if the parties should agree thereto; and this without objection. The defendant agreed to pay this sum, and on the Tuesday fixed for the purpose the plaintiff's attorney stated he had not yet heard from his client, but on the following day stated that his client had refused to accept the compromise judgment. *Held*, (1) the plaintiff having waived his legal right that the judge should exercise his discretion to set aside the verdict at the term it was rendered, cannot avail himself of the fact that this was not done; (2) the order setting aside the verdict was the judgment of the court at that term, and the compromise judgment was only to become effective as a substitute if thereafter agreed to by both of the parties, and upon their failure to agree the order for a new trial remained in effect; (3) the reason for the delay being to give the parties time to hear from their clients, and Tuesday being supposed to be sufficient for the purpose, but not the last day, the action of the court on Wednesday, the day following, was valid, especially as plaintiff's conduct implied consent that the court might act on that day; (4) the misunderstanding having arisen from the failure of the court and the parties to effect a compromise, an order granting a new trial would otherwise be proper.

(27) APPEAL by plaintiff from *Peebles, J.*, at August Term, 1914, of PITT.

This action was brought to recover damages for injuries alleged to have been caused by the defendant's negligence, and resulted in a verdict for the *feme* plaintiff upon all the issues. The case on appeal states:

The jury answered the issues in favor of the plaintiff, as set out in the record, and assessed her damages at $5,000. Upon the coming in of the verdict, the defendant moved the court, in its discretion, to set aside the verdict as against the weight of the evidence and excessive in amount of damages. The court being of the opinion that the aforesaid verdict was against the weight of the evidence and excessive in amount, it is thereupon considered, ordered, and adjudged by the court, in its discretion, that the aforesaid verdict of the jury herein rendered be and the same is hereby set aside, vacated, and annulled. R. B. PEEBLES,
*Judge Presiding.*

Filed 29 August, 1914.
A. T. MOORE, C. S. C.

It further appears in the case:

"The jury found all the issues in favor of the plaintiff and assessed the plaintiff's damages at $5,000.

"The defendant thereupon moved to set aside the verdict as being contrary to the weight of evidence and excessive. The court said that he was satisfied that the verdict was contrary to the weight of evidence and was excessive, but he thought the *feme* plaintiff ought to have something,

and that if she would agree to take $1,700 and costs, the court would not set aside the verdict of the jury; but if she did not agree to take that, the court would set aside the verdict of the jury, in its discretion, as being contrary to the weight of the evidence and excessive; that if the plaintiff agreed to take $1,700 and costs, and the defendant refused to give it, the court would give the judgment upon the $5,000 verdict.

"Whereupon, Mr. L. I. Moore, for the defendant, and S. J. ( 28 ) Everett, for the plaintiff, said they would like to have time to consult their respective clients. Mr. Moore said he thought they could hear from the defendant during the next day. Mr. Everett said he didn't think he could hear from the plaintiff before Tuesday of the following week. The court then said it would postpone the motion to set aside the verdict of the jury until the next Tuesday, by consent and without prejudice to either side. No objection was made to that arrangement.

"On 29 August, 1914, Mr. Long, of the firm of Moore & Long, stated to the court that he was afraid, under *Stilley v. Planing Mills,* 161 N. C., 517, the plaintiff would try to take some advantage if the motion to set aside the verdict of the jury was continued until after the civil court expired. Thereupon the court signed two judgments, one setting aside the verdict of the jury in the discretion of the court, on the ground that the verdict was against the weight of evidence and excessive; the other one was a compromise judgment, by consent, for $1,700 and costs. He delivered both judgments to the clerk of the court, with instructions to file both, but not to record either one until they heard from the plaintiff, the defendant having before that time assented to paying the plaintiff $1,700 and costs. The court stated to the clerk that if he heard from the plaintiff, and the plaintiff agreed to take the $1,700, he would tear up the judgment setting aside the verdict of the jury and have the compromise judgment recorded.

"On Tuesday of the second week the court asked Mr. Everett if he had heard from his client, and he said he had not. On Wednesday Mr. Everett said he had heard from his client, and she had declined to accept the $1,700 and costs. Thereupon the clerk tore up the compromise judgment for $1,700 and directed the clerk to record the judgment setting aside the verdict of the jury. Thereupon Mr. Everett appealed to the Supreme Court. Appeal bond was fixed at $25. Mr. Long, of the firm of Moore & Long, was present in the courthouse at the time."

*S. J. Everett, Julius Brown, and N. W. Outlaw for plaintiff.*
*L. I. Moore and W. H. Long for defendant.*

WALKER, J., after stating the case: It has been settled by decisions of this Court that the judge presiding in the Superior Court has no power to set aside a verdict out of term, or at a subsequent term (*Stilley v.*

*Planing Mills,* 161 N. C., 577), although the same judge may have presided at both terms, without the consent of the parties; but with their consent he may do so. *Clothing Co. v. Bagley,* 147 N. C., 37. In such a case, and generally also, consent waives the law. The elementary doctrine is well stated in Broom's Legal Maxims (6 Am. Ed. of 1868), at top page 105, star page 137 *et seq.*: "*Consensus tollit errorem* (2 Inst.,
(29) 123), that is the acquiescence of a party who might take advantage of an error obviates its effect. In accordance with this rule, if the venue in an action is laid in the wrong place, and this is done *per assensum partium,* with the consent of both parties, and so entered of record, it shall stand; and where, by consent of both plaintiff and defendant, the venue was laid in London, it was held that no objection could afterwards be taken to the venue, notwithstanding it ought, under a particular act of Parliament, to have been laid in Surrey, for *per curiam, Consensus tollit errorem.* On the maxim under consideration depends also the important doctrine of waiver, that is, the passing by of a thing, a doctrine which is of very general application both in the science of pleading and in those practical proceedings which are to be observed in the progress of a cause from the first issuing of process to the ultimate signing of judgment and execution. If a party, after an irregularity has taken place, consents to a proceeding which, by insisting on the irregularity, he might have prevented, he waives all exceptions to the irregularity. This is a doctrine long established and well known. *Consensus tollit errorem* is a maxim of the common law, and the dictate of common sense. It may appear in some measure superfluous to add that the consent which cures error in legal proceedings may be implied as well as expressed; for instance, where, at the trial of a cause, a proposal was made by the judge in the presence of the counsel on both sides, who made no objection, that the jury should assess the damages contingently, with leave to the plaintiff to move to enter a verdict for the amount found by the jury, it was held that both parties were bound by the proposal, and that the plaintiff's counsel was not, therefore, at liberty to move for a new trial on the ground of misdirection, for *qui tacet consentire videtur,* the silence of counsel implied their assent to the course adopted by the judge, and 'a man who does not speak when he ought, shall not be heard when he desires to speak.'" It is often convenient for the judge, parties, and counsel that such arrangement should be made, and where it is done with the acquiescence, express or implied, of all interested, it should be allowed to stand and the proceeding considered, so far as its validity is concerned, as if it had been regularly conducted, for that no party should be allowed to take advantage of his own wrong is another cardinal maxim of the law, as well as a precept of good morals. But we should always be careful to see that the proper consent has been fairly given. We do not

doubt as to the true meaning of this transaction. The judge had clearly announced his decision, upon defendants' motion, that the verdict was not only against the weight of evidence as to the cause of action, but that if it was right in that respect, the damages were excessive, and for these reasons the verdict would be set aside. It is impossible to misunderstand his language, which imported but one thing, that the verdict should be set aside. But he desired to be perfectly fair to the ( 30 ) parties, and therefore stated that the plaintiff *ought* to have something. Here is the only obscurity in the whole proceeding. Whether the learned judge thought that she was legally, or only morally, entitled to something does not clearly appear; but this is deemed an immaterial consideration. His mind was made up as to setting aside the verdict, and a formal order (or judgment, so called) to this effect was drawn up and signed by him and delivered to the clerk. We understand that, in law, this did set aside the verdict, and that the signing of a judgment for $1,700, the amount fixed by him, was merely for the purpose of substituting that judgment for the other, if the parties thereafter should so agree, and not having agreed, the $1,700 judgment became a nullity, and the judgment setting aside the verdict continued in force. This is the fair construction of the matter, for this carries out the manifest purpose of the judge and the parties.

But there is another view. If the two judgments were prepared and signed, so that the parties might thereafter choose between them, the consent that the proceeding might remain in that shape until their respective clients were heard from—for that is clearly what was intended by all—and the setting of the next Tuesday for calling the matter up, imparted validity to the decision of the court, even on Wednesday, and for this reason: Tuesday was not fixed as the only, or final, day on which the matter could be heard. Such a narrow construction of their agreement would defeat the obvious intent, which was that there should be sufficient time to hear from their clients and to receive proper authority to act in the premises, and the length of time, as being limited to the next Tuesday, was not of the essence. It was merely considered as a convenient time to take the matter up again, so that it would not be overlooked. What occurred on Tuesday and Wednesday makes this clear. The judge asked plaintiff's counsel on Tuesday if he had heard from their client, which question he answered in the negative; but on the next day, Wednesday, plaintiff's counsel called the matter to the attention of the court, and stated that he had heard from his client and that she declined to accept $1,700 and costs. If it had not been understood that, by tacit consent, the matter had been left over until she should be heard from, why mention the matter at all on Wednesday? It must be inferred that judge and counsel were waiting to hear from the respective parties, so that the

arrangement, which had received their consent the week before, might be carried out with binding authority. The purpose was to settle the case, if possible, upon the basis of the judge's suggestion, which was unfavorable to the defendant, in the view he had already taken of the case, and the time of settlement was unessential, except in the respect that it was necessary that the required time should be used in procuring their
( 31 ) consent, so that the agreement would stand. Tuesday of the next week was merely named as a convenient day upon which to renew the matter, as the criminal court would then be sitting, and was not intended to be the final day. This construction of the agreement is necessary in order to preserve the good faith of all parties and to execute the apparent intent.

But there is still another view which is controlling. Upon the basis that there was a misunderstanding among those who were parties to the agreement—and there appears to have been, by the argument before us—the law will never permit any injustice to be done under such circumstances. The only way to correct the error is to set aside the verdict and give the parties a new start. It would be grave injustice to proceed otherwise. The law strives to do what is right and just among litigants, as determined, it is true, by fixed rules and principles; but in many respects the days of legal quibbles and technicalities have passed, and a more enlightened age of civilization has taken a different view of the rights of parties, as they should be administered in the courts, and has, therefore, liberalized their practice and procedure. There is no reflection on judge, counsel, or parties in this case, and no fault to be found with any one. Defendant's counsel are merely guarding with proper care and commendable loyalty the legal rights of their clients, as it is their duty to do, and it may be said of all those who took part in the case, that they have simply performed their duty in the premises.

We are of the opinion that the ground just taken by us is also a safe one upon which to rest our conclusion, viz., that by the combined effort of the judge, counsel, and parties to reach a definite agreement, there has resulted, unfortunately, a misunderstanding as to the time allowed for effecting a settlement, for the purpose of doing substantial justice, with, however, a firm decision of the judge, which was announced from the bench and reduced to the form of a judgment, signed by him, that the verdict should be set aside. The intention is clear and should be effectuated, as it violates no settled principle of law to do so, and justice demands that it be done.

But apart from this, the legal effect of the transaction was to set aside the verdict, with leave to strike out the order if the proposition of the judge was afterwards accepted. This was the substance of it. The defendant had already agreed to do it, and the judgment for $1,700 was

signed by the judge to await the acceptance or rejection of the plaintiff, as a convenient way of effecting a settlement, if both parties agreed, without the further intervention of the court.

Counsel were fully justified in maintaining their positions and defending their client's legal rights, as they did by fair and legitimate argument in this Court. The benevolent object of the judge was ( 32 ) disappointed, leaving the alternative order to stand. The merits of the case and the question of removal are not before us.

Affirmed.

*Cited: Hyatt v. McCoy,* 194 N.C. 762 (1c); *Acceptance Corp. v. Jones,* 203 N.C. 527 (1c).

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HARRIET CAULEY v. CHARLES F. DUNN.

(Filed 14 October, 1914.)

**1. Pleadings—Amendments—Court's Discretion.**

The refusal of the trial court to permit a party to amend his pleadings is a matter within its discretion, and not reviewable on appeal.

**2. Contracts—Debtor and Creditor—Bankruptcy — Promise — Consideration.**

A promise to pay a debt barred by bankruptcy of the debtor is upon a sufficient consideration.

**3. Contracts—Bills and Notes—Parol Evidence—Contradiction.**

Under the doctrine that the terms of a written contract may not be varied by parol, it is incompetent to show by parol, in the absence of fraud and mutual mistake, that at the time of making a note, payable at a certain time, it was agreed between the parties that the maker should pay it in small amounts or after he should have recovered from bankruptcy.

APPEAL by defendant from *Whedbee, J.,* at January Term, 1914, of LENOIR, on appeal from a justice of the peace.

*No counsel for plaintiff.*
*Defendant in propria persona by brief.*

CLARK, C. J. This action is brought upon the following bond:

$114.60 KINSTON, N. C., October, 1904.

Two years after date I promise to pay Harriet Cauley $114.60. Value received. Payable at the Dime Bank, Kinston, N. C.

CHAS. F. DUNN. [SEAL]

No. 43. Due 17 October, 1906.

The defendant's plea before the justice was as follows: "The defendant did not deny the note, but offered evidence to show that the plaintiff had agreed that he might pay in installments until the note was paid. The plaintiff denied any such agreement."

The defendant asked in the Superior Court to be allowed to amend his plea and set up "no consideration." The court stated it would hear the evidence and then pass upon the motion, which was assented to by
( 33 ) both parties, and after hearing the evidence the court declined to allow the defendant to amend his pleadings. The defendant excepted, but the amendment was a matter in the discretion of the judge and not reviewable. Rev., 507; *Forbes v. McGuire,* 116 N. C., 449. Besides, his evidence did not support the amendment, if it had been allowed. A promise to pay a debt barred by bankruptcy is upon a sufficient consideration. *Shaw v. Burney,* 86 N. C., 331; 9 Cyc., 362.

The defendant admitted the execution and delivery of the note and that the entire written portions of the note sued on were in his own handwriting, including the words "Due 17 October, 1906." The plaintiff testified that from the savings of her labor she sent the defendant small sums of money to keep for her, amounting in the aggregate to $114.60, and that when she went to him to get her money he gave her the note sued on; that after she had repeatedly demanded payment he did on one occasion offer to pay her $1 on the note, but she refused to take so small a sum as a payment on the same.

The defendant testified that after he had been discharged in bankruptcy he gave the plaintiff the note sued on with the understanding that he would pay the same "when he got on his feet"; that he received the $114.60 from plaintiff before he was adjudged a bankrupt.

The court charged the jury that if they believed the entire evidence, then they should answer the issue set out in the record, "$114.60, with interest from 17 October, 1906." The defendant excepted, but there is no error. The court did not "direct a verdict," though it might have done so. *S. v. Riley,* 113 N. C., 650, citing *U. S. v. Taylor,* 3 McCrary, 500.

Nothing is better settled than that "A written contract cannot be varied, altered, or contradicted by a contemporaneous parol agreement." The plaintiff seems to have been a colored woman, making small savings from her daily labor which she intrusted from time to time to the defendant, who is a bank president. There is no pleading, or evidence, of fraud or imposition by the plaintiff, or that the instrument was drawn erroneously by mutual mistake of fact or omitting an essential part thereof, or any other ground of equitable defense. Indeed, the defendant testified that he made out the note himself.

No error.

*Cited: Harvester Co. v. Parham,* 172 N.C. 390 (3c); *Sanford v. Junior Order,* 176 N.C. 448 (1c).

( 34 )

ELM CITY LUMBER COMPANY v. CHILDERHOSE & PRATT ET AL.

(Filed 14 October, 1914.)

**1. Appeal and Error—Objections and Exceptions—Unanswered Questions—Briefs—Exceptions Abandoned.**

When answers to questions are excluded from the evidence by the trial judge, the character and relevancy of the testimony sought to be elicited should appear in the record on appeal; and where exceptions of record are not discussed in appellant's brief they are taken as abandoned.

**2. Bills and Notes—Negotiable Instruments—Banks and Banking—Holders in Due Course—Custom—Evidence.**

Where the evidence tends to show that a foreign bank is a holder of a draft in due course and has sent it through its correspondent banks for collection, a custom of charging back unpaid drafts by the forwarding bank to its customers may not be shown by one draft which had been charged back, which was in no wise connected with the transaction involved in the suit; nor can the custom of the collecting bank in this respect be received as evidence of the custom of the forwarding bank.

**3. Bills and Notes—Negotiable Instruments—Banks and Banking—Holders in Due Course—Discount—For Collection—Bills of Lading Attached—Trials—Instructions.**

In this case there was evidence that a foreign bank discounted a draft, bill of lading attached, placed the money to the credit of the drawer, who checked it out, and then sent the draft to a Philadelphia bank for collection, from whence it reached the local bank of the drawee and was paid; but before remittance made the funds were attached by the drawee. The foreign bank interpleaded and the plaintiff maintained that from the amount the interpleader received on the draft and from its custom to charge it was evidently a charge made for collection and not a discount of the paper. *Held,* the instruction of the court defining a holder in due course is correct (Revisal, 2201); and the rights of a purchaser of a draft with bill of lading attached defined in the instructions are within the principles of *Mason v. Cotton Mills,* 148 N. C., 498; and the charge is further approved upon the question of whether or not the interpleader was a holder in due course, or the transfer was made for collection or a transfer in order to secure the bank for money advanced.

APPEAL by plaintiff from *Daniels, J.,* at April Term, 1914, of CRAVEN.

This is an action to recover damages accruing upon a contract for the sale of hay, bought by the plaintiffs from Childerhose & Pratt, in which the proceeds of two drafts, drawn by Childerhose & Pratt on the plain-

tiff and paid by it, were attached in the hands of the Peoples Bank of New Bern.

The Bank of Ottawa intervened, alleging that it was the owner of the proceeds of the drafts, and the only issue in controversy is as to ownership, raised by the interplea.

The drafts were introduced in evidence, and on each was the word "collection."

( 35 ) T. A. Uzzell testified for the plaintiff: "I am cashier of the Peoples Bank, and was cashier in 1912. In 1912 we received drafts from the Girard National Bank of Philadelphia on the Elm City Lumber Company. We have record of a draft for $211.03 and one for $161.30; they were sent to us for collection. [The drafts introduced in evidence identified by witness.] The regular indorsement stamp of the Girard National Bank appears on both drafts; the green stamp has the word 'collection' on it. We did not give the Girard National Bank any credit on our books for these amounts before they were paid. In receiving drafts of this kind, sometimes we would remit proceeds less collection charges, and sometimes credit the bank's account and give them notice of the credit on the collection."

Cross-examination: "The drafts were made payable to the Bank of Ottawa, and were sent to us through our correspondent, the Girard National Bank. The former is a Canadian bank and the latter an American bank. I don't know whether or not the bank of Ottawa bought the drafts. They indicate on the face they were sent here for collection. We receive drafts in different ways. Sometimes as cash items and collection items; it depends how the draft is send to us; it could be sent to the Girard either as cash or collection, and be sent to us in the same way."

Redirect: "The form of this draft is the usual form furnished to customers of banks. This is the form furnished by us to our customers and that we have on our counters. When drafts come to the bank, we notify the drawee that we have it for collection. We either send our collector or mail notice of same. In this instance we would notify Elm City Lumber Company we hold draft on them for Childerhose & Pratt, and the Bank of Ottawa would not appear on the notice. The stamp across the corner of the draft means we are not to surrender the bill of lading attached to the draft, only upon payment of the draft, and if necessary hold the item for arrival of the goods. We would have no authority to turn the goods over until the payment of the draft. It is this direction in stamp across corner of draft, not in the regular printed form."

Defendant offered the following evidence:

J. G. Burgess, witness in behalf of Bank of Ottawa, interpleader, who testified as follows: "I reside at Ottawa. I am manager of the Chaudier Branch of the Bank of Ottawa; that is equivalent to cashier in your

country. I have been manager over three years, and in the banking business sixteen years. I am acquainted with Childerhose & Pratt. In regard to this hay, Mr. Pratt brought the drafts to me in the bank and the bills of lading also. On 29 April, 1912, Mr. Pratt brought into the office of the Bank of Ottawa these two drafts with bills of lading attached, drawn at sight on the Elm City Lumber Company, one for ( 36 ) $211.03 and one for $161.30, and asked that they be discounted and placed to their credit, Childerhose & Pratt, which I did, less our commission, and they withdrew the money the same day the drafts were brought in. I have the original entry sheet on which the entry was made. I attended to this and checked it over, and it was under my inspection, and I checked it over and put my initials on the sheet. On the original record I find $161.30 and $211.03; that is the discount sheet and that the ledger sheet [witness indicates different sheets]; the original entry is in the discount sheet, and that is checked by me as correct, also the other one. After the money was placed to the credit of Childerhose & Pratt, and the money withdrawn by them, we forwarded the drafts to the Girard National Bank, who are our agents for the Southeastern and Southern States practically, for collection. This collection was to be made for us. Childerhose & Pratt did not have any interest in the collection. They had received the money and had no further interest. The collections were ours, and we sent the drafts to the Girard National Bank and they sent them to the Peoples Bank and were to return the money to us. I did not know, of course, to whom the Girard National Bank would send them; the proceeds were to be paid to us. Since then Childerhose & Pratt have dissolved. Childerhose & Pratt were paid by the bank $371.33; the full amount was $372.60, the difference between the two represented the discount. We have not received any money upon the drafts, because Elm City Lumber Company attached the funds."

Cross-examination: "We charge interest at 7 per cent in Canada. Interest on $372.60 for fifteen days would be $2.50. We did not take their paper at a loss. You claim collection took fifteen days. It should not have taken that long. I left Ottawa Saturday at 4:30 p.m., arrived in New Bern at 9:30 a. m. Tuesday following. This draft was not paid until thirty days after it was presented to us into the Peoples Bank. The draft is stamped 26 May, and discounted 29 April. The interest on that amount of money for thirty days would have been three times the amount charged for collection. It should not have been that long. I do not know how long it would take to come from Ottawa—the freight transportation. I left Ottawa Saturday at 4:30 and was here Tuesday at 9:30. As far as I know, Childerhose & Pratt are solvent. They did not carry a pretty good account with us; the ledger accounts show a balance of from $600 down to $10; I do not consider that big. We had several drafts from

Childerhose & Pratt. We never charged back to them any draft on the Elm City Lumber Company. One of the drafts, I know, was returned. All these dealings occurred within four or five days. There is a draft for $235.55 made in the same manner as this. I don't know that
( 37 ) we charged this draft back after it was returned. These were discounted 29 April and the $235.55 was on 25 April. If the drafts had been returned to the Bank of Ottawa we would have returned them to Childerhose & Pratt. This is our usual method; we might have got the bill of lading and charged them back to their account. I don't know —with their permission, we might have charged them back. We have never made any demand on Childerhose & Pratt for payment of this money. They signed the draft for which this collection was made. Of course, I cannot recall any case when the person signing the draft was not liable when the draft was not paid, but I have had them. Childerhose & Pratt had no money when I left Ottawa. Childerhose & Pratt have both left Ottawa; been gone about a year; I don't know where they have gone. They dealt in real estate and commissions. They shipped varied amounts of hay each month; I don't know that they were doing a large business. I knew the two drafts were for hay. We had the bills of lading, which showed they were for hay. I did not know anything about any contract between them and the Elm City Lumber Company. We did not look up the Elm City Lumber Company in a commercial agency."

Redirect: "The reason you didn't investigate the commercial rating of the Elm City Lumber Company was because when they drew the drafts they attached the bills of lading for the hay?"

Plaintiff objected. Objection overruled, and plaintiff excepted.

At this stage of the case the court excluded from the consideration of the jury all evidence relating to the draft charged back, and the court instructed the jury not to consider that evidence. Plaintiff excepted. The loose-leaf sheets from the book of the Bank of Ottawa showing account of Childerhose & Pratt with the bank, including the draft charged, were afterwards introduced in evidence without objection.

His Honor, among other things, charged the jury as follows:

"The Bank of Ottawa undertakes to sustain its contention that it is the owner upon the ground that it is a banking institution in Canada, and that in the ordinary course of business, Childerhose & Pratt, conducting business in their city, came to the bank with the two drafts, which have been described in the answer drawn in favor of the Bank of Ottawa, and sold those drafts to the Bank of Ottawa, or procured the Bank of Ottawa to discount them, and at the same time indorsed the bills of lading to the bank as security for the amount. They allege that they paid for the drafts and the two bills of lading, and that the bank, at the time

that was done, advanced $371.33, about $1.40 less than the face of the drafts, and that it placed this money to the credit of Childerhose & Pratt upon the books of the bank; that the defendants Childerhose & Pratt, being customers of the bank, drew the money out of the bank that same day by checks, or within a day or two; that the bank sent the ( 38 ) drafts with the bills of lading to their correspondent bank, the Girard National Bank of Philadelphia, and that that bank, in the ordinary course of business, sent to its correspondent in New Bern for collection against the Elm City Lumber Company; that the drafts were presented and collected, paid by the plaintiff, and that the plaintiff took the bills of lading and got the hay. Now, the Bank of Ottawa contends that by reason of those facts, which it says are the facts which I have just recited, and which it says has been established, that it became the owner of the bills of lading and therefore the owner of the hay as security for the amount that it had advanced upon the drafts, and that when those drafts were collected the Bank of Ottawa was the owner of the proceeds of the drafts of $372.60 now, or at least then, in the Peoples Bank of New Bern, afterwards attached in this action."

Plaintiff excepts to this part of his Honor's charge.

2. "Now, if this evidence satisfies you by its greater weight that the Bank of Ottawa discounted the drafts mentioned in the ordinary course of business and became the holder thereof in due course and at the same time took an assignment of the bills of lading mentioned in the interplea for security for the amount advanced to Childerhose & Pratt upon those drafts, then you should answer this issue 'Yes.'" Plaintiff excepted.

3. "The holder in due course is the holder who has taken an instrument under the following conditions: That the instrument is complete and regular on its face. There is no contention here that it is not. Second, before it was overdue and without notice that it had been previously dishonored. There is no evidence here that they were overdue or had been previously dishonored. Third, that they were taken in good faith and for value; and, fourth, that at the time they were negotiated to the bank it had no notice of any infirmity in the instrument or any defect in the title of the person who negotiated them. To constitute notice of infirmity in an instrument or defect in the title of the person negotiating same, the person to whom it is negotiated must have actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounts to bad faith." Plaintiff excepted.

4. "Under these definitions, your first inquiry would be, Were these papers transferred in the ordinary course of business to the Bank of Ottawa, and did the bank take them in good faith for value? The only testimony on that point is that of Mr. Burgess, the cashier of the bank. He tells you the circumstances under which he took the papers; he testi-

fied that he had no knowledge of any contract between Childerhose & Pratt and the Elm City Lumber Company; that they were ship-
( 39 ) ping these two car-loads of hay and that they were drawing for the money; that the bills of lading covering the shipment of hay were indorsed and transferred to his bank; that he charged them the usual bank discount for the drafts and took an assignment of the bills of lading as security for the money advanced by the bank; and that the money was placed to the credit of Childerhose & Pratt on the books of the bank, and that almost immediately that money was drawn out of the bank." Plaintiff excepted.

5. "If this evidence satisfies you by its greater weight that the paper was discounted at the bank in the ordinary course of business, and that the proceeds of the drafts, after deducting the commission or discount, were placed to the credit of Childerhose & Pratt; that the bank at the same time took an assignment of the bills of lading and Childerhose & Pratt drew this money out of the bank in a day or two and got the benefit of it, then in that event it would constitute the Bank of Ottawa the holder for value." Plaintiff excepted.

6. "The next question is whether the bank took the drafts with notice of any infirmity. (I don't understand that there is any question as to defect in title or any evidence offered on that point.) The defendant Bank of Ottawa contends that it had no notice, and offers in support of that contention the testimony of the cashier, who says that the bank took the papers in good faith for value and without any notice that there was any contract between plaintiff and Childerhose & Pratt, and the only infirmity that could have been was that the hay was defective or that in shipping the hay there was a breach of warranty, in that it should be No. 2 timothy hay; and he says, further, that Childerhose & Pratt never told him anything about the contract; that he never knew anything about it. So if you find the facts to be as testified to by the witness for the Bank of Ottawa, that it took this paper under the circumstances claimed to have existed, then you will find that the bank took it for value; that it took it without notice of any infirmity or defect, if you are so satisfied by the greater weight of the evidence." The plaintiff excepted.

7. "The holder bank has a prior interest, who takes an assignment of the bills of lading as security for the amount advanced on the drafts and becomes owner of the goods to an extent sufficient to secure the two drafts, if he gets them under the circumstances I have outlined, that is, in good faith for value, without any notice of infirmity or defect, and having gotten the bills of lading in that way, it holds the property covered by them, and it has the right to enforce its claim as against an attaching creditor, as in this case of plaintiff." The plaintiff excepted.

There was a verdict in favor of the bank, interpleader, and from the judgment rendered thereon the plaintiff appealed.

*Moore & Dunn for plaintiff.* ( 40 )

*D. L. Ward for Bank of Ottawa.*

ALLEN, J. The first and third exceptions, to the refusal to permit a witness to answer certain questions, cannot be considered, because there is nothing in the record to show what evidence would have been elicited (*Stout v. Turnpike Co.*, 157 N. C., 366), and the fifth, sixth, and seventh exceptions are abandoned, because not discussed in the brief. *Rogers v. Mfg. Co.*, 157 N. C., 484.

The question intended to be presented by the second exception does not clearly appear, as no evidence had been introduced at the time the exception was taken that any draft had been charged back; but if, as indicated in the brief of the appellant, the draft referred to was not one of those the proceeds of which are in litigation, and the evidence was offered to prove the custom of the Bank of Ottawa, it was incompetent for that purpose, as one item among many others differing from it cannot establish a custom.

It also appears that the plaintiff afterwards had the benefit of the evidence, as sheets from the books of the bank were introduced showing the item.

The evidence offered to prove the custom among the banks of New Bern to charge back drafts returned unpaid could not affect the rights of the Bank of Ottawa, and the witness stated that he knew nothing of the custom in Ottawa.

The other exceptions are to parts of the charge to the jury, which we have set out, and in which we find no error.

The definition of a holder in due course is taken almost literally from section 2201 of the Revisal, and the statement of the rights of a purchaser of a draft with bill of lading attached is in accord with the principles declared in *Mason v. Cotton Co.*, 148 N. C., 498, and in other decisions.

His Honor did not charge the jury that the bank was a holder in due course if it took the drafts for collection, and, on the contrary, told the jury: "The plaintiff, on the other hand, contends that under this evidence you ought to find that the bank merely took the drafts and bills of lading as a collecting agent, and that it never acquired any property by way of security for anything advanced, if anything was advanced, and, taking them that way, it had no property right in them, and, having no property right in them, it had no interest in the hay or the proceeds from the hay; and the plaintiff calls your attention to the testimony of Mr. Burgess, that the charge upon this transaction was but $1.40, and contends from

that you ought to find that that amount was paid, not as a discount on the purchase of the paper, but was merely a collecting fee or com-
( 41 ) mission for collecting, and nothing more. If you are satisfied from the evidence that the bank merely took the paper for collection and charged a commission for collecting, then that would not be a purchase and the bank would not be the holder in the ordinary course of business, because in order to become holder it must have paid, as it contends, the difference between this charge and the face value of the drafts and credited the amount to Childerhose & Pratt, who must have drawn the money out of the bank. If they took up the paper for collection and charged a commission for collection and placed the proceeds to the credit of Childerhose & Pratt, and you are satisfied, from all the evidence, that it was the custom of the bank that when drafts were not paid, which had been so obtained, to charge them back to the drawer, that would be evidence for you to consider upon the question of whether or not this was a mere transfer for collection or a transfer in order to secure the bank for money advanced."

We have carefully considered the exceptions taken, and find No error.

*Cited: Timber Co. v. Lumber Co.,* 168 N.C. 457 (1c); *Warren v. Susman,* 168 N.C. 464 (1c); *Deposit Co. v. Trust Co.,* 187 N.C. 613 (3c); *Newbern v. Hinton,* 190 N.C. 111 (1c); *In re Will of Redding,* 216 N.C. 499 (1c).

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F. J. FRENCH v. G. T. RICHARDSON.

(Filed 17 October, 1914.)

**1. Reference—Report—Omission of Findings—Approval of Trial Judge—Conclusions of Law—Appeal and Error.**

Where the report of a referee fails to find a material fact necessary to the determination of the controversy, and his report has been approved by the court without further finding, and the judgment appealed from, the affirmation of the report by the lower court will have no conclusive effect, and this Court will remand the case, to the end that the necessary fact be found; and while the conclusions of law found by the referee in this case seem to regard the fact as found, the Court will not supply the omission or pass upon the matter.

**2. Limitations of Actions—Reference—Debtor and Creditor—Application of Payment—Intent—Trials—Evidence.**

In an action by the mortgagor against the mortgagee for an account, etc., it appeared that the parties had various and sundry dealings, the

defendant mortgagee keeping the accounts, and there was evidence tending to show that certain credits were made by him on the mortgage note in time to prevent the running of the statute of limitation in plaintiff's favor, with conflicting evidence as to whether the plaintiff had authorized these credits to be made upon the note, some of it tending to show that the plaintiff had contended that the credits should be in a larger amount. *Held*, the direction of the creditor as to the application of his payment may be express or deduced from circumstances tending to show his intention; and in this case the question was one of fact as to the authority of the defendant creditor to enter the credit upon the note, which should have been passed upon and determined by the referee.

APPEAL by defendants from *Daniels, J.*, at May Term, 1914, of (42) CRAVEN.

This action was brought to cancel two mortgages and to set aside a sale of the land made under one of them. Plaintiff borrowed the money and paid off one of the mortgages. The other mortgage was given by plaintiff to defendant on 5 March, 1892, to secure three notes for $50 each, with interest, and due respectively 15 December of the years 1892, 1893, and 1894. The parties had had various and sundry dealings and transactions, the defendant, by consent, keeping the account and making all entries of debit and credit. The three notes were written on one sheet of paper, and in June, 1898, it was found from the balance sheet that defendant owed plaintiff $1.75, which the former credited on the three notes, and in December, 1905, he also credited $2.50, due by him to plaintiff for work and labor of his son, Lewis French. The plaintiff pleaded payment and the statute of limitations to the three mortgage notes, and the question arose, whether the credits had been placed upon the notes by the consent and authority of the plaintiff.

The cause was referred to the Hon. Charles R. Thomas to take and state an account between the parties of all their dealings. He filed a report and found that the plaintiff had not paid the three mortgage notes, and that they were not barred by the statute, but were existing obligations of the plaintiff. He recommended that the sale under the mortgage be set aside and a resale ordered, as defendant bought at his own sale, unless plaintiff paid the debt secured thereby. The report is a very able and intelligent one, disposing of each and every contested item of a long and very difficult account with fine discrimination and judgment. The court approved all the findings of the referee, but reversed his conclusion of law, that defendant was entitled to foreclose the mortgage by sale to pay the $150 indebtedness due by the three notes, and adjudged that the sale under it be set aside and the notes and mortgage be canceled. Defendant appealed.

*No counsel for plaintiff.*
*D. L. Ward for defendant.*

WALKER, J., after stating the case: The judgment seems to have been based upon the ground that the debt secured by the mortgage was barred, because the entry of credit on the notes was not authorized by the debtor. If his Honor thought that there was not a sufficient finding of the fact as to authorization, he was right; but he should not have concluded therefrom that the debt was barred, the proper course being to find the
( 43 ) fact from the evidence, one way or the other, or to recommit the case to the referee, with directions to make a more specific finding of the fact. If the learned judge thought there was no evidence of such authorization, he was in error, as we think there was sufficient evidence for the consideration of the referee and judge. It may be doubted, though, if the learned referee has distinctly found the ultimate fact, viz., that plaintiff authorized the credit to be entered on the notes. He made a supreme effort to prove that he was entitled to a larger credit, by reason of the fact that a greater balance was due, and even insisted that he was entitled to a larger credit for his son's services. There is much evidence of the same kind, showing, or rather tending to show, that such authority existed. We must send the case back for a definite finding of the ultimate fact of authorization, as we cannot safely infer from the referee's report that he intended to find, as a fact, that the credit was entered upon authority received from the plaintiff to that effect, or whether that was his legal inference. We are convinced that the referee, in his own mind, so found, and intended that we should understand his report by the language we find in his conclusions of law. He says: "The partial payments credited upon the notes by defendant G. T. Richardson were credited under such circumstances as to warrant the inference that the debtor recognized the debt as then existing, and his intention to pay the balance. It was a *voluntary* payment of the debtor, or *authorized* by him. There is nothing to indicate the contrary. The accounts were all kept by G. T. Richardson, with the knowledge and concurrence of the plaintiff, so as to make the credit a payment. *Supply Co. v. Dowd,* 146 N. C., 196." But we may do an injustice by thus construing his report, as he may have intended this as his legal conclusion from the facts. There is an excellent résumé and analysis of the evidence in the report, the evidence itself not having been set up; but however strongly it should convince us that the entries of the credits were authorized and that the referee intended to so find, we would unduly risk something, at the expense of the plaintiff, if we should undertake, ourselves, to declare that the testimony so conclusively established an authorization as to require us to declare the fact to be in accordance with this trend of the evidence, however irresistible it may be, or to construe the report with a view of declaring what was the referee's intention. It is far better to let him make the findings distinct, rather than attempt to solve the doubt as to the true meaning.

We therefore prefer, in the interest of justice and a decision of the case upon its real merits in conformity with settled procedure, to have a specific statement of the referee upon this point.

We may add, though, that the doctrine as to the application of payments is now a familiar one. The debtor, at or before the time of the payment, has the right to direct its application. If he fails to ( 44 ) do so, the creditor may apply it at his option to any existing debt, and in case he fails to exercise his right thus acquired, the law will make the application to the most precarious debt, or, as is sometimes said, the court will make the application in such manner, in view of all the circumstances of the case, as is most in accord with justice and equity, and will best protect and maintain the rights and interests of the parties. 30 Cyc., 1227, 1240 to 1247; *Jenkins v. Beal,* 70 N. C., 440; *Sprinkle v. Martin,* 72 N. C., 92; *Moss v. Adams,* 39 N. C., 42, and *Stone v. Rich,* 160 N. C., 161, where the subject is fully discussed and the cases cited. The first and paramount right of appropriation of the payment rests with the debtor, and his will and direction may be shown, not only by an express agreement or a distinct application of the payment to the debt or a simple declaration as to how it shall be applied, but it may be deduced from circumstances tending to show his intention. 30 Cyc., p. 1230; *Moose v. Marks,* 116 N. C., 542; *Roaks v. Bailey,* 55 Vt., 542; *Pearce v. Walker,* 103 Ala., 250. The evidence in this case is sufficient to prove, by the course of dealings between the parties throughout a long series of years and otherwise, that plaintiff intended and directed the balance due him by defendant to be applied to the debts owing by him to the latter; but the referee must find the fact, as we do not pass upon the evidence in the first instance, however clear and strong it may be. Nothing that we have said in this opinion should influence the referee, one way or the other, in making his finding.

The judgment will, therefore, be set aside, with costs against the plaintiff, and the judge will remand the case to the referee under a direction to find clearly and decisively, from the evidence already taken by him, as to the question whether the plaintiff authorized the credits to be placed upon the notes. In all other respects, not inconsistent with this opinion, the findings and rulings of the referee and the judge are approved and confirmed; and the single question reserved for future decision, if the case should find its way back to this Court, will be as to the decision upon the question whether the credits were authorized by the plaintiff. As to this, either party may except to the ruling and appeal from the final judgment, if so advised.

We recognize the well-settled practice in this Court to the effect that we will not, generally, review findings of fact by a referee, when they have been approved by the judge (*Harris v. Smith,* 144 N. C., 439; *Fry*

*v. Lumber Co., ibid.*, 759), but this case is not within that rule, as here the finding of the ultimate and determinative fact, as to the consent of plaintiff to the entry of the credits, is not definitely stated by the refree, and, therefore, approval of his findings by the judge does not add any force thereto, in that respect, or tend to clarify its meaning.

Error.

*Cited: Robinson v. Johnson,* 174 N.C. 234 (1p); *Thomas v. Bank,* 183 N.C. 511 (2c); *Phillips v. Penland,* 196 N.C. 427 (2c); *Power Co. v. Clay County,* 213 N.C. 709 (2c).

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( 45 )

T. A. ASHFORD AND PUGH & BROOKS COMPANY v. H. C. SHRADER. COMPANY.

(Filed 14 September, 1914.)

**1. Vendor and Purchaser—Contracts—Implied Warranty—Trials—Burden of Proof.**

There is ordinarily no implied warranty of quality of wares upon a contract of sale made between dealers, but the wares delivered thereunder must, at least, be salable; and where oranges are sold by the box, without reference to quality, there is an implied warranty that they will not be delivered in such unsound or rotten condition that they will not be merchantable; and the burden of proof is on the purchaser in his action to recover the consequent damages in his action upon the implied warranty.

**2. Same—Waiver—Inspection—Questions for Jury.**

Where the seller of oranges by the box ships them bill of lading attached to draft, subject to inspection, and they are accepted by the purchaser, and there is evidence tending to show that he had first inspected them in the usual or customary manner without discovering their damaged condition, the question of whether he waived his right to recover damages by his inspection is properly left to the determination of the jury, with the burden of proof on the plaintiff to show that he made the inspection with ordinary care.

APPEAL by defendant from *Daniels, J.*, at February Term, 1914, of CRAVEN.

This is an action to recover damages for an alleged breach of an implied warrant in the sale of 600 boxes of oranges. Both the plaintiffs and the defendant are dealers in oranges, plaintiffs doing business at New Bern and the defendant in Florida. The contract was to sell 600 boxes of oranges at a price agreed on, without further description, and the right was given to the plaintiffs, who were the purchasers of the oranges, to inspect.

The oranges were shipped to New Bern to the order of the defendant, with draft upon plaintiffs and bill of lading attached. There was evidence offered upon the part of the plaintiffs that they exercised ordinary care in the inspection of the oranges, and did not discover any defect therein, and that they then paid the purchase price, and it was afterwards discovered that one-third of the oranges were rotten and unfit for sale.

His Honor charged the jury, among other things, as follows: "Now, under these circumstances, there was what, in law, is called an implied warranty that the oranges should be merchantable, that is, salable; not that they should be of first quality, but that they should be salable. And I charge you that if you believe all the evidence to be true as testified to by the parties, plaintiffs and defendant, you will answer the first issue 'Yes.' That is, there was a warranty in the sale of the ( 46 ) oranges to the plaintiffs by the defendant—not an express warranty; I have excluded that, the plaintiffs having failed to establish an express warranty by their evidence; but what in law is called an implied warranty; that is, a warranty that the goods should be salable; so I say if you find the facts to be as testified to by the witnesses, you will answer 'Yes'; if you do not, you will answer the issue 'No.'

"The burden is upon the plaintiffs on this issue to satisfy you by the greater weight of the evidence that there was any warranty in the sale of the goods. If they have so satisfied you, you will answer the issue 'Yes'; if they have not, you will answer 'No.'

"The next issue for your consideration is: 'If so, was there a breach of said warranty?' The plaintiffs allege there was, and the burden is upon them to satisfy you of the truth of this contention. The breach of warranty, as they contend, consists in the fact that the oranges were not merchantable or salable, and as evidence of that they testify as to the condition of the oranges after they came in their store. The plaintiffs testified that they had made an examination and inspection of them at the depot, and they seemed to be all right, and they were then taken to their store. You will remember what they said in their testimony; and after a few days they found, upon examination, that the oranges were one-third to one-half rotten. The defendant would be liable if you find them liable at all, for such damage or deterioration in the oranges as existed at the time of their delivery to the plaintiffs and their assignee, by the railroad company, to the plaintiffs, but would not be liable for any damage or deterioration by reason of some cause after the oranges came into the possession of the plaintiffs, if they were merchantable and salable when delivered here in New Bern. The defendant contends that oranges are of a perishable nature; that they were left at the depot before taken out by the plaintiffs; that they were then delivered to the plaintiffs and their assignee, and then remained in their place of business for several

days before their condition was discovered; and the defendant argues that if they were in a damaged condition when they arrived here, and when the plaintiffs took them from the railroad company, that with the inspection they made of the fruit they would have discovered any damage or deterioration, if any existed, and that you ought to find that the damage complained of by the plaintiffs came from some cause arising in their places of business, and that there never was any breach of warranty by the defendant.

"You will take all the evidence bearing on that point, and say whether or not there was any breach of warranty. If you are satisfied by the greater weight of the evidence that at the time the oranges were delivered to the plaintiffs that they were not in a merchantable or salable
( 47 ) condition, then your answer to this issue would be 'Yes'; if you are not so satisfied, then your answer would be 'No.' If you find there was a warranty, and that there was a breach of such warranty, then you will consider the third issue: 'If so, did the plaintiffs waive such warranty?' You will remember that the goods were shipped subject to the inspection of the plaintiffs. They were not to accept the goods, the oranges, unless, after inspection, they were found to be merchantable or salable; and they had the right to reject them if, upon inspection, they found them not to be up to the warranty, if you find there was a warranty; and they had that right to inspect before they accepted and received them. It was the duty of the plaintiffs, under this order permitting inspection, when these oranges came here to exercise the care of a reasonably prudent man, and to give them a reasonable inspection in order to determine whether or not they were merchantable or salable. If you find that they did exercise the care of a man of ordinary prudence, reasonable care, in making the inspection, and that they were unable, in the exercise of such care, to discover that the fruit was in bad condition—that is, of course, if you find it was in bad condition at the time of the inspection—then the plaintiffs would have performed their duty in respect to that inspection, and would not have waived the warranty, if there was a warranty; and in that event you would answer the issue 'No.' But if you find that the plaintiffs failed to exercise such care, and thereby failed to discover that the fruit was in bad condition, if it was in bad condition, and accepted and used the oranges, or some of them, then you would answer the issue 'Yes,' because in that event there would have been a waiver of any warranty made. The defendant would be liable if a warranty was a part of the contract, and it was a part of the contract that the plaintiffs could go to the car and make a reasonable inspection of the fruit, if the plaintiffs failed to make such an inspection, and by reason of such failure did not find out the bad condition of the fruit, and under these circumstances accepted and used some of the fruit, then there

would be an acceptance after an inspection, and that would be a waiver of any warranty, and you should answer the issue 'Yes.' "

The defendant excepted to that part of the charge holding that there was an implied warranty that the oranges should be salable, and also to the part of the charge as to the duty imposed upon the plaintiff to inspect.

The jury returned the following verdict:

"1. Was there any warranty in the sale of the oranges? Answer: Yes.

"2. If so, was there a breach of said warranty? Answer: Yes.

"3. If so, did plaintiffs waive such warranty? Answer: No.

"4. What damages, if any, are plaintiffs entitled to recover of (48) the defendant? Answer: $380."

There was a judgment in favor of the plaintiffs, and the defendant excepted and appealed.

*R. A. Nunn for plaintiff.*

*C. R. Thomas for defendant.*

ALLEN, J. The maxim of the civil law is *caveat venditor,* while the maxim of the common law is *caveat emptor,* and it is generally held in courts where the common law is administered that in contracts for the sale of personal property, as between dealers, there is no implied warranty as to quality. *Farrell v. Market Co.,* L. R. A. (N. S.), 884, and cases in note; *Shingle Co. v. Mill Co.,* 35 L. R. A. (N. S.), 261, and note; Tiffany on Sales, 252; 35 Cyc., 397; *Dickson v. Jordan,* 33 N. C., 166; *Woodridge v. Brown,* 149 N. C., 302. This rule has not been stated more clearly or with greater strictness anywhere than in the two cases cited from our own reports.

In the first of these, *Pearson, J.,* speaking for the Court, says: "It is a principle of the common law that no warranty of quality is implied in the sale of goods. *Caveat emptor.* In the absence of fraud, if the article proves to be of bad quality, the purchaser has no redress, unless he has taken the precaution to require a warranty. This rule is founded in wisdom, and its practical good sense is so well fitted to the habits of our trading people that we are disposed to adhere to it. We believe it is adopted in almost all of the States of the Union where the common law prevails"; and this is quoted and approved in the later case.

It seems that the exceptions to this rule are (1) where the sale is for a particular purpose; (2) by sample; (3) by particular description, or where it is made by the manufacturer or producer. 35 Cyc., 399.

Along with this principle as to implied warranties is another of equal importance and prominence, and that is that the seller is held to the duty of furnishing property in compliance with the contract of sale that is, at least, merchantable or salable.

In the case of *Randall v. Newson,* 2 Q. B., 109, after quoting from *Best, C. J.,* in *Jones v. Bright,* 5 Bing., 30, that, "If a man sells an article he thereby warrants that it is merchantable—that it is fit for some purpose. If he sells it for that particular purpose, he thereby warrants it fit for that purpose. Whether or not an article has been sold for a particular purpose is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit. The law, then, resolves itself into this, that if a man sells generally, he undertakes that the article sold is fit for *some* purpose; if he sells it for a particular purpose,
he undertakes that it shall be fit for that particular purpose,"
( 49 ) and after commenting on other English cases, *Brett, J.,* for the
Court, says: "I have cited these cases and the principles laid down in them in order clearly to ascertain what is the primary or ultimate rule from which the rules which have been applied to contracts of purchase and sale of somewhat different kinds have been deduced. Those different rules, as applied to such different contracts, are carefully enumerated and recognized in *Jones v. Just.* In some contracts the undertaking of the seller is said to be only that the article shall be merchantable; in others, that it shall be reasonably fit for the purpose to which it is applied. In all, it seems to us, it is either assumed or expressly stated that the fundamental undertaking is that the *article offered or delivered shall answer the description of it contained in the contract.* That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used, or the circumstances, what, in or according to the contract, is the real mercantile or business description of the thing which is the subject-matter of the bargain of purchase or sale, or, in other words, the contract. If that subject-matter be merely the commercial article or commodity, the undertaking is that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, salable or merchantable."

This authority has been followed in *Jones v. Just,* 3 Q. B., 199; *Grieb v. Cole,* 1 Am. St. Rep., 536; *Howard v. Hoey,* 23 Wend., 350; *Peck v. Armstrong,* 38 Barb., 218; *Warren v. Ice Co.,* 74 Me., 478; *Fitch v. Archbald,* 29 N. J., 164; *Merrien v. Field,* 39 Wis., 580; *Hanson v. Brewing Co.,* 70 Ill. App., 265, and in our own reports in *Main v. Field,* 144 N. C., 311; *Medicine Co. v. Davenport,* 163 N. C., 297.

In the last case *Justice Walker* quotes with approval from Benjamin on Sales and from the English cases, as follows: "If a man sells an article, he thereby warrants that it is merchantable; that is, that it is fit for some purpose. If he sells it for a particular purpose, he thereby warrants it to be fit for that purpose. *Jones v. Bright,* 5 Bing., 544. The principle was clearly expressed by *Lord Ellenborough* in *Gardiner v.*

*Gray,* 4 Campbell, 143, where he denied the application of the rule as to sales by sample: 'I am of opinion, however, that under such circumstances the purchaser has a right to expect a salable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be salable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. The question then is, ( 50 ) whether the commodity purchased by the plaintiff be of such a quality as can be reasonably brought into the market to be sold as *waste silk.* The witnesses describe it as unfit for the purposes of waste silk, and of such a quality that it cannot be sold under that denomination.' "

We are, therefore, of opinion that his Honor's charge was correct; that there was an implied warranty in the sale of the oranges that they should be at least salable, and the question as to the waiver of the warranty was submitted to the jury under instructions which were fair to both parties.

The evidence offered upon the part of the plaintiff tended to prove that the oranges were packed by machinery, and that if they were taken from the boxes they could not be replaced, and that the inspection that was made was the one usually made in the trade, and was such as men of ordinary prudence engaged in like business would have made, and the jury has found this evidence to be true.

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

No error.

*Cited: Guano Co. v. Live Stock Co.,* 168 N.C. 448 (1d); *Furniture Co. v. Mfg. Co.,* 169 N.C. 44 (1c); *Register Co. v. Bradshaw,* 174 N.C. 416 (1c); *Jewelry Co. v. Stanfield,* 183 N.C. 11 (1c); *Swift v. Etheridge,* 190 N.C. 165 (1c); *Gravel Co. v. Casualty Co.,* 191 N.C. 317 (1c); *Poovey v. Sugar Co.,* 191 N.C. 725 (1c); *Swift & Co. v. Aydlett,* 192 N.C. 334, 335 (1c); *Swift & Co. v. Aydlett,* 192 N.C. 344 (1j); *Furst v. Taylor,* 204 N.C. 605 (1c); *Williams v. Chevrolet Co.,* 209 N.C. 31 (1c); *Aldridge Motors v. Alexander,* 217 N.C. 755, 756 (1c); *Petroleum Co. v. Allen,* 219 N.C. 464 (1d); *McConnell v. Jones,* 228 N.C. 220 (1c); *Davis v. Radford,* 233 N.C. 286 (1c).

J. H. NEWBURY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 14 October, 1914.)

**Railroads—Principal and Agent—Contracts—Special Authority—Trials—Evidence—Questions for Jury.**

Upon the question whether a railroad company through its proper officers authorized its local agent to make a contract for furnishing the plaintiff a baggage car at certain other of its stations at stated times, or ratified the act of the agent in making such contract, evidence is held sufficient which tends to show the plaintiff requested the car from the local agent, who asked time before replying, and subsequently entered into the contract, and the car was thereafter furnished at two of the stations. The charge of the court is approved in this case.

APPEAL by defendant from *Whedbee, J.*, February Term, 1914, of DUPLIN.

*Johnson & Johnson for plaintiff.*

*H. L. Stevens and Murray Allen for defendant.*

CLARK, C. J. When this case was before us, 160 N. C., 156, this Court held that the local station agent of a railroad company is not presumed to have authority to contract with a traveling troupe to furnish a baggage car for the hauling of its platform, tents, etc., for an indeterminate period, and to recover damages for breach of contract when made
( 51 ) by an agent of this character for failure to furnish a baggage car at other stations beyond that of the alleged contract, special authority must be shown, or it must appear that the contract has been in some way approved or ratified by the company, and a new trial was granted upon the first issue, as to damages for failure to furnish the baggage car.

On this trial the jury found, on the issues submitted, that the defendant railroad company, through its agent at Weldon, agreed to furnish the plaintiff with a baggage car every Saturday night, up to and including Saturday night, 9 July, 1910, at Louisburg, and that the defendant authorized or ratified said contract, but failed to furnish said car at Louisburg, to plaintiff's damage, $377.50.

The only point presented in the defendant's brief (Rule 34) is the refusal to nonsuit upon the ground that there was no evidence of authority or ratification. There is evidence from the defendant to the contrary, but that we cannot consider. That was for consideration by the jury, and they have found against the defendant.

The evidence submitted to the jury in favor of the plaintiff is correctly summed up by the court substantially as follows: "The first question for the jury to consider is, Was there a contract between the plaintiff and the

defendant that the defendant was to furnish the plaintiff the baggage car each Saturday night while the plaintiff was on the defendant's line of railroad? The plaintiff contends that there was such contract. His evidence was that he, with his manager, Moore, went to the defendant's agent, Rodwell, at Weldon (to whom he was sent by the ticket agent, Carter), and told him that he would be on the defendant's line of railroad for several weeks with his private car, and that he would want a baggage car of certain dimensions, with doors in the ends, each Saturday night while he was on defendant's line; that Rodwell told him he would let him know, and in a short while did let him know, saying he could furnish the car; that in pursuance of this agreement the defendant did furnish the car at Weldon and at Henderson." Plaintiff further contends that even if the defendant's agent, Rodwell, had no authority to furnish the car at Weldon and at Henderson, that this was a ratification of the contract as made by said Rodwell, and thereby became binding on the defendant.

The court then stated defendant's evidence and contentions, and, after defining contract and charging that the plaintiff must satisfy them by the greater weight of evidence of such contract, told the jury that "If either of the defendant's agents, Carter or Rodwell, made the contract with plaintiff, as alleged by him, then in order for the contract to become binding on the defendant it would be necessary that this information be communicated to the defendant's officers who were especially intrusted with furnishing such equipment, and that they, upon this ( 52 ) information and upon the terms of the contract, furnished the equipment in question; and if the jury should find this by the greater weight of the evidence it would be a ratification of the contract, and would be as binding on the defendant as if it had made the same in the first instance by its duly authorized agent." The court further charged the jury correctly that before an unauthorized agreement by an agent can be ratified or adopted so as to bind the principal, he must know the terms of the contract; that the jury must first find whether either Carter or Rodwell made the contract as alleged by plaintiff, and that neither of them had a right to make such contract without express authority, and that there was no evidence that such authority was given them; and the plaintiff must show that the officer who had such authority confirmed the contract, before the plaintiff can recover.

The charge was somewhat fuller than this, and was correct. The only question is, Was there any evidence upon which the jury would be authorized to find that the contract was ratified by the proper official? For this the plaintiff relies upon his evidence that Rodwell made such contract, but asked for delay before he agreed to furnish the car, and the plaintiff contends that it is a reasonable inference from such delay, followed by the contract and the subsequent furnishing of the car at the

proper time at Weldon and at Henderson, which warranted the jury in finding that Rodwell wired and got authority. There was no conflicting evidence that the car was not furnished at Louisburg, and there was no exception as to the evidence of damages.

The jury found that the contract was made by Rodwell or Carter at Weldon. We think the fact that it was complied with by a car of that description being furnished at the proper time, later at Weldon and at Henderson, was some evidence to go to the jury that the official who controlled the movement of such cars had authorized or ratified such contract. In the nature of the case, it would be difficult for the plaintiff to furnish any other or further evidence. He could not go with safety "into the enemy's camp" and bring its officials at random from Norfolk or other points. Indeed, he might not know what official had charge of this matter. The plaintiff dealt with the only representatives of the company he could see, Rodwell or Carter, at Weldon, and left it, of course, to such agent to communicate with his proper superior who had that matter in charge.

The jury, under the charge, must have believed that the local agent communicated the terms of the contract and that it was accepted by some one "higher up." The evidence of ratification or of authorization was more than a scintilla.

No error.

*Cited: Powell v. Lumber Co.*, 168 N.C. 636 (c); *Lumber Co. v. Johnson*, 177 N.C. 51 (c).

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( 53 )

LAURA A. MILLER v. LAURA A. HARDING ET AL.

(Filed 14 October, 1914.)

**1. Wills—Estates—Limitations Over—"Blood Relative"—Heirs—Rule in Shelley's Case.**

A devise of an estate for life with limitation over to G. "to have and to hold during her natural life and at her death to her nearest blood relative," does not create a fee simple in the remainderman after the death of the first taker, for the term "nearest blood relative" is not equivalent to the word "heirs." The rule in *Shelley's case* does not apply.

**2. Estates for Life—Reinvestment—Findings of Fact—Appeal and Error.**

In this case the plaintiff contended that she took a fee-simple estate under the construction of a will devising lands to her, and requested that should she be held to take a life estate, the lands be sold and reinvested for her. The lower court correctly holding, upon the evidence, that the

plaintiff took only a life estate, found as facts that her present income was sufficient for her support in her condition of life, that her income would be increased by the sale, etc., but that she would be the only one materially benefited, and refused to order the lands sold; and on appeal it is held that the Supreme Court is bound by these findings, and no error is found.

APPEAL by plaintiff from *Whedbee, J.,* at March Term, 1914, of LENOIR.

This is a civil action tried upon facts agreed.

His Honor rendered judgment in favor of the defendants. The plaintiff appealed.

*Rouse & Land for plaintiff.*

*L. R. Varser, W. D. Pollock, Loftin & Dawson for defendants.*

BROWN, J. This is an action brought to construe the will of Richard F. Green, as follows: "Item: I give and bequeath to my wife, Eliza B. Green, my house and lot in the town of Kinston in which I now reside, together with all my household and kitchen furniture and all other improvements thereunto belonging, to have and to hold during her natural life and at her death to go to my daughter, Laura A. Green, to have and to hold during her natural life, and at her death to her nearest blood relative."

The plaintiff also prays for a sale of the lot and the investment of the proceeds in case the court should be of opinion that she has only a life estate therein. We are of opinion that his Honor was correct in holding that the plaintiff acquired only a life estate under the terms of the will.

The plaintiff contends that the use of the words "to have and to hold during her natural life and at her death to her nearest blood relative" converts the estate into a fee under the rule in *Shelley's case,* ( 54 ) that the use of the term "nearest blood relative" is quivalnt to the use of the word "heirs."

This contention cannot be maintained. The word "heir" or "heirs" is not synonymous with the term "nearest blood relative." In its primary sense, the word "heir" means a person who inherits, or may by law inherit, from a decedent. The word refers to a class of persons who take by succession from generation to generation, and means all who take generally without exception, as a class of inheritable persons.

In the rule in *Shelley's case* the word "heirs" imports the heirs of a person generally or heirs of the body, and not any particular class of heirs to the exclusion of others. If the limitation over is to a particular heir or class of heirs, to the exclusion of heirs generally, the rule would not apply.

In the case of *Ward v. Stowe,* 17 N. C., 512, *Judge Gaston* says: "An heir is he who succeeds by descent to the inheritance of an ancestor, and in this, its appropriate sense, the word comprehends all heirs and the heirs of heirs, *ad infinitum,* as they are called by law, to the inheritance. This succession is regulated by the canons of descent. According to one of these, the lineal descendants of any person deceased represent their ancestors, or stand in the place in which such ancestor would have stood if living at the time of the descent cast, and it is this taking by a right of representation which is termed a succession *per stirpes,* or by stocks, the branches taking the same share which their stock would have done."

It is thus plain that the "nearest blood relative" of Laura A. Green would not necessarily include all of her heirs within the meaning of the rule in *Shelley's case.* To illustrate: at her death she may leave a brother, and nephews and nieces, children of a deceased brother; in which case the surviving brother would be her "nearest blood relative"; but her nephews and nieces would, also, be equally her heirs to that part of her land which their father, if living, would have inherited. They would not take from their father, however, but directly from Laura A. Green.

Upon the second branch of the case, in which the plaintiff asked that the land be sold and the proceeds invested, his Honor made the following findings:

"First. That the gross annual income to the plaintiff from the lands sought to be sold by her in this action does not exceed $300.

"Second. That by a sale of the said lands and by a proper reinvestment of the funds derived therefrom a gross annual income to the plaintiff of $900 could be obtained.

"Third. That the plaintiff is now 64 years of age.

( 55 ) "Fourth. That, in addition to the income to the plaintiff from the lands sought to be sold in this action, she receives from other lands an annual net income of $300, which, when taken together with the income from the lands sought to be sold herein, is sufficient for her maintenance and support in keeping with her station in life, and that she has no other source of income.

"Fifth. That the interest of those who will take said land in remainder at the death of the plaintiff neither requires the sale of the said lands, or any part thereof, for the purpose of reinvestment as provided by law, nor would their interest be materially enhanced by it, but the only party whose interest either requires or would be naturally enhanced by such sale and reinvestment is the plaintiff.

"Now, therefore, on motion of counsel for the defendants, Faulkner, it is ordered, adjudged, and decreed that this action be and it is hereby dismissed, the court holding that the plaintiff has made no showing which in law or equity justifies the sale of the said lands or any part thereof."

It is unnecessary for us to decide whether the land can be sold against the wishes of a vested remainderman, at the instance of the life tenant, or whether there is any contingent interest involved, which can be represented before the Court. *Hodges v. Lipscomb,* 133 N. C., 201.

The findings of fact made by his Honor, based upon the evidence offered, are binding upon us, and we think under those findings his Honor very properly refused to enter a decree for the sale of the land.

Affirmed.

*Cited: Dawson v. Wood,* 177 N.C. 162 (2c); *Williamson v. Cox,* 218 N.C. 184 (1c); *Williams v. Johnson,* 228 N.C. 735 (1c); *Ratley v. Oliver,* 229 N.C. 121 (1d).

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JOSEPHINE FLOYD AND HUSBAND V. ATLANTIC COAST LINE RAILWAY COMPANY.

(Filed 14 October, 1914.)

**1. Dead Bodies—Mutilation—Damages—Parties—Next of Kin.**

In the order of their priority of inheritance of the personal property of the deceased, the next of kin may maintain an action to recover damages for the negligent mutilation of his dead body after death.

**2. Same—Father and Mother—Interpretation of Statutes.**

The father in his lifetime is now, by statute, entitled to all the personal property of his deceased child, in preference to its mother, upon the intestacy of the child without wife or children (chapter 172, Public Laws 1911, now Pell's Revisal, Supplement, sec. 132); and hence the mother of a deceased minor child, in the lifetime of the father, may not recover for the mutilation of its body after death. *Semble,* the same result would follow from the interpretation of Revisal, sec. 132, subsec. 6, before the amendment of 1911, chapter 172.

**3. Same—Joinder of Parties.**

The mother may not recover damages for the mutilation of the dead body of her minor child, when the father is alive, is made a formal party plaintiff, and disavows all personal interest in the recovery; for the suit is then, in effect, one for the recovery by the mother alone.

CLARK, C. J., dissenting.

APPEAL by plaintiffs from *Daniels, J.,* at August Term, 1914, (56) of SAMPSON.

*No counsel for plaintiffs.*
*H. A. Grady for defendant.*

WALKER, J. This action was brought by the *feme* plaintiff to recover damages for the negligent mutilation of the dead body of her son, Grady O'Berry Floyd, who, it is alleged, had theretofore been killed by one of the defendant's trains. The plaintiff's counsel state very frankly in their brief that the action is one solely in behalf of the *feme* plaintiff, her co-plaintiff and husband being joined with her as a nominal party under the statute, and disavowing any right to recover in his behalf. It is, therefore, to be regarded as her suit, and not as his.

In the start it may be taken as settled by us in *Kyles v. R. R.*, 147 N. C., 394, that the cause of action set out in the complaint is recognized as a legal one, and plaintiff is entitled to recover damages, provided she is the party entitled to sue for them, and establishes her case before the court and jury. These authorities may be added to those cited in the *Kyles case:* "At common law there can be no property in a dead human body, and after burial of such dead body it becomes part and parcel of the ground to which it was committed. Nevertheless, the right to bury a corpse and preserve its remains is a legal right which the courts will recognize and protect. While the body is not property in the usually recognized sense of the word, yet it may be considered as a sort of *quasi* property, to which certain persons may have rights, as they have duties to perform towards it, and the right to dispose of a corpse by decent sepulture includes the right to the possession of the body in the same condition in which death leaves it." 13 Cyc., 267-268. "In more recent times the obdurate common-law rule has been very much relaxed, and changed conditions of society and the necessity for enforcing that protection which is due to the dead have induced courts to reëxamine the grounds upon which the common-law rule reposed, and have led to modifications of its stringency. The old cases in England were decided when matters of burial and the care of the dead were within the jurisdiction of the ecclesiastical courts, and they are not longer absolutely controlling." *Foley v. Phelps,* N. Y. App. Div., 551, 555 (37 N. Y. Supp., 471). And again, in the same case: "The right is to the possession of the
( 57 ) corpse in the same condition it was in when death supervened. It is the right to what remains when the breath leaves the body, and not merely to such a hacked, hewed, and mutilated corpse as some stranger, an offender against the criminal law, may choose to turn over to an afflicted relative." It was said in *Pierce v. Swan Point Cemetery,* 10 R. I., 227: "That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted. Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by some one toward the dead; a duty, and we may also say a right, to protect

from violation; and a duty on the part of others to abstain from violation. It may, therefore, be considered as a sort of *quasi* property, and it would be discreditable to any system of law not to provide a remedy in such a case." So that it may be considered as finally settled that an action will lie in such a case by the proper person, it being an actionable wrong to him. There are very able and learned discussions of the question in *Lawson v. Chase, supra,* by *Judge Mitchell,* and in *Pearce v. Swan Point Cemetery,* 10 R. I., 227 (14 Am. Rep., 227), by *Judge Potter,* in which it is maintained that there is a *quasi* property in a dead body, which belongs to certain of the relatives of the deceased or to those who sustained close relations to him while living, which will be protected by the courts.

The judge below ruled that plaintiff was not the proper party to sue, but that the father of the deceased is the proper party, and the cause of action, if it exists, belongs to him. He therefore gave judgment of nonsuit, and plaintiff appealed.

The recovery is claimed for mental anguish, caused by the mutilation of the body. It is said in the *Kyles case,* at pp. 398 and 399: "The right to the possession of a dead body for the purpose of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife or next of kin, and when the widow was living with her husband at the time of his death, her right to the possession of the husband's body for such purpose is paramount to the next of kin. *Larson v. Chase,* 47 Minn., 307. A widow has a right of action for the unlawful mutilation of the remains of her deceased husband. *Larson v. Chase, supra;* 28 Am. St., 370; *Foley v. Phelps,* 37 N. Y. Supp., 471. While a dead body is not property in the strict sense of the common law, yet the right to bury a corpse and preserve its remains is a legal right which the courts will recognize and protect, and any violation of it will give rise to an action for damages. 8 A. and E. (2 Ed.), 834, and cases cited; 13 Cyc., 280, and cases cited. While the common law does not recognize dead bodies as property, the courts of America and other Christian and civilized countries have held that they are *quasi* ( 58 ) property, and that any mutilation thereof is actionable. *Larson v. Chase, supra.* This is not an action for the negligent killing of the deceased, but an action by the widow (8 A. and E. (2 Ed.), 838, and cases cited) for the willful, unlawful, wanton, and negligent mutilation of this dead body. She was entitled to his remains in the condition found when life became extinct, and for any mutilation incident to the killing the defendant would not be liable, but it is liable in law for any further mutilation thereof after death, if done either willfully, recklessly, wantonly, unlawfully, or negligently. *Larson v. Chase, supra; Foley v. Phelps, supra; R. R. v. Wilson,* 123 Ga., 62; *Lindh v. R. R.,* (Minn.), 7

L. R. S. (N. S.), 1018. Where the rights of one legally entitled to the custody of a dead body are violated by mutilation of the body or otherwise, the party injured may in an action for damages recover for the mental suffering caused by the injury. Perley Mortuary Law, 20; *Reniham v. Wright,* 125 Ind., 536; *Larson v. Chase, supra; Hole v. Bonner,* 82 Texas, 33."

In that case the widow sued for the mutilation and disfigurement of her husband's body. Here the mother sues for the wrong done her in the mutilation of her son's body, the father being still alive. Can she do so? is the question for us to decide.

It is said in 13 Cyc., at p. 281, that "An unauthorized and unlawful mutilation of a corpse before burial gives rise to an action for damages in favor of the surviving husband or wife or next of kin. So the next of kin of a dead person has a cause of action against a carrier for an injury to the body of such deceased person caused by the negligent act of the carrier while transporting it for hire." And in *Burney v. Children's Hospital,* 169 Mass., 57, it appeared that a child died in a Boston hospital and an autopsy was performed upon the body without any authority from the parents. It was held that the father of the child, being its natural guardian, and after its death having a right to the possession of the body for burial, could maintain an action for damages against the hospital authorities for such unauthorized autopsy, and the Court held that "As in the case at bar there was no executor, and there could be none, as the deceased was a minor, the father, as the natural guardian of the child, was entitled to the possession of its body for burial. Being entitled to the possession of the body for the purposes of burial, is not his right against one who unlawfully interferes with it and mutilates it as great as it would be if the body was buried in his lot, and was thence unlawfully removed? That an action may be maintained in the latter case we have already seen; and we are of opinion that it may be in the former." Speaking to the same question in *Bogert v. Indianapolis,* 13 Ind., at p. 138, the Court said: "We lay down the proposition that
( 59 ) the bodies of the dead belong to the surviving relations, in the order of inheritance, as property, and that they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated."

Whatever was formerly the law under Rev. Code, ch. 64, sec. 1, and subsecs. 5 and 6; Revisal, ch. 1, sec. 132, subsecs. 5 and 6 (*Gillespie v. Foy,* 40 N. C., at marg. p. 282 of Anno. Ed.); Public Laws 1911, ch. 172; Pell's Revisal (Supplement), sec. 132, p. 4, the law has now been made clear, as that act provides that "If in the lifetime of the father any of his children shall die intestate without wife or children, then the father shall be entitled to all of the personal property of such deceased

child." This was an amendment to Revisal, sec. 132, subsec. 6. When the father is dead the former law is in force, and if there is no widow or children of the deceased child, the mother and brothers and sisters take equally as distributees; and if there is a widow, she and the mother take equally. *Wells v. Wells,* 156 N. C., 246 (on rehearing, 158 N. C., 330). But the latter question, where there is no father, does not arise in this case, and we only mention it incidentally and in passing. We are concerned, though, with the recent clear and explicit statement of the law in Laws 1911, ch. 172, by which the father is made next of kin or nearest relative of his child, to the exclusion of the mother. He is the natural guardian of his child, as we have seen, and while there may have been formerly some doubt as to his status in the succession to his deceased child's personal estate, there can be none since the passage of that act, which applies to this case, as the death occurred in April, 1912, after the act took effect. There is, therefore, every reason why he should be preferred to the mother. When a contest arises between them as to the child's custody, and there is no personal disqualification of the father, he is given the preference. *Harris v. Harris,* 115 N. C., 587; *Newsome v. Bunch,* 144 N. C., 15; *In re Turner,* 151 N. C., 474. He is primarily liable for the support, maintenance, and education of his child, as between himself and its mother. 29 Cyc., 1606. He is entitled to its services and earnings. *Ibid,* 1623; *Williams v. R. R.,* 121 N. C., 512, where *Justice Clark* (now Chief Justice) says: "For the services the son had rendered, compensation belonged to the father." And in 29 Cyc., at p. 1637 *et seq.,* it is said: "A parent has, as a general rule, a right of action against a person whose wrongful act or omission has caused an injury to the child. As between the parents, this right belongs, primarily, to the father; but, as a general rule, is given to the mother where, by reason of the father's death or otherwise, the right to the custody and services of the child has devolved upon her. The parent's right to recover for an injury to the child rests upon the doctrine of compensation. It is generally stated that the basis of the right of action is the resulting loss of ( 60 ) the services of the child, and according to some authorities this is the sole basis: so that if there be no actual loss of services, there can be no recovery by the parent; but other authorities base the right of action upon the right to services rather than the actual rendition of services. The more reasonable view is that the right of action is based not only upon the right to services, but also upon the duty of care and maintenance, so that if the parent is, by the wrong of another in injuring the child, put to extra expense in fulfilling his duty, he is entitled to recover indemnity from the wrongdoer, without reference to any loss of services resulting from the injury," citing *King v. R. R.,* 126 Ga., 794 (8 L. R. A. (N.S.), 544); *R. R. v. Goodykoontz,* 119 Ind., 11 (12 Am. St., 37); *R. R. v. Wil-*

*loehy,* 15 Ind. App., 312; *Keller v. St. Louis,* 152 Mo., 596 (47 L. R. A., 391), and other cases. This does not include injuries personal to the child. 29 Cyc., 1653; *Durkee v. C. P. R. Co.,* 56 Cal., 388 (38 Am. Rep., 59).

There are many other primary rights and responsibilities of the father with respect to his child which could be enumerated, but those already mentioned will suffice to show the general trend of the law with regard to his priority of claim and interest as against the other. If he is entitled to the preferential right to sue in the cases we have recited, why not where the body of the child, with whose decent burial he is charged, has been mutilated or disfigured after death? "At common law it was the duty of the father to decently inter his child and defray necessary expenses thereof, if he possessed the means." Would it not seem to follow logically and naturally, as the night the day, that if he must attend to its *decent* burial, he is entitled to recover for any indignity to or defacement of the body by which its decent interment is prevented or rendered more difficult? We are unable to perceive why this is not so.

It seems to be settled that the right to sue in a case of this kind must go to the next of kin in the order of their seniority of rank as fixed by the law, the father, in respect to a deceased child, being placed at the head of the class which may take in succession from the child, and there is no double headship, in which he shares this right with the mother. When he dies, the mother goes to the front; and if she be dead, then the next of kin who are in equal degree of kinship are advanced to this position. It is said in Iredell on Executors, pp. 559 and 560: "The next of kin referred to by the statute are to be ascertained by the same rules of consanguinity as those which determine who are entitled to letters of administration. These rules have been already considered, but it may be convenient to repeat in this place some of their results. When a child dies intestate, without wife or child, leaving a father, the latter is
( 61 ) entitled, as the next of kin in the first degree, to the whole of the personal estate of the intestate, exclusive of all others. Formerly, if a child had died intestate, without a wife, child, or father, his mother was entitled, as the next of kin in the first degree, to his whole personal estate; but now, by our statute, every brother and sister, and the representatives of them, shall have an equal share with her. The principle of this provision is, that otherwise the mother might marry and transfer all to another husband." It may be well to note that the recent legislation of the Congress, known as the Federal Employers' Liability Act, places the father in the forefront of those allowed to recover for the death of his son caused by negligence of the employer while the son was engaged in interstate commerce, where there is no surviving husband, widow, or children of the deceased child, as in this case. See Thornton's Emp. L. and S. Acts, sec. 79.

We have been referred by learned counsel of the plaintiff to *Davis v. R. R.*, 136 N. C., 115, as establishing the principle in this State that the father and mother are jointly the beneficiaries, under the statute of distributions already cited, of any recovery for the death of the child caused by negligence or a wrongful act; but this is not so, as an examination of that case will show. The *Chief Justice* there expressly says: "We refrain from passing upon the point, because it is not raised in this record, but it may become pertinent in another trial. Even that question is specially left open for future decision, when presented. But that is not the point here, and even if that question had been decided, as counsel supposed it had been, it would not necessarily alter our conclusion, and certainly not since the law has been changed by Laws 1911, ch. 172. Nor does Laws 1913, ch. 13, giving to a married woman her earnings, under a contract for her personal services, and any damages for personal injury to her or other tort sustained by her, have any bearing upon the case. The law of 1911 is explicit beyond the possibility of cavil, that the father shall be considered as next of kin to his child. As the male plaintiff has expressly entered a disclaimer in this case of any damages for the mutilation, and the case therefore rests solely upon the right of the *feme* plaintiff, the judge's ruling was obviously correct.

A cursory reading of *Price v. Electric Co.*, 160 N. C., 450, will show that it has no application to this case. There the husband and wife were conceded to have separate and distinct causes of action, and the husband having consented that his damages, for loss of her services, might be included in the judgment in favor of his wife, was estopped thereby to set up thereafter any claim to his said damages. There could not be two recoveries for the loss of his wife's services—one by her, with his consent, and then one by him. Having given up his cause of action to her, he could not sue upon it himself. Here there is no prosecution of ( 62 ) his cause of action, but solely a claim of the wife for damages supposed to be due directly to her.

Affirmed.

CLARK, C. J., dissenting: There is, strictly speaking, no property in a dead body, though its possession can be recovered. This is not an action to recover the possession of the body, but an action of tort for the mental anguish caused the mother by the wrongful mutilation of the body of her son.

The statute of distributions has no application. In *Kyles v. R. R.*, 147 N. C., 394, it was held that the widow could recover punitive damages for mutilation of the dead body of her husband. This proves that an action for the tort is not required to be brought by the next of kin, for the widow is not the next of kin of her husband. This action is a tort to be sued for by the person who most naturally would have

suffered mental anguish by reason of the wrongful mutilation and indignity inflicted on the body of the dead son. He was 18 years old and the support of his mother. Her husband is an invalid, but was joined as a plaintiff as in *Price v. Electric Co.*, 160 N. C., 450.

In that case, where the husband was joined in an action with his wife to recover damages for a personal injury to them both arising from the same negligent act, and his counsel withdrew all claims for damages for him, and the action was successfully prosecuted to recover damages for the injuries inflicted on the wife, including personal and physical anguish and loss of time, the Court held that she could recover. This case is *exactly like that,* and the judgment in her favor could be recovered, even as the law formerly stood.

But in fact the position of the wife is rendered much stronger by the act which was immediately passed as soon as the next General Assembly met, chapter 13, Laws 1913, which provides, among other things: "Any damages for personal injuries or *other tort* can be recovered by her suing alone."

This is a tort pure and simple, and the wife is entitled to recover for it just as she has recovered in actions for failure to deliver a telegram whereby she as well as her husband has suffered mental anguish. *Gerock v. Tel. Co.*, 147 N. C., 7. This action is for mental anguish and damages suffered by her and not by the estate of her son, who was 18 years of age. If an action had been brought for his wrongful death, it should have been brought by the administrator.

The court granted a nonsuit upon the ground that the wife was not the "next of kin," but that the husband was. If so, he was also a party. The statement is incorrect as a matter of fact. It is true that chapter 172, Laws 1911, does amend the statute of distributions, by providing
( 63 ) that the father shall receive "all the personal property of any of his children who shall die intestate, without wife or children," thereby giving him preference over the wife and to her total exclusion in his favor. Whatever may be said as to the justice or injustice of such provision, it does not enact an untrue statement of fact by saying that the father is nearer of kin to the child than the wife. That statute has no application to an action of this kind, which is a tort for the anguish suffered by the mother by reason of the mutilation of the body of the son whom she brought into the world and nourished. Great Nature tells us that her suffering is something apart from and usually greater than that of her husband. It is for this wrong that she has sued, and not for a share in his estate. Indeed, he had none, being a boy 18 years old, the sole support for her and her invalid husband, and of course the pride of her heart.

The plaintiff is entitled to recover as a matter of justice and of right under the legislation enacted for the benefit of married women in such cases under chapter 13, Laws 1913.

*Cited: Shipp v. Stage Lines,* 192 N.C. 479 (2c); *Stephenson v. Duke University,* 202 N.C. 625, 627 (2c); *Bonaparte v. Funeral Home,* 206 N.C. 656 (1c); *Morrow v. Cline,* 211 N.C. 256 (1c); *Gurganious v. Simpson,* 213 N.C. 614 (1c); *Parker v. Belotta,* 215 N.C. 88 (2p); *White v. Comrs. of Johnston,* 217 N.C. 332 (2p); *Toler v. Savage,* 226 N.C. 211 (2p).

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CAPE LOOKOUT COMPANY v. THOMAS GOLD ET ALS.

(Filed 17 October, 1914.)

**1. Torrens Law—Remedial Statutes—Interpretation.**

Chapter 90, Laws 1913, known as the "Torrens Law," is not in derogation of common right, but is of a remedial character, and should be liberally construed according to its intent.

**2. Same—Summons—Notice—Publication.**

Where the summons in proceedings to register lands under chapter 90, Laws 1913, known as the "Torrens Law," has been issued and served under the provisions of section 6 of the act, it is not requisite to the validity of the proceedings that the publication of notice of filing should have been made on exactly the day the summons was issued, if the publication has been made in the designated paper once a week for four successive weeks, as directed by section 7 thereof. It appears in this case that the publication in a weekly paper was made in its first issue after the clerk of the court received the summons, and that all other requirements of the statute had been complied with.

**3. Torrens Law—Notice—Publication—Waiver.**

In proceedings under the "Torrens Law" (ch. 90, Laws 1913, secs. 6 and 7) to register a title to lands, a party claiming an interest in the lands waives his rights to object on the ground of the irregularity in the publication of notice by appearing and answering the petition.

CLARK, C. J., discusses the "Torrens" and other systems of land registration.

APPEAL by defendant from *Peebles, J.,* at chambers in CRAVEN, ( 64 ) 15 September, 1914.

*J. F. Duncan for plaintiff.*
*George F. Ward, T. D. Warren, and A. D. Ward for defendants.*

CLARK, C. J. This is a proceeding under chapter 90, Laws 1913, "To provide for the assurance and registration of land titles," commonly

known as the "Torrens Law," and is the first time that this statute has been presented in this Court.

The petition in this case was filed before the clerk of Carteret Superior Court, 25 June, 1914, and on 10 July, 1914, summons dated 9 July was issued in accordance with section 6, chapter 90, Laws 1913. Pursuant to section 7 of said act, on 10 July, 1914, notice of filing of said petition was delivered by the clerk to the publisher of a newspaper having general circulation in the county of Carteret, where the land lay. The publication was made in the next issue of said paper, on 17 July, 1914, and consecutively each succeeding week for four weeks.

On the return day of the summons other defendants came in on their own motion, and counsel entered a general appearance for all, and an order was made by the clerk allowing said defendants till 25 September to answer or demur to the petition. After said general appearance duly entered, the defendants, through their attorneys, excepted to the sufficiency of the publication because that the first publication appeared in the paper on 17 July, whereas the summons was issued on 10 July. This publication was made in the first issue of the paper that appeared after the notice was delivered by the clerk to the publishers.

The summons was duly served and the clerk adjudged that the publication of the notice was complete. On appeal to the judge, he found that though the issues of the paper were dated 10 July and 17 July, in fact they were printed according to custom on the day before their dates, *i. e.*, on 9 July and 16 July, and approved the order of the clerk. In these rulings there was no error.

Laws 1913, ch. 90, sec. 6, provides that the summons shall be issued as in other cases of special proceedings, "except that the return shall be at least sixty days from the date of the summons and shall be served in the same manner at least ten days before the return thereof." It is not controverted that this was done. Indeed, the summons being dated on 9 July and returnable 9 September, gave sixty-two days.

Section 7 of said act provides that, "In addition to the summons issued, prescribed in the foregoing section, the clerk of the court shall at the time of issuing such summons publish a notice of the filing thereof (prescribing what the notice shall contain) in some secular newspaper published in the county wherein the land is situate . . . once a week
( 65 ) for four issues of such paper." It is not controverted that this section was complied with in all respects, except it is contended that the notice was not published "at the time of issuing said summons." It was impossible to publish the notice for four weeks in the newspaper "at the time of issuing the summons." It would seem a reasonable construction of this statute that the notice should be published for four weeks, in the manner prescribed, between the issuing of the summons and

the return day thereof. But, however this might be, it was proper that the notice should be put in the paper at an early date after issuing the summons, and both the clerk and the judge find that as a matter of fact the notice appeared in the very first issue of the paper, towit, in its issue of 17 July, which was printed off 16 July and was the first issue printed off after the summons was issued on 10 July.

We presume that the parties have brought this plea up merely out of abundant caution, as this statute is now before the Court for the first time and there have been no decisions settling its construction or the practice under it. It seems, however, to be a very plain statute, and was evidently drawn with great care and doubtless after consideration of the numerous statutes of this kind in force in the other States and carefully adapting what was thus culled out to our system of law and procedure and to our local conditions.

Besides, as to the defendants, the entry of the general appearance for them waived any defect as to the publication of the notice, if there had been any.

The principle of the "Torrens System" is conveyance by registration and certificate instead of by deed, and assimilates the transfer of land to the transfer of stocks in corporations. Like the Drainage Act, which has been before us, this Torrens system was adopted at the wish of the landowners of the State, as evidenced by the proceedings of the Farmers' Union, the Chamber of Commerce of many cities, and other organizations.

Three systems of transferring real estate are in use in the civilized world: (1) Transfer without recording or registering; (2) the ministerial system of recording deeds; and (3) the judicial system of registering titles. Niblack on the Torrens System, 2; 3 Devlin Deeds (3 Ed.), secs. 1438-1473.

The first system is used in most of the counties of England, where land is transferred merely by the production and delivery of all the title deeds, including one from the seller to the purchaser. This is a substitute for the original common-law system of "livery of seizin." Under the law of primogeniture the eldest son inherits the real estate and the title papers go with the land. Until about fifty years ago land was scarcely considered a commercial commodity in England, and the rarity of its transfer made the above system less inconvenient than it ( 66 ) would otherwise have been. Under that system the owner of land could borrow money on the security of his land by merely depositing his title papers with the lender, who thus acquired an equitable lien on the land. This was popular with both borrowers and lenders, because it was cheap, safe, and secret.

The second system (of recording deeds) was the only one in use in this country before the adoption of the Torrens system, and prevails also in

most of the countries of Europe, outside of England, and in South America and in Middlesex and York in England. In most of these countries, however, the conveyances are not recorded in full, but merely a memorial, in a prescribed form, is copied on the records.

The third or judicial system prevails to some extent in Russia, Turkey, Norway, Mexico, and some other countries. Its adoption was discussed in England and a report was made in its favor by a commission appointed by Parliament in 1830. It, however, was first adopted in South Australia at the instance of Sir Robert Torrens in 1857, and in the first two years 1,000 titles were registered under it, though the system was, as usual, optional. A similar act was passed in Queensland in 1861, in New South Wales, Victoria, and Tasmania in 1862, in New Zealand in 1870, in West Australia in 1874, and in Fiji in 1876. Though there is some diversity in these statutes, the system has thus prevailed in Australia, and indeed throughout Australasia, for something like half a century.

The Torrens law was adopted in the several provinces of Canada soon after its success in Australia had been demonstrated. A bill proposing a modified system was presented in the English Parliament by Lord Cairns, then solicitor general, in 1859. In 1862 a somewhat more comprehensive bill was passed at the instance of Lord Chancellor Westbury. This was amended at the instance of Lord Chancellor Selborne in 1873 and again passed in 1875. The act, however, was not made compulsory till 1897, and then only as to certain localities, including the whole of the county and the city of London.

In this country the first States to adopt it were Illinois, California, Massachusetts, Oregon, Minnesota, and Colorado. In some of these constitutional defects were at first found by those courts whose judges were not favorable to the innovation. But the act was corrected in those States to remove the objections found, or succeeding judges held the act to be constitutional. In many other States the system has since been adopted, including our own.

Like the drainage act, however, its adoption by landowners is with us optional and not compulsory. Its features need not be discussed, as they can be found in the act itself. The defendants contend that
( 67 ) the act is "in derogation of common right" and should be strictly construed. It is not in derogation of common right, but is a remedial statute and to be liberally construed, according to its intent, "so as to advance the remedy and repress the evil." This appeal calls for the construction only of the provision in section 7 above set out, as to which the judgment of the court below is

Affirmed.

*Cited: Mills v. Hansel,* 168 N.C. 653 (3c); *Dillon v. Broeker,* 178 N.C. 67 (1c); *Perry v. Morgan,* 219 N.C. 379 (1c); *Davis v. Morgan,* 228 N.C. 82 (3d).

MAGGIE HARRELL DUDLEY ET ALS. v. NANNIE HARRELL TYSON ET ALS.

(Filed 14 October, 1914.)

**1. Dower—Allotment Before Division—Heirs at Law.**

The widow of a deceased owner of lands held by him in common with others may have her dower interest therein set apart to her before division of the lands among the heirs at law.

**2. Same Partition—Actions—Interpretation of Statutes.**

The widow of a deceased owner of an undivided one-half interest in lands held in common with his sister had her dower interest of one-sixth of the lands laid off to her; and the heirs at law of the deceased having purchased the interest of the other tenant in common, the widow and some of the heirs at law bring suit against the other parties in interest, for partition of the lands subject to the widow's right of dower to be now allotted therein: *Held,* the action in this form can be maintained. Revisal, sec. 2517.

**3. Process—Parties—Minors—Guardian ad Litem—Irregularities—Process Cured.**

The appointment of a guardian *ad litem* before service of summons upon the infants is an irregularity which may be cured by the service of summons upon the infants thereafter, and the filing of the answer of the guardian, etc.

**4. Dower Proceedings—Actions—Collateral Attack—Partition.**

An allotment to the widow in dower proceedings cannot be attacked collaterally in proceedings for partition of the lands of the deceased ancestor by his heirs at law.

APPEAL by defendants from *Daniels, J.,* at February Term, 1914, of GREENE.

This is a proceeding for partition of land.

In June, 1903, James Harrell, husband of the plaintiff, Maggie Harrell, died intestate, leaving him surviving a widow and four infant children, and seized in fee simple and possessed of an undivided one-half interest in the tract of land described in the petition, the other one-half interest being owned by his sister. After his death, his cotenant, Susan Sylivant, his sister, conveyed her interest in said land to ( 68 ) the infant heirs at law of her deceased brother, reserving a life estate to herself. On 12 February, 1908, some time after the conveyance to said infant heirs by their aunt of her interest in said lands, the plain-

tiff, then the widow of James Harrell, brought a proceeding in the Superior Court of Greene County for the purpose of having her dower in the lands of her deceased husband laid off and allotted to her, which was prosecuted to a finality and in which her dower was laid off and allotted to her, and she put in possession thereof. The record shows that the report of the jury allotting her dower was filed in the Superior Court on 18 March, 1908, and that immediately thereupon the widow, plaintiff in this cause, went into possession and has remained in possession since that time. No exceptions or objections were ever filed to the report of the jury.

When the dower proceeding was instituted, the infant heirs at law of James Harrell, one of whom is the *feme* defendant, owned one-half of said lands as heirs at law of James Harrell, and the other half as grantees of their aunt; in said proceeding they were represented by their guardian *ad litem,* J. O. Sugg; that personal service of summons was made upon said infant defendants and said guardian *ad litem,* who filed answer contained in the record, and all the parties were before the court when the court heard the proceeding and entered the order for a jury and the writ of dower; that the petitioner asked that her dower be allotted in one-third of one-half; that is, one-sixth of the whole land.

On 29 August, 1913, nearly five years after said dower proceeding was concluded and report of jury filed, the petitioner, for herself individually and as general guardian of the infant heirs at law of her former husband, James Harrell, brought this partition proceeding against the *feme* defendant, one of said heirs at law, recently become 21 years of age, asking that said land be divided into four equal shares by proper metes and bounds, subject to her dower as theretofore laid off and allotted, and that each of said heirs at law be allotted one share in severalty. In this partition proceeding the defendant undertakes to attack said dower proceeding, alleging that same is null and void, upon the following grounds:

(1) That dower was allotted before the land was divided, the petitioner being entitled to dower in an undivided one-half of the land.

(2) That the children of James Harrell were not made parties as grantees of Susan Sylivant.

(3) That a guardian *ad litem* for the infant defendants was appointed before service of summons on them.

(4) That the answer of the guardian is insufficient.

( 69 ) His Honor denied the motion to set aside the dower and adjudged partition subject to dower, and the defendant excepted and appealed.

*J. Paul Frizzelle for plaintiff.*

*George M. Lindsay for defendant.*

ALLEN, J. James Harrell was at the time of his death the owner in fee of an undivided one-half of the land described in the petition, and his widow was therefore entitled to have set apart to her as dower one-sixth in value of the whole land.

In the petition in the proceeding for dower the title is truly stated, and the petitioner only asks for the allotment of one-third of one-half, or one-sixth in value of the whole, and there is nothing in the record tending to prove that she gained any advantage, or that more was allotted to her than she was entitled to.

We would not, therefore, be justified in setting aside the proceeding, to which all persons in interest were made parties, and which seems to have been conducted to a just conclusion, upon slight grounds, when, so far as we can see, the same judgment would be rendered in another proceeding, and we are of opinion the objections raised are not valid.

It is not necessary to have a division of the land before the allotment of dower.

The doctrine is correctly stated in 14 Cyc., 902: "A wife is not entitled at common law to dower in an estate held by her husband as a joint tenant; but she is entitled to dower in estates held by him in common, and in most States the same is now true of estates in joint tenancy under statutes abolishing the right of survivorship and providing that the share of a joint tenant shall go to his heirs, or changing estates in joint tenancy to estates in common. If partition of an estate in common is made during the lifetime of the husband, his wife's dower is limited to the portion set apart to him. But partition need not precede the setting aside of the widow's dower. It may first be set aside and partition be afterward made."

The Revisal, sec. 2517, permitting the allotment of dower in a proceeding for partition, and the case of *Seaman v. Seaman,* 129 N. C., 293, holding that the widow is entitled to have her dower allotted before a sale for partition, are in recognition of this principle.

The second objection is not sustained by the record. The children of James Harrell inherited from their father an undivided one-half of the land, subject to the dower right of the widow, and they acquired the other half by the deed of their aunt, a sister of James Harrell, and a co-tenant with him.

This was the condition of the title when the petition for dower was filed, and it was alleged in the petition that the widow was entitled as dower to one-third of one-half of the land, and that the ( 70 ) children of James Harrell were the owners of the whole, subject to the dower, which was admitted by the guardian *ad litem,* and which could not be true if they were not parties as grantees of their aunt and as heirs of their father.

The appointment of the guardian *ad litem* before service upon the infants was irregular, but it does not render the proceeding void, and the irregularity was cured by the service of the summons on the infants thereafter and the filing of an answer by the guardian *ad litem,* as was held in *Carraway v. Lassiter,* 139 N. C., 146.

The answer of the guardian *ad litem* was sufficient, and counsel for defendant very properly abandoned the objection to it by failing to discuss it in the brief.

Upon a consideration of the whole record we find no error.

We have treated this as a motion in the dower proceeding, although it is not clear that such motion was made. If not, the dower proceeding could not be attacked collaterally in the petition for partition. *Tyson v. Belcher,* 102 N. C., 112; *Coffin v. Cook,* 106 N. C., 376.

Affirmed.

*Cited: Long v. Rockingham,* 187 N.C. 209 (3c); *Welch v. Welch,* 194 N.C. 637 (3c); *High v. Pearce,* 220 N.C. 274 (4j).

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J. H. HADDOCK AND WIFE, EMILY, ET ALS. v. NONIE STOCKS AND HUSBAND, ET ALS.

(Filed 14 October, 1914.)

**1. Appeal and Error—Assignments of Error—Requisites.**

Assignments of error must point out concisely the substance of the rulings on the trial excepted to, or they will be disregarded on appeal.

**2. Tenants in Common—Clerks of Court—Adverse Interests—Nonsuit—Certiorari.**

Every proper party to proceedings to partition lands among tenants in common have an interest in its final division among them; and where issue is joined it is the duty of the clerk of the Superior Court to transfer the cause to the trial docket of the court. Hence, when the proceedings have become adversary, putting at issue the rights of one of the parties defendant, the action of the clerk in permitting the plaintiffs to take a nonsuit is a nullity (Revisal, sec. 2485), and upon proper application to the Superior Court the writ of *certiorari* will issue.

APPEAL by plaintiffs from *Daniels, J.,* at January Term, 1914, of PITT.

Special proceeding for partition of the lands of Martha Louisa Cox, tried in the Superior Court upon these issues.

( 71 ) 1. Was Henry Haddock, the father of the defendant Nonie Stocks, born out of lawful wedlock? Answer: No.

2. If so, did Martha Louisa Cox, the testatrix, in her lifetime, acknowledge and recognize Henry Haddock as the son of William Haddock, and

did she recognize and treat him as her kinsman, and acknowledge the relationship as his aunt and he her nephew? Answer: .....

His Honor rendered judgment "that Henry Haddock was the lawful child of William Haddock, mentioned in the last will and testament of Martha Louisa Cox, and that Nonie Stocks, the only child of Henry Haddock, is the owner of and entitled to a one-ninth undivided interest in and to the lands set out and described in item 2 of said will as the child of Henry Haddock," and further adjudging that the lands be divided between the nine parties plaintiff and defendant as tenants in common, giving to each one-ninth in severalty. The decree further appoints commissioners to make division and provides for an accounting of the rents and profits of the lands.

The plaintiffs petitioners excepted and appealed.

*S. J. Everett, Harding & Pierce for plaintiffs.*

*W. F. Evans, L. G. Cooper, Harry Skinner for defendants.*

BROWN, J. The defendants move to dismiss the appeal because the appellants have failed to comply with the well settled rules of this Court governing the assignments of error.

We think the objection to the assignments of error, except to the first four, well taken. The remaining assignments do not appear to be even an attempted compliance with the rules of this Court. They do not undertake to point out in any manner the substance of the ruling assigned as error. As a sample, we quote No. 22: "Plaintiffs rely on twenty-seventh exception, as it is contrary to law." We have said repeatedly that assignments of error not stated according to the rules of this Court will be disregarded. *Steeley v. Lumber Co.*, 165 N. C., 27.

The work of this Court is so exacting that we cannot grope through a voluminous record to ascertain what error is complained of. In all appellate courts the bills of exceptions or assignments of error are required to point out concisely the substance of the ruling excepted to. Failing to do so, they will be disregarded. *Wheeler v. Cole*, 164 N. C., 380.

Nevertheless, in this case we have carefully gone through the entire record, and can find no error which necessitates another trial.

These nine tenants in common, arrayed as plaintiffs and defendants, are admitted in the original pleadings to be tenants in common of the lands devised by Martha L. Cox, as follows: "I give and devise and bequeath unto my brother, J. J. Haddock, and wife, Emila ( 72 ) Augusta Haddock, and the children of my two deceased brothers, William Haddock and Henry Haddock, share and share alike, and their respective heirs forever, my tract of land in Chicod Township, known as

part of the Frederick Haddock land, adjoining the lands of W. G. Tucker, Bryant Tripp, and others, containing 600 acres."

The will further provides that the devisees should take *per capita* and not *per stirpes.*

The only dispute was as to the share to be allotted to Nonie Stocks, the daughter of Henry Haddock, the son of the William Haddock mentioned in the will. It was claimed that he was illegitimate. That question was determined in favor of the legitimacy of Nonie Stock's father and settled her title to one-ninth of the lands. We have examined the rulings and charge of the court in submitting that issue, and find no reversible error in them. The question was one largely of fact, and appears to have been clearly put to the jury.

The first four assignments relate to an attempted nonsuit before the clerk, which the plaintiffs claim put an end to this action before it reached the Superior Court.

We are of opinion that in partition proceedings a nonsuit cannot be taken and the proceeding dismissed except by consent of all parties before the court. When the issue was joined as to the right of Nonie Stocks to a share as tenant in common under the statute, it was the duty of the clerk to transfer the case to the civil docket for trial by jury. He is not invested with any judicial discretion in the matter. The statute is mandatory, and the act of the clerk in dismissing the proceedings was a nullity. The Superior Court properly ordered a *certiorari* to bring the record up to term for trial. *Brittain v. Mull,* 91 N. C., 498.

This petition for partition was filed 30 January, 1911. It alleges that all the parties plaintiff and defendant, including Nonie Stocks, are tenants in common of these lands, and asks for a partition in severalty.

The defendants Nonie Stocks and others answered, admitting the tenancy in common, and also praying for a division of the lands. On 3 February, 1911, the clerk entered a decree appointing commissioners to divide the lands. The commissioners made the division and allotted the several parts to Nonie Stocks and the other plaintiffs and defendants as tenants in common, according to the decree.

The report was filed 13 April, 1911, with the clerk, and Jesse Haddock filed exceptions to the report. On 4 April, 1911, the plaintiffs filed an amended complaint, without any permission of court, challenging for first time Nonie Stocks' right to any share in the lands—a fact already admitted in the original pleadings—and asks a confirmation of the divi-
( 73 ) sion already made, leaving Nonie Stocks out. She had already filed exceptions to the report of division as to the tract assigned to her.

She and her husband filed an answer to the amended petition, denying its allegation, and claiming her share as the daughter of Henry Haddock, the alleged illegitimate son of William Haddock.

At this stage of the proceedings, on 6 September, 1911, the clerk adjudged "that the plaintiffs in this special proceeding be nonsuited, and the petition filed herein is dismissed without prejudice, with the cost taxed against the plaintiffs," and refused to docket the case on civil-issue docket for trial of the issue.

By *certiorari* the defendants brought the record before the Superior Court in term, where the case was tried upon the issues herein set out and raised by the amended petition and the answer thereto.

In a learned opinion in *McKesson v. Mendenhall,* 64 N. C., 502, *Justice Rodman* considers the subject of nonsuit very fully, and lays down the rule that a plaintiff may elect to be nonsuited in every case where no judgment other than for costs can be recovered against him by the defendant; and when such judgment, other than for costs, may be recovered, he cannot, and says: "The Court will not allow a plaintiff to become nonsuit to the prejudice of the defendant."

It must be borne in mind that this attempted nonsuit was taken after decree for partition had been entered, and after the partition had been made and report filed.

In Daniel Chancery Practice it is said: "After a decree, however, the court will not suffer a plaintiff to dismiss his own bill, unless upon consent, for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it."

*Chief Justice Smith* says: "He who comes into a court of equity seeking its assistance must himself do equity, and the plaintiff cannot be allowed, after taking the advantage derived from his action, by putting an end to it, to deprive the defendants of the advantages to which they are entitled." *Purnell v. Vaughan,* 80 N. C., 48.

In *Wate v. Crawford,* 11 Paige Ch., 470, *Chancellor Walworth* says: "Before any decree or decretal order has been made in a suit in chancery by which a defendant has acquired rights, the complainant is at liberty to dismiss his bill upon payment of costs. But after a decree has been made the bill cannot be dismissed without destroying these rights."

In *Bynum v. Powe,* 97 N. C., 374, it is held that "Under the present method of civil procedure there is but one form of action, and the plaintiff, as indicated above, may, no matter what may be the nature of the cause of action, voluntarily submit to a judgment of nonsuit, except that in cases purely equitable in their nature he cannot do so after the rights of the defendant in the cause of the action have attached ( 74 ) that he has the right to have settled and concluded in the action. This is reasonable, and rests upon grounds of manifest justice."

So in *Boyle v. Stallings,* 140 N. C., 524, this Court held that plaintiff was not entitled to dismiss his action after an account had been taken and exceptions filed. In that case no counterclaim was set up by defend-

ant. The plaintiff asked for an accounting and defendant submitted to an account, which was taken. This Court held that was substantially a counterclaim, although not one in express terms. To same effect, see *Egg v. Deavey,* 11 Beav., 221; *Hall v. McPherson,* 3 Bland (Md.); 6 Enc. Pl. and Pr.; *Wyatt v. Sweet,* 48 Mich., 539.

In *Connor v. Drake,* 1 Ohio St., 166, it is said: "After a defendant has been put to trouble and expense in making his defense, if, in the progress of the case, rights have been manifested that he is entitled to claim and which are valuable to him, it would be unjust to deprive him of them merely because the plaintiff might come to the conclusion that it would be for his interest to dismiss his bill. Such a mode of proceeding would be trifling with the court as well as the rights of the defendant."

In *R. R. v. R. R.,* 148 N. C., 59, it is held that in a condemnation proceeding the plaintiff may not, as a matter of right, submit to a judgment of nonsuit after obtaining an order giving it possession and ejecting defendant.

It seems to be uncontroverted that where the defendant pleads a counterclaim, or in reconvention, or in actions of an equitable nature has acquired some right in the action which he is entitled to have determined, the plaintiff may not submit to a nonsuit. *Gatewood v. Leak,* 99 N. C., 364; 14 Cyc., 409.

At one time partition of land could only be effected by suit and decree in equity. The several State courts possessing general equity or chancery powers have jurisdiction of suits for partition, unless their authority has been abrogated or restricted by statute. 30 Cyc., 170.

In this State, prior to 1868, partition between tenants in common was a matter to be determined by a court of equity under the act of Assembly. Revised Code, ch. 82. They are entitled to partition as a matter of right, and not as a matter of discretion. *Holmes v. Holmes,* 55 N. C., 334. Since 1868 partition is accomplished by a special proceeding, and is regulated by statute. Revisal, sec. 2485.

Where the plea of sole seizin is set up, the effect is practically to convert it into an action in nature of ejectment. Where it is not set up, the parties are taken to be tenants in common, and the only inquiry is as to the interest owned. *Wright v. McCormick,* 69 N. C., 14; *Graves v. Barrett,* 126 N. C., 270.

( 75 ) Our statute now provides that the Superior Courts on petition of one or more persons claiming real estate as tenants in common *shall* appoint commissioners to make division.

It is not a matter of choice with a tenant in common whether he will have the common lands divided, but it is compulsory. If he commences such a proceeding, the other tenants in common have equal rights in it, and it follows necessarily that if he changes his mind, or the division

made does not please him, he cannot block the partition by submitting to a nonsuit and dismissing the proceeding, as was attempted to be done in this case, after the division had been made and the report filed.

Any tenant in common, party to the proceeding, without regard to which side of the case he may be arrayed on, whether as plaintiff or as defendant, has a right to prosecute the proceeding to final judgment. If this were not so, the statute would fail to accomplish its purpose.

No error.

*Cited: Gill v. Porter,* 174 N.C. 570 (2p); *Bank v. Leverette,* 187 N.C. 746 (2c); *Clark v. Homes,* 189 N.C. 712 (2c); *Barber v. Barber,* 195 N.C. 712 (2p); *Talley v. Murchison,* 212 N.C. 206 (2p); *Trust Co. v. Watkins,* 215 N.C. 294 (2p); *Rostan v. Huggins,* 216 N.C. 389 (2p); *Hyman v. Edwards,* 217 N.C. 344 (2p); *Mineral Co. v. Young,* 220 N.C. 290 (2p); *Bailey v. Hayman,* 222 N.C. 60 (2c).

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## OVEY J. BETTS AND RAYMOND BETTS v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 21 October, 1914.)

**1. Telegraphs—Mental Anguish—Sendee—Consolation and Assistance.**

Where a person has telegraphed to his brother of the death of another brother, the time of burial, etc., and the sendee of the message is prevented from being at the funeral through the negligence of the telegraph company, the sender may recover for the mental anguish occasioned by the absence of the sendee at the funeral, and not hearing from him; and evidence is competent which tends to show that the sendee was an elder brother, whose advice and assistance was especially needed in making the necessary preparation for the burial of the deceased.

**2. Same—Death Message—Notice of Importance.**

A telegram addressed to Ovey J. Betts, and reading, "Clifton died suddenly this morning; funeral tomorrow afternoon. Have written. Signed, Raymond," is sufficient upon its face to give notice that mental anguish will likely result if it is not delivered, and to sustain a recovery by both the sender and sendee of the message, brothers of the deceased.

**3. Telegraphs—Death Message—Notice of Importance—"Have Written."**

A telegram announcing a death and time of burial, giving, upon its face, implied notice to a telegraph company that mental anguish will likely result if the sendee is unable, through its negligent failure to deliver the message, to arrive in time for the burial, the added words to the message, "have written," are to be regarded as merely incidental to the announcement of the death and burial, and not as indicating, necessarily, that the sendee is not expected to come, and afford the company, there-

fore, no complete defense that the message itself implied that the sendee would not come.

**4. Telegraphs—Death Message—Failure to Deliver—Trials—Evidence—Prima Facie Case—Burden of Proof.**

The agent of a telegraph company at its receiving office accepted a telegram for transmission and delivery, requiring the use of telephone connection at the delivering end of the line, and there was evidence tending to show that the operator accepted the message with the promise to "put it through"; that like messages were customarily telephoned to sendees at the same address; and that no service message was sent informing the sender that an additional charge for delivery would be required. *Held*, the failure of the telegraph company to deliver the message raised a *prima facie* case of its negligence, and the burden rests upon it to prove it had not been neglectful of its duty; and the defense of the company that it was not required to transmit the message to the sendee over the lines of the telephone company is unavailing under the circumstances of this case.

**5. Telegraphs—Death Message—Postponement of Funeral—Trials—Evidence—Damages—Questions for Jury.**

Where damages for mental anguish are sought in an action against a telegraph company for its negligent failure to deliver a message announcing a death and the time of the funeral, and the defense is set up that the message was filed with it too late for the sendee to arrive in time for the funeral; and there is evidence tending to show that had the message been delivered with reasonable promptness, the funeral would have been postponed and that the sendee would have arrived in time, the question of whether the failure of the company to perform its duty caused the damages alleged is for the determination of the jury.

**6. Courts—Arguments of Counsel—Per Curiam Opinions—Statement of Fact—Jury—Appeal and Error.**

It is not objectionable for counsel in arguing propositions of law to the court, in the presence of the jury, to cite a *per curiam* opinion by the Supreme Court, and state the facts in that case, in his endeavor to show the similarity between them and the case at bar, and to contend, for that reason, that the *per curiam* opinion is authority for his position.

**7. Telegraphs—Negligence—Service of Other Company—Trials—Evidence.**

Where a telegraph company is sued for damages alleged to have been caused by its negligent failure to deliver a telegram, it is competent for the plaintiff to show, upon the question of defendant's negligence, that another telegraph company, upon the same occasion, gave very prompt and efficient service to the same parties under substantially similar conditions.

( 76 ) APPEAL by defendant from *Allen, J.*, at April Term, 1914, of WAKE.

These actions were brought, one by Ovey J. Betts and the other by Raymond Betts, against the defendant, to recover damages for the negligent failure to deliver a telegram in the following words:

*To* OVEY J. BETTS, *Technical School, Rogersville, Tenn.*

Clifton died suddenly this morning. Funeral tomorrow afternoon. Have written. (Signed) RAYMOND.

The message was delivered to defendant's operator at Raleigh, ( 77 ) N. C., on Sunday, 23 June, 1912, at 4:15 p.m., and was transmitted at 4:19 p. m. The operator promised to "get it through." It was received at Rogersville, but was never delivered. The addressee accidentally read in a newspaper, about 12 o'clock m. on the following Tuesday (25 June, 1912), an article which caused him to think that his brother, Clifton Betts, had been killed by his younger brother. He then wired by the Postal Telegraph Company, asking for information at once. He was answered by the same line, immediately: "Clifton died suddenly. Come at once," to which he replied by same line: "Will come home at once." The entire time consumed in the transmission and delivery of these three messages was about two hours, and Ovey Betts wired from Rogersville, the place to which the original telegram announcing Clifton's death was addressed. It also appears that he was at the Technical School, near Rogersville, at the time this message was received, and it could have been properly delivered to him by the exercise of proper care and diligence. The jury so found. The two cases were consolidated and tried together, the jury returning the following verdict:

"1. Was the defendant guilty of negligent delay in the transmission or delivery of the message sued on, as alleged in the complaint? Answer: Yes.

"2. What damages, if any, is the plaintiff Ovey J. Betts entitled to recover? Answer: Five hundred dollars.

"3. What damages, if any, is the plaintiff Raymond Betts entitled to recover? Answer: Two hundred and fifty dollars."

On 25 June, 1912, the Western Union Telegraph Company's operator at Rogersville sent a service message, stating that Ovey J. Betts could not be found at the school, and asking for a better address. The operator at Raleigh notified Raymond Betts of this message on the night of the said Tuesday, and this was the only notice he had received that his first message to his brother, Ovey J. Betts, announcing the death of Clifton Betts, had not been delivered. There is a telephone line from Rogersville to the Technical School, where Ovey J. Betts was living at the time the first message was sent, by which telegrams were customarily transmitted to the school.

Ovey J. Betts testified that he would have left Rogersville for his old home at once, to attend the funeral of his brother, Clifton Betts, had he received the first message, and would have arrived at Raleigh, according to the railroad schedule, at 7:30 p. m. on Wednesday; and Raymond Betts testified that he would have postponed the funeral until his arrival.

It appears that when Ovey J. Betts was informed that his brother, Clifton Betts, had been killed by his younger brother, Levern Betts, as it turned out, accidentally, he immediately wired, "Will come at
( 78 ) once," and left Rogersville by conveyance for Morristown, Tenn., where he caught the first train out for Raleigh. This was on Tuesday, and he arrived at Raleigh Wednesday, 26 June, 1912. If the first message had been delivered promptly he could not have reached Raleigh in time for the funeral, unless the latter had been postponed. The train arriving at Raleigh Monday night, 24 June, 1912, was three hours late. The court rendered judgment according to the verdict, and defendant appealed.

*B. M. Gatling and P. H. Busbee for plaintiffs.*
*George H. Fearons and Pace & Boushall for defendant.*

WALKER, J., after stating the case: There was evidence that Ovey J. Betts had suffered mental anguish, and we think there can be no serious question raised on this branch of the case. There was testimony from which the jury could reasonably have inferred that Ovey J. Betts, if he had received the message sent by defendant's line, would have left at once for home and notified his brother, or some relative there, of his coming; and as his brother, Raymond Betts, would have postponed the funeral, he would have had the consolation of attending it, which was lost by the defendant's negligence. It seems that Clifton was his favorite brother, and the jury might well have found that he suffered mental anguish, as he was deprived of the privilege of paying this tribute to his memory by taking part in these last sad rites. As to Raymond Betts, we are also of the opinion that there is evidence from which the jury may reasonably have drawn the conclusion that he had endured mental anguish, being deprived of the presence, society, and consolation of his brother at the funeral, and not knowing why his message was unanswered.

Discussing a similar question in *Bright v. Telegraph Co.*, 132 N. C., 317, this Court said: "A woman suddenly bereft of her husband, and who has no father or other relative or friend to whom she can turn in her distress, except the uncle of her husband, might well call upon him for consolation and assistance, especially when, as is abundantly shown by the evidence in this case, he was her husband's nearest living relative and had raised and educated him and was 'devoted to her husband and herself,' and stood towards them in the place of a parent. She had every right to expect that as soon as the sad news of the death of her husband had reached him, he would come at once to her and give her that comfort, consolation, and assistance which she sorely needed. If he was not her father, he entertained for her all of the tender regard and affection

of a parent, and was as much interested in her welfare as if he had been her father, and she could therefore reasonably expect that he would do under the circumstances precisely what her father would have done if he had been living." And to the same general effect is *Cashion v. Telegraph Co.*, 123 N. C., 267: "We do not mean to say that dam- ( 79 ) ages for mental anguish may not be recovered for the absence of a mere friend, if it actually results; but it is not presumed. The need of a friend may cause real anguish to a helpless widow, left alone among strangers with an infant child and the dead body of her husband. In the present case the plaintiff seems to have received the full measure of Christian charity from a generous community, but it may be that she did not expect it, and looked alone to her brother-in-law, whose absence she so keenly felt. If so, she may prove it." As substantially said by *Justice Brown* in *Harrison v. Telegraph Co.*, 143 N. C., 147, the testimony in this case, if believed, tended to prove something more than mere disappointment and should be submitted to the jury, that they may find whether or not mental anguish was really suffered.

But defendant earnestly contends that the face of the message furnished no notice to the company that mental anguish would result. We need not pause here to consider the distinction between actions in tort and those in contract, with a view of determining what damages may be recoverable. *Penn v. Telegraph Co.*, 159 N. C., 306. Numerous decisions of this Court are to the effect that the company must be informed of the nature of the message, either by its words or by facts brought to its attention extraneously. *Williams v. Telegraph Co.*, 136 N. C., 82; *Harrison v. Telegraph Co.*, 143 N. C., 147; *Suttle v. Telegraph Co.*, 148 N. C., 480. But we have also held in as many cases that the message itself may be sufficient to impart the requisite knowledge, and this is so when its great importance is disclosed by the fact that it relates to the illness or death of a person. "When this is the case (as said in *Bright v. Telegraph Co., supra*) it is sufficient to put the company on notice that a failure to deliver will result in mental suffering, for which damages may be recovered," citing *Lyne v. Telegraph Co.*, 123 N. C., 129; *Sherrill v. Telegraph Co.*, 109 N. C., 527; *Hendricks v. Telegraph Co.*, 126 N. C., 310, to which may be added *Hunter v. Telegraph Co.*, 135 N. C., 458, where the very question is carefully and elaborately considered by *Justice Douglas*, with the citation of many authorities; and there are several cases of more recent date to be found in our reports. See *Ellison v. Telegraph Co.*, 163 N. C., 5.

The company will not be permitted to close its mind to the knowledge of significant facts which are apparent on the face of the message, or to disregard its plain import; and if it does so, its fault will not be chargeable to the plaintiff, so as to bar his right to damages. It must see and

understand what is obvious to all, that mental anguish will result from delay in handling such a message. These messages are sent to avoid the very thing that has occurred here, and which every intelligent man, mindful of his just obligations to others, should have known would
( 80 ) occur if he failed in his plain duty to be reasonably prompt and diligent. If this message had been properly forwarded, it would have accomplished its intended mission, but defendant's default has prevented its consummation. We so said in *Suttle v. Telegraph Co.*, 148 N. C., 480, and *Dayvis v. Telegraph Co.*, 139 N. C., 79.

The defendant further insisted that it was not required to transmit the message from Rogersville to the Technical School over the telephone, but only to the end of its line; but there is evidence which warranted the jury in finding that it undertook to do so. The operator promised "to send it through," and it was addressed to Ovey J. Betts, at the Technical School, via Rogersville. It was also the custom to send messages in that way. *Barnes v. Telegraph Co.*, 156 N. C., 150. Besides, defendant cannot take advantage of this point, because it utterly failed to notify the sender, with reasonable promptness, that the message had not been delivered, or to demand any pay for the supposed extra service. *Hoaglin v. Telegraph Co.*, 161 N. C., 390. That case was much like this one. It was there held that defendant's failure to give such notice was evidence of negligence, and further it was said to be well settled "that where a telegraph company receives a message for delivery and fails to deliver it with reasonable diligence, it becomes *prima facie* liable, and that the burden rests upon it of alleging and proving such facts as it relies upon to excuse its failure," citing *Hendricks v. Telegraph Co.*, 126 N. C., 304; *Cogdell v. Telegraph Co.*, 135 N. C., 431, and other cases. Defendant has not discharged itself of this burden, and the *prima facie* case practically stands unchallenged, or, at least, unimpaired.

It is further urged that Ovey J. Betts was notified too late for him to attend the funeral; but we have disposed of this contention in discussing other matters. The funeral would have been delayed if defendant had performed its duty, and there would have been no mental anguish. Defendant argues that the words in the message, "Have written," show that Ovey was not expected to come, and therefore no harm was done, citing *Gainey v. Telegraph Co.*, 136 N. C., 447; but that case bears no resemblance to this one. Those words were evidently inserted for the purpose of giving Ovey Betts more fully the particulars of the death than could be done in a telegram, and as soon as possible, in the event that he could not come. Like words have been held not to affect the result, but the fact stated was treated as a mere incident to the general purpose for which the message was sent, and in this connection it was further said not to be at all in accord with the promptings of the human heart that the

average relative should be content to put off coming until the last moment. *Harrison v. Telegraph Co.*, 143 N. C., 147. We extract this passage from the headnote: "Where a telegram notified a stepmother of the death of her stepson and of the hour fixed for the funeral, the defendant's contention that the only purpose of the telegram was to ( 81 ) notify the mother of the hour of the interment, and that nothing else was reasonably within the contemplation of the parties, is without merit."

The objection to Mr. Gatling's statement to the court of the facts in *Spence v. Telegraph Co.*, which was decided here by a *per curiam* order, is not tenable. Counsel was addressing the court upon a question of law and trying to show the similarity between the facts of that case and those of this one, for the purpose of arguing, to the court, that *Spence's case* was an authority for the position he had taken during the trial of this case below. Counsel was acting strictly within his rights, and the cases of *Horah v. Knox*, 87 N. C., 483; *Harrington v. Wadesboro*, 153 N. C., 437; *Chadwick v. Kirkman*, 159 N. C., 259, and *S. v. Corpening*, 157 N. C., 623, fully sustain the ruling of the Court. In those cases the counsel was reading the facts of another case to the jury for the purpose of applying the law of the case to the one in hand, and it was held proper for him to do so. If that be true, how can it be improper to read the facts to the court, though they are heard by the jury, for the same purpose? Mr. Gatling was addressing the court and not the jury.

It may be well, before concluding, to consider the testimony of Raymond Betts upon the question of his mental anguish, as additional to what has already been said in respect thereto, as the case, we think, is entirely free from error in other respects, and much stress has been laid upon this one feature of it. He testified: "Q. State to the jury how you suffered in consequence of your brother Ovey's failure to get that telegram and to be present here. A. I knew that they were favorite brothers, and knowing that my brother was locked up at the time and that I needed him here, and most everything was left up to me to look after in almost every way, the conduct of the funeral and looking after my younger brother and all, and knowing that he was the oldest brother, he would be so much help to the family. Ovey J. Betts is my oldest brother; I had charge of most of the funeral arrangements." It will be seen that the evidence as to his mental anguish is much stronger than was that of the plaintiffs in cases where the sender of the message has been allowed by this Court to recover. That the testimony of Raymond Betts, which we have quoted, was competent and tended to prove mental anguish, we think was clearly decided in *Shaw v. Telegraph Co.*, 151 N. C., 638, where similar testimony was considered and admitted, and its probative force passed upon by the Court.

We have discussed the case quite fully because learned counsel of defendant, in an able argument before us, supported by a most carefully prepared brief, have zealously contested plaintiff's right to recover; but we can see no obstacle in their way. The damages were light, in
( 82 ) view of the evidence, and the negligence was gross and inexcusable. The Postal Company gave prompt and efficient service, which tends to show that defendant, under substantially the same conditions, could have done much better than it did and prevented any loss to it.

There is some discrepancy in the evidence as to whether Ovey Betts arrived in Raleigh Tuesday or Wednesday night, but we do not deem this material.

No error.

*Cited: Cashwell v. Bottling Works,* 174 N.C. 329 (6c); *Lamm v. Shingleton,* 231 N.C. 15 (2c).

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T. T. HAY & BROTHER v. THE UNION FIRE INSURANCE COMPANY.

(Filed 28 October, 1914.)

**1. Insurance, Fire—Agents—Commissions—Insolvency of Company—Unearned Premiums—Claims Assigned.**

The local agents of a fire insurance company are entitled to their commissions upon the business they have written for the company, and when the company has become insolvent and the policy-holders have been duly notified to present their claims to the receiver for the unearned part of their premiums, the local agents, who have paid the claims of some of the policy-holders, on insurance they have secured, and have had the claims assigned to them, are entitled to the full amount thereof, without deduction for commissions they have received.

**2. Same—Special Contract—Burden of Proof.**

Where a fire insurance company has become insolvent and in the hands of a receiver, and its local agent has paid some of the policy-holders the unearned premiums on their policies which had been secured by his agency, and brings action for their repayment, the burden is upon the defendant company to show some special contract or agreement with the agent whereby the commissions he had received were to be deducted from the amount of the claims, when such is relied upon.

**3. Insurance, Fire—License—Voidable Policy—Right of Action—Insured—Interpretation of Statutes.**

While Revisal, sec. 4763, provides that no action shall be maintained in the courts of this State upon a policy of fire insurance issued by a company not authorized to do business in this State by the Insurance Com-

missioner, etc., the company issuing the policy in violation of this section may not receive the premiums and rely upon the statute to invalidate the policy, for such would permit it to take advantage of its own wrong.

**4. Same—Foreign Agencies—Principal and Surety.**

Where a foreign insurance company, authorized to do business here under our laws, issues its policy on property situated within the State, but through an agency in another State which is unauthorized to write it here, because of not having obtained the license required by Revisal, secs. 4706, 4765, the policy is valid as to the right of action of the insured thereon; and in this case the surety on the bond, given to the Insurance Commissioner by the company in lieu of the cash deposit required, is responsible for the default of the insurer.

APPEAL by defendant from *Cooke, J.*, June Term, 1914, of ( 83 ) WAKE.

*Winston & Biggs for local agents.*
*J. G. McCormick for Acme Manufacturing Company.*
*Armistead Jones & Son for defendants.*

CLARK, C. J. The plaintiffs T. T. Hay & Bro., on behalf of themselves and all other creditors, bring this action against the Monongahela Underwriters' Agency, the American Union Fire Insurance Company, and the United States Fidelity Guaranty Company, for the appointment of a receiver on the ground of insolvency of said insurance companies and to subject the bond of $10,000 given by the said guaranty company, in lieu of the deposit required by law, to the payment of the debts of the insurance companies. Murray Allen, Esq., was appointed referee. The court overruled all exceptions to his report and adopted his findings of law and fact.

T. T. Hay & Bro. were the general agents in this State of the American Union Fire Insurance Company, and the Underwriters' Agency, both of which it is admitted became insolvent about 1 March, 1913, and this proceeding was begun soon afterwards. The policy-holders and local agents were notified by the general agents, T. T. Hay & Bro., and J. R. Young, State Insurance Commissioner, that the company was insolvent, and the policy-holders were notified to present their claims to the receiver for the unearned premiums, representing the unexpired portions of the various policies. Defendants concede that those policy-holders who filed their claims directly with the court are entitled to recover the full amount of the unearned premium covering the time of the unexpired portion of the policy. *R. R. v. Trust Co.*, 38 L. R. A., 98. But they insist that where a local agent, in order to accommodate his policy-holders and to save them the expense and trouble of filing their small claims, saw fit to advance the amounts due them, having the claim assigned to such local

agent, that the local agents are not entitled to prove for such amount, but should deduct therefrom one-half of the commission which the agent earned and received when he placed the business originally.

This claim cannot be sustained. It is found as a fact by the referee, and the finding approved by the court, that "The commission paid an agent for writing a policy of insurance is paid as compensation for his work in securing the business and running the agency for the company."

If the company fails, as this one did, as between the company and the policy-holder, the latter is entitled to recover the full amount of the unearned premium. But as between the local agent and the company, the former has done his work by securing and writing the policy, and the subsequent default of the company cannot entitle it to recover back
( 84 ) from the agent any part of his commission. That would entitle the company to profit by its own wrong or default. This principle is so clear that no citation is necessary.

The authorities relied upon by the appellants do not sustain them. In *Ins. Co. v. Anderson,* 130 N. Y., 134, the company sued to recover damages against the agent, because after he had received his commissions he became agent for a rival company and induced the policy-holders to cancel the policies which he had written. The Court held that he was liable for the return of his commission on the unearned part of the premium. But also further held that where policies of insurance were made with a right reserved to the assured of surrender with a rebate *pro tanto* of the premiums paid, that in such case the agents were not required to return any part of their commissions to the company, since they had done their full service. In *Ins. Co. v. Gilmore,* 206 Mass., 203, the controversy was over a contingent commission, which does not bear upon this case. In *Ins. Co. v. Warren,* 150 Cal., 346, the contract provided that the agents were to receive a commission on "premiums after deducting all return premiums," and the Court held that such express contract required the deduction.

In *Devereux v. Ins. Co.,* 98 N. C., 6, the Court held that where the agent had voluntarily paid back a part of his commission with knowledge of all the facts, in the absence of any agreement, express or implied, to repay it, he could not recover back such payment. In that case the policy had been canceled by the company, under the terms in the policy, within eight days after it was placed, and the defendant company returned to the assured the amount of the premium except for the eight days, and the agent, returned his commissions, less the commission he had earned. It is not so held in the case, as it was not necessary, but the Court intimated that the agent should have done this anyway, because in the policy the insurance company reserved the right to cancel on return of premiums for the unexpired time, and the agent was aware of the terms of the policy

which he placed, and doubtless used that very provision as an inducement to procure the policy. He knew that the insurance company could cancel the policy at any time upon those terms, and therefore took his commission with that understanding. In this case, however, the policy was canceled by the insolvency of the insurance company. The agent had done his full duty in procuring the insurance, and there was no agreement, express or implied, that in case of default by the insurance company he was to forfeit any part of his commissions for the work he had done.

Besides, there was evidence in this case by T. T. Hay, the general agent of the company: "We had no agreement whatever with regard to the agents as to the effect upon their commissions if the company should become insolvent." In the absence of an express agreement ( 85 ) that the agents were to refund a *pro rata* part of their earnings in such event, it was incumbent upon the defendant to show an implied contract that there was such a usage in such case. On the contrary, the agent showed, and the referee found, that the usage was that the commissions in such cases upon the unearned premium should not be returned by the local agents, in the absence of express agreement. This was competent. *Bank v. Williams,* 79 N. C., 29; *Brown v. Atkinson,* 91 N. C., 389; *Blalock v. Clark,* 137 N. C., 142; 12 Cyc., 1066-70.

As to the claim of Charles W. Martyne, assignee of the Acme Manufacturing Company, it is found by the referee as facts, and approved by the court, that the policies upon which the claim is based were issued in Philadelphia on property in this State, through the Loyersford Agency, which was not licensed to do business in this State, but on behalf of companies which were so authorized. The Acme Manufacturing Company is a corporation organized in this State.

It is true that under Rev., 4763, "No action shall be maintained in any court in this State upon any policy or contract of fire insurance issued upon any property situated in this State by any company, association, partnership, individual or individuals that have not been authorized by the Insurance Commissioner to transact such insurance business." In *Ins. Co. v. Edwards,* 124 N. C., 116, it was held that this would prevent the unauthorized party to bring an action upon the policy, as in that case it was attempted to collect assessments upon the policy. But the statute does not make the policy void in the hands of the assured. The defendant company could not take advantage of its own wrong by receiving the premium and not being responsible. Besides, the defendants here, the American Union Fire Insurance Company and Monongahela Underwriters' Agency, were both authorized to do business here. In *Allgeyer v. Louisiana,* 164 U. S., 578, it was held that while under *Hooper v. California,* 155 U. S., 648, a statute like ours was valid which prohibited foreign insurance companies from doing business in this

State without complying with certain requirements, yet when a citizen of this State took out such policy in such forbidden corporation in another State the policy was binding on such company. It was not void.

While the Loyersford Agency was forbidden to conduct business in this State without a license (Rev., 4706, 4765), the policies taken out through its agency in Pennsylvania in favor of the Acme Manufacturing Company, a corporation of this State, are binding on both insurance companies, especially as they were authorized to do business in this State. The guaranty company is responsible for their default.

Affirmed.

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( 86 )

R. H. GARRIS ET ALS. v. A. L. HARRINGTON ET ALS.

(Filed 21 October, 1914.)

**Trials—Dividing Boundaries—Burden of Proof.**

The burden of proof is on the movant or plaintiff, in proceedings to establish the true dividing line between his own lands and those of adjoining owners, which is not affected by the fact that the defendant sets up another line as the true one; and an instruction that puts the burden of proof on plaintiff to establish the line contended for by him, and upon the defendant to establish the line he claims, is reversible error as to the latter.

APPEAL by defendants from *Daniels, J.*, at April Term, 1914, of PITT.

This is a proceeding to establish the dividing line between the plaintiff and defendant.

The plaintiff contends that the true line is from A to B on the plat, and the defendant, that it is from C to A, the land in dispute being a triangle between the lines A B and A C.

Both parties introduced evidence to sustain their contentions.

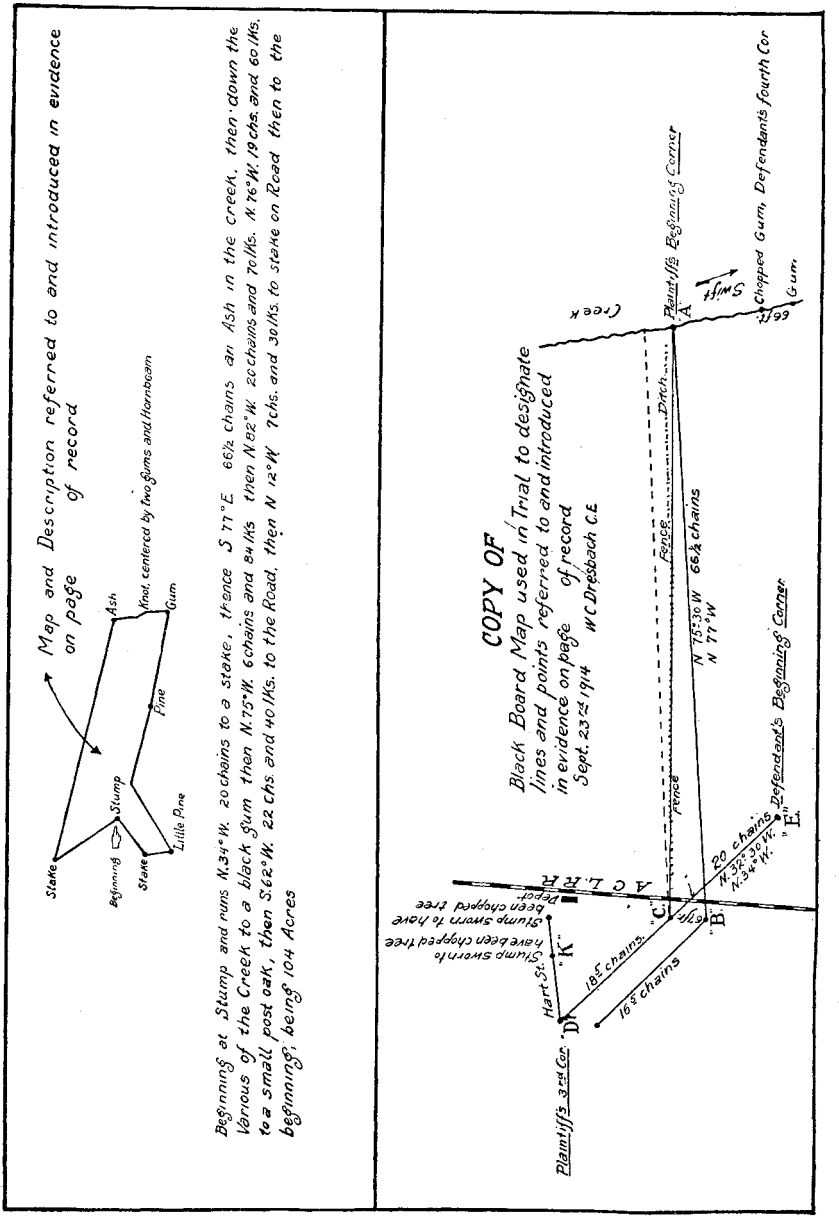
The jury returned the following verdict:

"1. What is the true dividing line between the plaintiffs and defendant? Answer: 'A B.'

"2. Have the defendants been in possession of the lands lying south of the line indicated by 'C to A' for more than seven years, adversely, under color of title? Answer: 'No.'

"3. Have the defendants been in possession of the lands lying south of the line indicated by 'C to A,' adversely, for more than twenty years? Answer: 'No.'"

His Honor charged the jury, among other things: "If the evidence satisfies you by its greater weight, the burden being upon the plaintiff to establish the line as contended for by him, that this ash was estab-


Map and Description referred to and introduced in evidence on page of record
Ash
Knot, centered by two Gums and Hornbeam
Gum
Pine
Stump
Little Pine
Stake
Beginning
Stake
Beginning at Stump and runs N.34° W. 20 chains to a stake, thence S 77° E 66½ chains an Ash in the creek, then down the Various of the Creek to a black gum then N.75° W. 6 chains and 84 lks then N.82° W. 20 chains and 70 lks. N.76° W. 19 chs. and 60 lks. to a small post oak, then S.62° W. 22 chs and 40 lks. to the Road, then N 12° W 7 chs. and 30 lks to stake on Road then to the beginning, being 104 Acres
COPY OF
Black Board Map used in Trial to designate lines and points referred to and introduced in evidence on page of record
Sept. 23rd 1914 W C Dresbach C.E
Creek
Plaintiff's Beginning Corner
A
Smith
Chopped Gum, Defendants fourth Cor
Gum
Fence
Ditch
N 75°30 W 66½ chains
N 77° W
A C L R R
Depot
Stump Sworn to have been chopped tree
Stump Sworn to have been chopped tree
K
Hart St.
Plaintiff's 3rd Cor
D
18.5 chains
16.8 chains
C
B
20 chains
N.32°30 W.
N.34° W.
Defendants Beginning Corner
E

lished as a corner at that time and marked, and that a line was run and marked from that point north 77 west 66½ chains with the intention and purpose of making that the dividing line between the two tracts, then your answer to that issue would be the line 'A to B'; that would be finding that the plaintiffs' contention is the true dividing line."

And again: "The defendant contends that upon that evidence you ought to be satisfied that the true dividing line established at the time these lands were divided was the line C to A. The burden is upon him to satisfy you by the greater weight of the testimony of the truth of his contention; and if he has, you will find that the true dividing line and answer this issue C to A." The defendant excepted.

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

( 88 ) *Harding & Pierce and F. G. James & Son for plaintiff.*
*D. M. Clark, Harry Skinner, and L. G. Cooper for defendant.*

ALLEN, J. The plaintiff became the actor, and assumed the burden of proof to establish the true line between him and the defendant, when he instituted the proceeding (*Hill v. Dalton,* 140 N. C., 9), and this burden of proof did not shift to the defendant because, in addition to denying the line to be as claimed by the plaintiff, he alleged another to be the dividing line.

The precise question was considered and decided in *Woody v. Fountain,* 143 N. C., 66. In that case, which was a proceeding to establish a dividing line, the plaintiff alleged the true line to be at a certain place. This was denied by the defendant, and he alleged the true line to be at another place. The issue submitted to the jury was like the one in the record before us, and it was held to be error to charge the jury that "If they should find from the greater weight of the evidence in this case that the original and true line between the plaintiff and defendant is as claimed by defendant, then you will answer this issue (as to boundary) in his favor," the Court saying of this instruction: "This was, in effect, telling the jury that the issue could not be answered in the defendant's favor unless they found the greater weight on his side. The burden of proof is on the plaintiff to establish the line contended for by her. *Hill v. Dalton,* 136 N. C., 339; *s. c.,* 140 N. C., 9.

The charge given cannot be distinguished from the one declared to be erroneous, and there must therefore be a

New trial.

*Cited: Tillotson v. Fulp,* 172 N.C. 500 (cc); *Poindexter v. Call,* 182 N.C. 368 (c); *Mann v. Archbell,* 186 N.C. 75 (c); *Carr v. Bizzell,* 192

N.C. 214 (c); *Power Co. v. Taylor*, 194 N.C. 234 (c); *Boone v. Collins*, 202 N.C. 13 (cc); *DeHart v. Jenkins*, 211 N.C. 316 (c); *Hill v. Young*, 217 N.C. 117 (c); *McCanless v. Ballard*, 222 N.C. 702 (c).

J. C. McMILLAN v. E. W. TEACHEY.

(Filed 21 October, 1914.)

**Judgment—Estoppel.**

In a former suit to foreclose a mortgage on certain lands fully described in the pleadings, the *locus in quo* was sold by a commissioner duly appointed for the purpose, under a decree ordering the sale, which conformed to the description contained in the pleadings, and the plaintiff in this action claims under the commissioner's deed, containing the same description. The defendant in the present action was also a party defendant in the suit to foreclose, and it is held that he is estopped by the judgment therein from showing that the boundaries set out in the present case, and in the former suit, did not correctly describe the lands contained in the mortgage.

APPEAL by defendant from *Whedbee, J.*, at February Term, 1914, of DUPLIN.

Civil action to recover land. Verdict and judgment for plain- ( 89 ) tiff, and defendant excepted and appealed.

*Stevens & Beasley for plaintiff.*

*G. R. Ward and H. D. Williams for defendant.*

HOKE, J. On the hearing it was properly made to appear, from a perusal of the pleadings and the admission of the parties, made in open court on the trial, that plaintiff claimed the land as grantee under a deed from J. R. Bell, who purchased the same at a judicial sale, under decree in case of *Bradshaw, executor, v. E. W. Teachey and Frank Brice.* That action was against present defendant and said Brice, to foreclose a mortgage for the purchase money and establish a lien on the land in controversy, and the land was fully described in the pleadings in that cause, and same description was in report of commissioner who made the sale and in the deed to the purchaser, and in conveyance from said purchaser to the present defendant. There was judgment by default in the *Bradshaw case,* no defense thereto having been made or attempted.

It was admitted on the present trial, "That E. W. Teachey, defendant in the present action, is the same E. W. Teachey who was one of the defendants in suit of *Bradshaw, executor, v. Teachey;* that he was in

present possession of the land in controversy and that the plaintiff claims under the deed from J. R. Bell and by mesne conveyances from court commissioner in the case of *Bradshaw, executor, etc.,* and that the land run and located according to the description set out in complaint in that case and described in the judgment therein and in the commissioner's deed to Bell and in the deed from Bell to the present plaintiff includes the land in controversy and is the same land described in the complaint in the present action."

Upon these facts and admissions we think his Honor correctly held that plaintiff is the owner and entitled to the possession of the property, and that defendant E. W. Teachey is estopped from showing that the boundaries set out in the present case and in that of *Bradshaw, executor, etc.,* did not correctly describe the land embraced in the mortgage, but that the same produced a wrongful interference, to the extent of 8 or 10 acres, with the boundaries of an adjoining tract which plaintiff now owns and did at the time the Bradshaw proceedings were instituted and decree therein was entered. It has been repeatedly decided with us that an estoppel by judgment will bind parties and privies "as to all issuable matters presented by the pleadings, and, though not issuable in the technical sense, it concludes, among other things, as to all matters within the scope of the pleading which are material and relevant and were in fact investigated and determined on the hearing." *Ferebee v. Sawyer,*
(90) *post,* 199; *In re Will of Thomas F. Floyd,* 161 N. C., 557; *Coltrane v. Laughlin,* 157 N.C., 282; *Bunker v. Bunker,* 140 N. C., 18; *Tyler v. Capehart,* 125 N. C., 64.

In the case of *Bradshaw, executor, v. Teachey et al.* the description of the land mortgaged, set forth by specific metes and bounds, was clearly issuable matter within the meaning of the principle, and, on that question, the parties to the proceedings and their privies are concluded. We were referred by counsel for defendant to *Clark v. Aldridge,* 162 N. C., 326, and other cases as authorities against the present decision, but we do not so interpret them. In *Clark's case,* the one more particularly relied upon, the former suit was a partition proceeding among the heirs at law of D. S. Clark, deceased, and one Benjamin Aldridge was allowed to become defendant and plead sole seizin as to a portion of the property, under deeds from D. S. Clark, the former owner and ancestor of the other parties; issue was joined on the delivery of these deeds, and, on a verdict sustaining delivery, it was held that Aldridge in the subsequent suit was not estopped from offering evidence as to the correct location of these deeds. On this question the decision of the Court was as follows: "A judgment in an action for lands which only involves the issue as to whether the deed under which a party claims title has been delivered, does not, as between parties or against privies who claim as volunteers,

prevent the party claiming title under the deed from showing that the original grantor had gone upon the lands and made a physical survey of the same and that the *locus in quo* was included within the intended boundaries, though they do not so appear on the face of the deed as written, there being no question of boundaries raised in the action wherein the judgment relied on was rendered."

Speaking to this question in the closing portion of the opinion, the Court said: "In such case (where boundary lines as contained in the deeds are in conflict with contemporaneous and physical location by the parties thereto) it has not been held that any change in the phraseology of the deeds is required, and, therefore, where the only issue involved was as to the delivery of the deeds, and there was no question of boundary either raised, considered, or determined, a decree awarding to the party litigant the lands 'contained in the deeds' should, by correct interpretation, be construed to mean 'as contained' in the deeds correctly located according to law."

It will thus be noted that in *Aldridge's case* it was not proposed, as here, to change in any way the boundaries as shown in the deeds, but the testimony received was only to show, under established rules of evidence in such cases, where the boundaries were.

The other cases cited by counsel were chiefly those where the second suit was on a different cause of action from that presented and involved in the first, and where, as shown by *Associate Justice Allen* ( 91 ) in *McTeer Clothing Co. v. Hay,* 163 N. C., 495, an estoppel in the former is only allowed to prevail as to relevant matter which was actually investigated and determined.

There is no error, and the judgment in plaintiff's favor is affirmed.

No error.

*Cited: Cannon v. Cannon,* 223 N.C. 670 (c).

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MARTHA D. HOLLOWAY ET AL. v. D. R. GREEN.

(Filed 28 October, 1914.)

**1. Deeds and Conveyances—Intent—Estates—Husband and Wife—Tenants in Common.**

A deed is interpreted as a whole to ascertain its intent, and the common-law rule as to the formal parts does not now obtain. Therefore, when thus construing a conveyance of land to husband and wife, it appears that they do not take the estate in entireties, but as tenants in common, the law of *jus accrescendi* does not apply.

**2. Deeds and Conveyances—Interpretation—Presumptions—Fee Simple—Interpretation of Statutes—Restraint on Alienation.**

Our statute, Revisal, sec. 946, provides that conveyances of land, without the use of the words "heirs," etc., are to be construed in fee, unless it clearly appears from the wording of the conveyance that an estate of less dignity was intended; and where a conveyance is thus construed to be in fee, any attempt of restraint upon alienation is void, but where relevant, the words therein used may be construed to ascertain whether the intent of the grantor was to convey a fee or an estate of less dignity.

**3. Same—Husband and Wife—Tenants in Common.**

A conveyance of land, in the habendum, reserved possession in the grantor until the happening of a certain event, and then the possession to go to the grantees, husband and wife, "with the further limitation that neither party of the second part shall sell his or her one-half interest in the said land while the other is living, but, at the death of either, the survivor may dispose of his or her interest in fee, the one-half belonging to the other dying to go to his heirs or devisees in fee." *Held*, (1) after the termination of the interest reserved in the grantors the fee in the lands goes to the grantees, husband and wife, as tenants in common, not in entireties, the last clause of the conveyance having been inserted to prevent the possibility of survivorship; (2) the attempted restraint on alienation is void, though construed as intending to prevent one of the grantees from introducing a stranger as tenant in common with the other.

APPEAL by defendant from *Whedbee, J.*, at September Term, 1914, of WAKE.

This is a controversy without action submitted on the following agreed statement of facts:

( 92 ) 1. On 18 August, 1911, the following deed was executed by F.J. Holloway and wife, Martha D. Holloway, of Wake County, North Carolina, to John T. Davis and wife, Luella Davis, of the District of Columbia:

NORTH CAROLINA—Wake County.

This deed, made this 18 August, 1911, by F. J. Holloway and wife, Martha D. Holloway, of Wake County, North Carolina, parties of the first part, to John T. Davis and wife, Luella Davis, of the District of Columbia, parties of the second part:

Witnesseth, that for and in consideration of the sum of $10 and other valuable consideration, the receipt of which is hereby acknowledged, the parties of the first part do hereby give, grant, bargain, sell and convey to the parties of the second part, upon the special limitations contained in the habendum herein, the following described tract of land lying in Neuse River Township, Wake County, North Carolina:

Beginning at southwest corner of schoolhouse lot in corner of W. G. Norwood's land, runs S. 85½ degrees E. 1,045 feet to a stone and iron pipe; thence S. 3½ degrees E. 457½ feet to an iron pipe; thence N. 85½

degrees W. 1,105 feet to a pipe in road; thence along road N. 3 degrees E. 457½ feet to the beginning, and contains 11 28/100 acres. Being taken from the lands of the parties of the first part in this location.

To have and to hold the said lands, together with all the privileges and appurtenances thereunto belonging, unto the said parties of the second part, upon the following limitations, to-wit:

The parties of the first part retain possession of the land for twelve years, provided both of the parties of the first part, or either one of them, live that long; but upon the death of both, the possession is to immediately go to the parties of the second part; and with the further limitation, that neither party of the second part shall sell his or her one-half interest in the said land while the other is living, but that at the death of either, the survivor may dispose of his or her interest in fee, the one-half belonging to the other dying to go to his or her heirs or devisees in fee.

W. W. Vass, trustee, joins in this deed for the purpose of releasing the above described tract of land from the operation of a deed of trust made to him by the parties of the first part, and recorded in Book 236, page 221, of the register of deeds' office of Wake County.

In witness whereof the said parties of the first part, and the said W. W. Vass, trustee, have hereunto set their hands and seals this the day and year first above named.

(Signed) F. J. HOLLOWAY, [SEAL]
(Signed) MARTHA D. HOLLOWAY, [SEAL]
(Signed) W. W. VASS, *Trustee.* [SEAL]

(The acknowledgement of the parties signing was taken in ( 93 ) proper form before, and the private examination of Martha D. Holloway by, W. H. Rogers, a notary public, of Wake County, North Carolina, whose commission was in force at the time. The deed was duly probated before Millard Mial, clerk of the Superior Court for Wake County, and is properly recorded in the office of the register of deeds of Wake County, in Book 260, at page 14.)

2. F. J. Holloway, one of the parties of the first part to the above recited deed, died on....., 1914, his wife, Martha D. Holloway, the other party of the first part to the said deed, and one of the parties plaintiff in this cause, surviving him. The parties of the second part to said deed, John T. Davis and wife, Luella Davis, who are also parties in this cause or controversy without action, are both living, and at present are residing in.....

3. The said Martha D. Holloway, wife of said F. J. Holloway, by virtue of the limitations contained in the above recited deed, is and has been, since the death of said F. J. Holloway, enjoying the possession of the land described in said deed, and the benefits derived therefrom.

4. Heretofore, towit, in the month of ....., 1914, the plaintiffs Martha D. Holloway, John T. Davis, and Luella Davis, his wife, entered into an agreement with defendant D. R. Green by which said plaintiffs agreed to convey to said defendant the tract or parcel of land described in the above deed, by a fee-simple deed with title freed of all encumbrances, each and all of said plaintiffs agreeing to enter into such a conveyance as granting parties, and to give the usual covenants in such deed, and to give immediate possession of said land to D. R. Green, the grantee; and the said defendant D. R. Green, in consideration of the plaintiffs' undertaking and agreement, agreed to pay to the plaintiffs on receipt of a deed to said land executed in accordance with plaintiffs' agreements, the sum of $750 as the purchase price, not then knowing of the existence of the said deed referred to in paragraph 1.

5. The said plaintiffs Martha D. Holloway, John T. Davis, and Luella Davis, his wife, have properly and in due form executed a fee-simple deed to the above described tract or parcel of land, making all the covenants usual to a fee-simple deed, and each of the said three parties plaintiff entering into this conveyance to defendant as granting parties, and they now stand ready to deliver to said defendant, on receipt of the purchase money, the deed as executed, and they have made proper tender of the deed to said defendant, and to give possession of the land; but the said defendant, declining to accept the deed, in view of the limitations, contained in the deed fully recited above, of the present legal right of the plaintiff to dispose of the said land by deed in fee simple and to
( 94 ) deliver immediate possession, has refused and does still refuse to accept the deed tendered by the plaintiffs, or to pay over the purchase money to defendants or any part thereof.

6. It is agreed that if the deed set forth in paragraph 1 hereof shall not be declared void, or, if declared valid, it shall not be further declared that the plaintiffs have the present legal right to dispose of the land described therein by deed in fee simple and to deliver immediate possession of the same, then the defendant owes the plaintiffs nothing and is under no obligation, legal or moral, to accept the deed tendered or to close the trade.

There was a judgment in favor of the plaintiffs, and the defendant excepted and appealed.

*Clark & Broughton for plaintiffs.*
*Winston & Biggs for defendant.*

ALLEN, J. It is now the well settled doctrine of this Court that the technical rules of the common law as to the division of deeds into formal parts will not prevail as against the manifest intention of the parties,

ascertained by an examination of the whole deed. *Triplett v. Williams,* 149 N. C., 394; *Acker v. Pridgen,* 158 N. C., 339.

It is also a well recognized principle that in a conveyance to husband and wife they take by entireties, with the right of survivorship (*Bruce v. Nicholson,* 109 N. C., 202), but that a conveyance may be made to them as tenants in common, when there is no survivorship. *Eason v. Eason,* 159 N. C., 539.

Restraints upon alienation are void (*Trust Co. v. Nicholson,* 162 N. C., 264), and since 1879 a deed is "held and construed to be a conveyance in fee, whether the word heirs shall be used or not, unless such conveyance shall in plain and express words show, or it shall be plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity." Rev., sec. 946.

Let us then read the deed under consideration in the light of these authorities.

The grantees, John T. Davis and wife, Luella Davis, take as tenants in common, subject to a reservation of the possession of the land for a period of twelve years for the benefit of the grantors, F. J. Holloway and wife, Martha D. Holloway, and as the attempted restraint upon alienation must be eliminated, except as it aids in the interpretation of the valid parts of the deed, the only clause which gives color to the contention that there is a limitation over as to the half interest of the tenant in common first dying is the conclusion of the habendum, "the one-half belonging to the one dying to go to his or her heirs or devisees in fee."

This language, instead of showing an intention to convey an ( 95 ) estate of less dignity than a fee to Davis and wife, strengthens and confirms the presumption raised by the statute.

It is the one-half interest *belonging* to the one dying that is to go in fee, thereby recognizing the transmission of the estate after death, which could only be of an estate of inheritance, and it is "to go to his or her heirs or devisees in fee."

Words used in a deed should be construed according to their usual and ordinary meaning, unless a contrary intent appears (13 Cyc., 605), and if it is said that A. owns an interest in land, which upon his death will go to his heirs or devisees in fee, the natural and reasonable conclusion is that A. has an estate of inheritance which will descend to his heirs if he leaves no will, and to his devisees if he dies leaving a will.

In adopting this construction we do not violate the rule that some meaning must be given to each word and clause, if practicable, as the parties to the deed evidently had in mind the doctrine of survivorship in conveyances to husband and wife, and wished to make it certain that when one died one-half interest in the land should descend to his or her

heirs or be transmitted to his or her devisees, and should not go to the survivor, and it is for this purpose the clause was inserted.

Another view which adds force to this construction is the clear intent manifested in the deed to make no distinction between the grantees, and to convey to each an equal interest in the land, which would be defeated if it should be held that there is a limitation over to the heirs or devisees of the one first dying, as the deed gives to the survivor the power to dispose of one-half in fee.

We are therefore of opinion upon a consideration of the whole deed that by proper interpretation it reserves the possession of the land to the grantors, F. J. Holloway and wife, Martha D. Holloway, for twelve years and then conveys the fee to John T. Davis and wife, Luella Davis, as tenants in common; and that the last clause in the habendum was inserted to prevent the possibility of survivorship.

The attempted restraint upon alienation is void, but, if not, it does not purport to deal with an alienation by both of the grantees joining in a conveyance, and was intended to prevent one from introducing a stranger as a tenant in common with the other.

It follows that the deed from Martha D. Holloway and John T. Davis and wife, Luella Davis, will convey an estate in fee to the defendant, F. J. Holloway being dead.

Affirmed.

*Cited: Moore v. Trust Co.,* 178 N.C. 126 (1c); *Davis v. Bass,* 188 N.C. 207 (1c); *Johnson v. Gaines,* 230 N.C. 654 (2c).

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( 96 )

W. H. GRIFFIN ET ALS. v. M. N. CUPP.

(Filed 21 October, 1914.)

**Appeal and Error—Premature Appeals—Fragmentary Appeals—Objections and Exceptions—Practice.**

An appeal will not lie from the refusal of the trial court to dismiss an action, the same being premature; nor by one of several defendants, for then the appeal will be fragmentary. The practice is for the movant to enter an exception which will preserve his position in the event of an adverse judgment in the lower court.

APPEAL by defendant from a refusal of a motion to dismiss by *Allen, J.*, May Term, 1914, of WAKE.

*J. B. Cheshire, Jr., for plaintiffs.*

*T. Lanier and J. W. Bunn for defendant Cupp.*

CLARK, C. J. This was a motion on the part of the defendant Cupp to dismiss the action as to him. This being refused, he appealed. The appeal does not lie, for two reasons.

No appeal lies from a "refusal to dismiss" an action. *Kerr v. Hicks,* 154 N. C., 269; *Johnson v. Reformers,* 135 N. C., 387, and thirty-five other cases cited in 1 Pell's Revisal at p. 313 under section 587. There are many other cases, besides, in which this oft-repeated ruling has been applied without writing an opinion. The remedy of the defendant was to enter an exception, and if the final judgment is in his favor, the point would not have to be passed upon on appeal. But if the final judgment is against him, the point will be preserved by the exception entered, and will be considered on appeal. If this were not so, any defendant could get six months or more of delay by simply moving to dismiss and appealing at once from a refusal of each motion.

The defendant relies upon the authority of *Knowles v. R. R.,* 102 N. C., 59. That case simply holds that a motion to dismiss because the complaint does not state a cause of action can be made at any time, even in this Court; which is true enough. But it does not hold that an appeal lies at once when the motion is made below and is denied.

The appeal also is premature and cannot be entertained, because it would be fragmentary. The motion to dismiss was made by only one of the defendants, and the trial of the whole case cannot be suspended until his motion can be passed on by appeal. He should have entered his exception, and if the final judgment does not embrace him, he will not need to appeal. Otherwise his exception can be reviewed on appeal from such judgment. *McGehee v. Tucker,* 122 N. C., 189; *Hinton v. Ins. Co.,* 116 N. C., 22.

As *Pearson, C. J.,* said in *Hamlin v. Tucker,* 72 N. C., 502, the Court will not "take two bites at a cherry."

Appeal dismissed.

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(97)

## SALLIE A. LLOYD ET AL. V. SWANSBORO LAND AND LUMBER COMPANY.

(Filed 28 October, 1914.)

**Judgments Conditional—Courts—Pleadings—Amendments—Discretion.**

An order allowing a plaintiff to amend his complaint within thirty days, with provision that if he fail either to file his complaint within the time allowed or pay the cost imposed as a condition, the action shall stand dismissed without further order, is an alternative or conditional judgment and void, leaving it open to the discretion of a succeeding judge to allow the amended pleading to be filed.

APPEAL by defendant from *Daniels, J.*, at July Term, 1914, of ONSLOW.

Appeal from an order of the court allowing plaintiffs to file amended complaint upon payment of costs.

*Duffy & Koonce, T. C. Wooten, J. F. Wooten, and G. V. Cowper for plaintiffs.*

*Frank Thompson, D. E. Henderson, and L. R. Varser for defendants.*

BROWN, J. At April Term, 1914, Whedbee, judge, made an order in this cause, allowing the plaintiffs to file amended complaint within thirty days, which order provided that if the plaintiffs fail either to file such amended complaint or to pay the cost as shown within thirty days from the adjournment of this term, then this action shall stand dismissed without further order.

The order could not be self-executing, and the condition is a nullity. The judge could not delegate to any one the power to enter up judgment if the amended complaint was not filed.

Alternative or conditional judgments are void. This left it open to the discretion of a succeeding judge to allow the amended pleadings to be filed. *Strickland v. Cox,* 102 N. C., 411; *Woodcock v. Merriam,* 122 N. C., 734; *Church v. Church,* 158 N. C., 564.

Affirmed.

*Cited: Campbell v. Asheville,* 184 N.C. 493 (c); *Flinchum v. Doughton,* 200 N. C. 771 (cc); *Luff v. Levey,* 203 N.C. 784 (c); *Hagedorn v. Hagedorn,* 210 N.C. 165 (c).

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( 98 )

J. C. LYNCH, ADMINISTRATOR OF ADA LYNCH, v. ROSEMARY MANUFACTURING COMPANY.

(Filed 17 October, 1914.)

**1. Evidence—Witnesses—Medical Experts — Opinion — Facts at Issue — Trials.**

The plaintiff sues to recover damages of the defendant for the death of his intestate, caused by moving her from one of its tenant-houses to another during an illness of typhoid fever. *Held,* a question is competent, asked the witness, a medical expert, as to the causes of the intestate's death predicated upon the symptoms of the patient and attendant facts, assumed to have been found by the jury, and not objectionable as an expression of opinion upon a fact at issue to be passed upon by them; and while in this case the question asked included the question of proximate

cause, it is further held that the case, if established, was so clearly the proximate cause that the error was rendered harmless.

**2. Evidence—Witnesses—Medical Experts—Text-books.**

Upon examination of a medical expert it is not permissible to read extracts from medical books for the purpose of cross-examining the witness and attacking the credibility of his evidence, or asking the witness if the opinion from the text-book was true or not; for the author has not made a statement under oath, subject to cross-examination, and such practice would permit by indirection what is expressly forbidden as evidence; but when the witness has testified as such expert, professing to have special training and knowledge from standard works of his profession, a general question of this kind may be allowed with the view of testing the value of his opinion.

**3. Appeal and Error—Brief—Exceptions Abandoned—Rule of Court.**

The brief of appellant must sufficiently state the assignments of error relied upon and give some reason or argument in support of them, or the assignments are deemed to have been abandoned, under Rule 34.

**4. Measure of Damages—Wrongful Death—Net Value of Life—Children—Trials—Evidence.**

In an action to recover damages for a wrongful death the present net value of the life wrongfully taken determines the measure of damages recoverable, and evidence tending to show the number and ages of the children of the deceased is incompetent; and where the judge in his charge has correctly stated in general terms that the jury should award a fair and just compensation for the pecuniary injury, and then specifically instruct them to find from the evidence what the earnings of the deceased would have been during the balance of his life, the instruction is held for reversible error.

APPEAL by defendants from *Connor, J.*, at March Term, 1914, of HALIFAX.

Civil action to recover damages for the wrongful killing of Ada Lynch, deceased, formerly wife of plaintiff administrator. Plaintiff alleged and offered evidence tending to show that, on 17 October, 1912, he and his then wife, the intestate, were tenants in one of defendant's houses, and the intestate had been for some time and was then sick in bed ( 99 ) with typhoid fever, and, in violation of their rights and against the will of plaintiff and deceased, they were wrongfully compelled to remove to another house, the wife being carried from her sick bed on a mattress to a wagon and driven therein ¼ mile to the other place, etc.; that from the shock and injury the intestate, pending or very soon after the removal, became unconscious and, sinking rapidly, died, as we gather from the testimony, in about one week; several witnesses, having duly qualified as experts, giving it as their opinion, on facts submitted, as in the finding of the jury, that the removal and the manner of it caused her death.

Defendants contended and offered evidence tending to show that the removal was not the cause of the death; that same was done on advice of a physician, cognizant of intestate's condition; that such a course would produce no injury, and that the wife and more especially the plaintiff himself consented to the removal taking place, etc.

The jury rendered the following verdict:

"1. Did the defendant Rosemary Manufacturing Company unlawfully, wrongfully, or negligently remove Mrs. Ada Lynch, the plaintiff's intestate, from the house in which she was sick to another house, against the protest of her husband or against her will, and thereby cause her death, as alleged in the complaint? Answer: Yes.

"2. If so, what damages is plaintiff entitled to recover of the defendant? Answer: Twenty-five hundred dollars ($2,500)."

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

*S. G. Daniel, T. M. Pittman, A. P. Kitchin, Knight, Peebles & Midyett for plaintiff.*

*George C. Green, W. E. Daniel, and E. L. Travis for defendant.*

HOKE, J. The jury, accepting the plaintiff's version of the occurrence, have rendered a verdict that the defendant unlawfully and wrongfully caused the death of plaintiff's intestate, and on careful perusal of the record we find no good reason for disturbing their conclusion on the issue fixing the liability on the company.

It is urged for error that some of the expert witnesses were allowed to give it as their opinion that the removal was the cause of the intestate's death, and in violation of the rule that a witness may not express an opinion on the very question at issue between the parties, citing the Court, among other cases, to *Summerlin v. R. R.*, 133 N. C., 557; but the position arises from a misconception of the decision in *Summerlin's case.* In that case questions propounded to an expert witness were excluded by the trial court and the ruling was affirmed because, as interpreted
(100) by the appellate court, the questions called for an opinion of the witness on a fact at issue and in controversy, towit, whether a fall produced the injury, as claimed by plaintiff. Speaking to the *ratio decidendi* of *Summerlin's case, Associate Justice Walker,* delivering the opinion, said: "There is nothing better settled than that a witness can ordinarily speak only of facts within his own knowledge, unless he is an expert, having special scientific knowledge, in which case he may give his opinion, but only on facts as they may be found by the jury." . . . And further: "Applying these general principles to the particular questions under consideration, we think that those asked the witness by plaintiff's

counsel and which were excluded by the court were incompetent as being in violation of the fundamental principle upon which the admissibility of expert testimony rests. They require the witness not to express a scientific opinion upon certain assumed facts, but to invade the province of the jury and decide the very question in dispute as to the cause of the child's injury."

We are confirmed in this interpretation of *Summerlin's case* by what was said concerning it by the same learned judge in the case of *Parish v. R. R.*, 146 N. C., 125-127. In *Parish's case*, "plaintiff claimed to have been wrongfully injured by sudden and violent impact of the engine against the car in which plaintiff was a passenger at the time, and that, as a result, plaintiff was thrown against the arm of a seat and severely injured in his back, hips, and spinal column." The following question and answer were held proper: "If the jury find the facts to be, from the evidence, that the plaintiff was injured by falling back against the arm of a seat in the train, and struck his back in the region of the kidney, and at the time it gave him great pain, followed by faintness or nausea, and that the second morning thereafter he passed urine mixed with blood, and that several times since he has passed bloody urine, as late as the 5th day of this month; that his nervous system was affected, and when he makes a misstep or has a sudden jar, he has acute pain in the region of the kidney, followed by passing bloody urine, what, in your opinion, is the cause of his being affected in this way?" The witness answered: "In my opinion, the kidney was dislocated by the fall, and the dislocation is permanent, and the plaintiff will be disabled for life, unless he has the kidney removed by an operation."

There, as here, *Summerlin's case* was referred to by counsel as being against the ruling, and *Justice Walker*, speaking to *Summerlin's case* and its bearing on the question then presented, said: "We cannot agree with the learned counsel of the defendant that this case bears any resemblance to *Summerlin v. R. R.*, 133 N. C., 550. In that case the questions excluded by the court were so framed as to require the witness to express an opinion as to the existence of a fact which was controverted, and it was there said by the Court that this was not the (101) proper form for the question to take, but that the expert's opinion should be founded upon a hypothetical question containing a statement of facts which the jury might find from the evidence, and supposing, of course, that they will find them to be as stated in the question. The rule is stated in 3 Wharton and Stille's Medical Jurisprudence (5 Ed.), p. 580, as follows: "An opinion that an injury resulted from a certain designated act, being the one upon which the action is based, as distinguished from an opinion that certain causes would produce certain results, is improper as usurping the province of the jury."

The questions objected to in the present case are clearly within the rule for the reception of such evidence, being opinions of medical experts as to the cause of intestate's death predicated upon the symptoms of the patient and attendant facts, assumed to have been found by the jury and are in accord with the authorities referred to and others of like kind in this jurisdiction. *Beard v. R. R.,* 143 N. C., 136-139; *Jones v. Warehouse Co.,* 137 N. C., 338; *S. v. Jones,* 68 N. C., 443.

In one or two of the questions the counsel, in zealous concern for their client's interest, asked if it was the "*proximate* cause of intestate's death"—an addenda to the usual formula that might well have been objectionable if the facts permitted any distinction between the two, but in this instance the cause, if established, was so clearly the proximate cause that the term may properly be considered as harmless error. *Beard v. R. R.,* 143 N. C., at page 139.

Again, it was contended that error was committed to defendant's prejudice in permitting the following question: "I ask you if all recognized medical authorities do not teach that typhoid fever patients must not be moved, if possible to do without it?"

The question by plaintiff was allowed on cross-examination of a medical expert who had treated the intestate in this case and testified for defendant, in effect, that the removal, in his opinion, had not unfavorably affected the patient in this instance, and that, on the facts of the case, it would likely increase her chances for recovery.

It is very generally recognized that extracts from medical books are not admissible in evidence, and for the very sufficient reason that the author does not write under the sanctity of an oath and has not been subjected to cross-examination, and the decisions of this State are to the effect that statements from these books may not be presented as such in the arguments of counsel nor introduced by means of questions put on cross-examination, as by reading an opposing opinion from a text-book and asking the witness if it is or is not true, for this would have the effect of putting the statement in evidence and thus accomplish by indirection what is expressly forbidden. *Butler v. R. R.,* 130 N. C., 15;
(102) *Huffman v. Click,* 77 N. C., 55; *Melvin v. Easeley,* 46 N. C., 386; for, as said by *Bynum, J.,* in *Huffman's case:* "If this practice were allowed, many of our cases would soon come to be tried not on the sworn testimony of living witnesses, but upon publications not written under oath."

The principle, however, is not as exigent in case of cross-examination, and when a witness has testified as an expert, professing to have special training and knowledge from standard works of his profession, a general question of this kind may be allowed with a view of testing the value of his opinion. *Sale v. Eichberg,* 105 Tenn., 333; *Brodhead v. Wiltse,*

35 Iowa, 429; 17 Cyc., p. 273. It was suggested on the argument that there was error in the charge of the court, in effect, "That though J. C. Lynch did consent, if Ada Lynch, the intestate, did not, then her removal would be a wrongful act, and if the proximate cause of her death, the first issue should be answered 'Yes.'" But such an exception is not open to defendant on the record, the same not having been sufficiently stated in the brief, within the meaning of Rule No. 34, "That 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 exception No. 20 in the record is stated in connection with exception No. 19, and the only mention made of it or which has any relevancy to it is that the same "is relied upon for error," and must therefore be taken as abandoned.

While we find no cause for disturbing the verdict of the jury on the first issue, we must hold that there was error in the charge of the court on the second, that as to the amount of damages. On this issue his Honor, although correctly stating to the jury in general terms that they would award what is a fair and just compensation for the pecuniary injury, in giving more specific direction, instructed them that they would "take all the evidence and say about what her earnings would have been during the balance of her life, about how long you find she would have lived." In this charge we think his Honor failed to observe and note the rule established by our decisions for the admeasurement of the damages for this kind of injury, "That it is the *present net* value of the life which has been wrongfully taken." *Speight v. R. R.*, 161 N. C., pp. 80 and 86; *Ward v. R. R.*, 161 N. C., at page 186; *Mendenhall v. R. R.*, 123 N. C., pp. 275 and 278; *Pickett v. R. R.*, 117 N. C., 616.

In this connection we deem it not amiss to call attention to the case of *Bradley v. R. R.*, 122 N. C., 972, as to the incompetency of evidence touching the number and ages of the intestate's children.

For the error indicated, defendant is entitled to a new trial of the issue as to damages, and it is so ordered.

Partial new trial.

*Cited: Buchanan v. Lumber Co.*, 168 N.C. 48 (3c); *Tilghman v. R. R.*, 171 N.C. 657 (2c); *S. v. Summers*, 173 N.C. 780 (2c); *Raulf v. Light Co.*, 176 N.C. 694 (1c); *Marshall v. Telephone Co.*, 181 N.C. 295 (1d); *Stanley v. Lumber Co.*, 184 N.C. 307 (1d); *Shaw v. Handle Co.*, 188 N.C. 233 (1c); *Martin v. Hanes Co.*, 189 N.C. 646 (1c); *Hanes v. Utilities Co.*, 191 N.C. 20 (4c); *S. v. Carr*, 196 N.C. 132 (1d); *Conn v. R. R.*, 201 N.C. 160 (2c); *Dempster v. Fite*, 203 N.C. 707 (1c); *Keith v. Gregg*, 210 N.C. 807 (1c); *Spivey v. Newman*, 232 N.C. 284 (1c).

(103)
SOUTHERN EXPRESS COMPANY v. CITY OF HIGH POINT ET ALS.

(Filed 28 October, 1914.)

**1. Intoxicating Liquors—Carrying Into Prohibited Territory—Personal Use—Interstate Commerce—Webb-Kenyon Act—Interpretation of Statutes.**

Chapter 1014, Public Laws 1907, relating to the city of High Point and providing that it shall be unlawful for any person, etc., to sell or dispose of for gain, or keep for sale, within the township, any spirituous wines, intoxicating liquors, etc., and that any person, corporation, etc., bringing within these limits any liquors, the sale of which is prohibited by the act, shall be guilty of a misdemeanor and fined or imprisoned, etc., is a valid exercise of legislative power, extending its prohibition to the purposes of sale and not to its receipt of transportation and delivery for personal use; and the importation of such liquor for personal use being lawful under the statute, the Webb-Kenyon law has no application, where interstate shipments are involved.

**2. Intoxicating Liquors—Carrying Into Prohibited Territory—Criminal Law—Equity—Injunction.**

Where the transportation of intoxicating liquors into prohibited territory is declared a msidemeanor and made punishable by statute, except in certain instances, the carrier must exercise vigilance and sound discretion and take notice of the use to which it is intended to put the liquor; and equity will not undertake to determine upon injunction whether the shipments of liquor are intended for an illegal or legal purpose. Nor will our courts enjoin the enforcement of the criminal law, at the suit of the carrier, upon the ground that it is threatened with continuous indictments for transporting the liquor to the prohibited territory.

CLARK, C. J., concurs in result.

APPEAL by defendant from *Lane, J.*, heard at chambers in GUILFORD.

Motion for a restraining order. The motion was based upon the verified complaint of the plaintiff. His Honor held that upon the complaint, itself, the plaintiff was not entitled to a restraining order. The plaintiff excepted and appealed.

*Watson, Buxton & Watson, Stras & Williams, Winston & Biggs for plaintiff.*

*L. B. Williams for defendant.*

BROWN, J. The plaintiff seeks to enjoin the defendants from the enforcement of a statute of this State, chapter 1014, Public Laws 1907, which reads as follows: "That it shall be unlawful for any person, firm, or corporation to sell or dispose of for gain, or keep for sale within High Point Township, any spirituous wines, malt, or other intoxicating liquors; that any person, firm, or corporation bringing into High Point

Township, for delivery to any person, corporation, company, or firm, any liquors, the sale of which is prohibited by this act, shall be guilty of misdemeanor and fined or imprisoned at the discretion of the court."

The plaintiff alleges that the defendant municipal officers of (104) High Point threatened to procure warrants for indictments against the plaintiff, and to arrest it and its agents and subordinates each time they make a delivery of liquors, delivered to it from points without the State, to be transported in interstate commerce to the township of High Point. The plaintiff contends that the said act is null and void in so far as it undertakes to prevent the delivery of liquors in interstate commerce within the said territory.

There are two insuperable objections to the granting of an injunction:

1. The statute sought to be enjoined as to its enforcement is not void, but in our opinion is a valid exercise of legislative power. The power of a State to prohibit within its boundaries the manufacture and sale of intoxicating liquors has been unquestioned since the case of *Mugler v. Kansas,* 123 U. S., 623.

It is also true, as contended by the plaintiff, that the right of an individual to import liquor into a prohibition State for his own personal use is recognized and declared in *Vance v. Vanderhook,* 170 U. S., 468, wherein the Supreme Court of the United States says: "It follows that under the Constitution of the United States, every resident of South Carolina is free to receive for his own use liquor from other States, and that the inhibitions of a State statute do not operate to prevent liquors from other States from being shipped into such State, on the order of a resident, for his own use. But the right of persons in one State to ship liquor into another State to a resident for his own use is derived from the Constitution of the United States, and does not rest on the grant of the State law."

The same question is discussed and decided in *Adams Express Co. v. Kentucky,* 214 U. S., 218. These decisions were made prior to the Webb-Kenyon law, and what bearing that may have upon them it is not necessary for us to decide.

The High Point statute does not undertake to prohibit the plaintiff from bringing into High Point Township for delivery to any one packages of liquor intended for personal use and consumption, or for any other lawful purpose. The law only extends its pains and penalties to any person, firm, or corporation bringing into such territory and delivering liquor therein to be kept for sale. The law is directed solely at the importation of liquor for sale, and not at that imported for personal use, which, so far, has been held to be a lawful purpose.

It must be borne in mind that the General Assembly of North Carolina has not up to this time undertaken to prohibit introduction of liquor into

this State for individual consumption. Whether it can do so,
(105) under the Constitution of the United States and of this State, has never been decided by this Court, and is a question not presented by this appeal.

The furthest that the general State law has gone, as affecting an individual who imports liquor for his own use, is to make the possession of more than a certain quantity at one time *prima facie* evidence of a purpose to sell. It is not contended, so far as we know, by any one, where the State permits the importation of liquor for the individual consumption of its citizens, or for any other lawful purpose, that the Webb-Kenyon law has any effect.

The High Point statute, as we have said, prohibits the introduction of liquor by any carrier intended for an illegal purpose, and it is asked, "How can the carrier know or ascertain whether the liquor is intended for sale, or for personal consumption?" That is a question we are not called upon to answer. As pointed out by the Supreme Court of Kentucky, the carrier must exercise vigilance and sound discretion and take notice of the use to which it is intended to put the liquor. *Adams Express Co. v. Kentucky,* 157 S. W., 908.

2. In any prosecution of an indictment under this act it is a valid defense that the liquor was intended for a lawful purpose, and therefore the courts will not undertake to determine upon injunction proceedings whether shipments of liquor are intended for an illegal or a legal purpose. We admit, as contended by the plaintiff, that the Supreme Court of the United States has departed sometimes from the doctrine enunciated in *Fitts v. McGee,* 172 U. S., 516, and that injunctions have been issued by the Federal courts prohibiting the enforcement of State statutes where such excessive penalties and punishments are imposed upon common carriers, and their officers, that they are deterred from testing the validity of such statutes in the State courts upon criminal proceedings. This subject is fully discussed in *Ex parte Young,* 209 U. S., 124, by *Mr. Justice Peckham,* and in an elaborate dissenting opinion by *Mr. Justice Harlan.* In that and subsequent cases the Court proceeded on the theory that the legislation was so drastic that the corporation and its officers were intimidated from testing it in the usual manner by the severity of the punishment imposed.

Even if we were inclined to depart from our own well settled precedents, no such case is made out by the complaint in this case, and as we have before remarked, it would be utterly impracticable to determine, by injunction proceedings, the legality of such shipments of liquor. The courts of this State will not undertake by injunction to enjoin the enforcement of the criminal law. The party charged with crime must make his defense and plead to the indictment, and if convicted, he may, by

appeal, bring his case before this Court. This must be especially true as to the statute, which we declare to be valid. *S. v. R. R.*, (106) 145 N. C., 516; *Paul v. Washington*, 134 N. C., 380.

Upon a consideration of this appeal, we are of opinion (1) that the High Point act is a valid exercise of legislative power, and does not prohibit the bringing of liquor into High Point for a lawful use; (2) that upon the facts presented in the record, the injunction was properly refused.

CLARK, C. J., concurring in result: I concur that an injunction does not lie to restrain the State against executing its criminal laws. The defendant has a full remedy by raising any objection to the validity of the law upon the trial of the indictment for the criminal offense. Equity never interferes, especially by injunction, when there is a full remedy at law. Further, it is settled beyond controversy that the State has the power to prohibit within its boundaries the manufacture and sale of intoxicating liquors, and that under the Webb-Kenyon law it has the same police power in regard to intoxicating liquors imported from another State as if manufactured here.

I do not concur, however, in the construction of chapter 1014, Laws 1907. That chapter (sec. 1) makes it "unlawful for any person, firm, or corporation to sell or dispose of for gain, or keep for sale, within High Point Township, any spiritous wines, malt, or other intoxicating liquors." A separate paragraph (sec. 5) makes it a misdemeanor for "any person, firm, or corporation to bring into High Point Township for delivery to any person, corporation, company, or firm any liquors the sale of which is prohibited by this act." The liquors the "sale of which is prohibited by this act" are "any spiritous wines, malt, or other intoxicating liquors." There is in this no intimation that such liquors, if to be used by the receiver for his own purposes, are permitted to be brought in. There is no discrimination in this act permitting the bringing in of liquors by reason of the use to which the liquors are to be applied.

There is nothing in the State or Federal constitutions which prohibits the people of North Carolina, speaking through their Legislature, to prohibit the manufacture of intoxicating liquors even solely for one's own use. This is held in *Mugler v. Kansas*, 123 U. S., 623. It follows that the Legislature can equally prohibit the importation of such liquors by any person for his own use, and *a fortiori* it can forbid a common carrier to bring in or import such liquors, irrespective of whether it is for the consignee's own use or not.

It was once contended that liquor was a necessity for medical purposes. But it has never been held to be such as a matter of law, and as a matter of fact it is public knowledge that the State Medical Society, com-

(107) prising a large number of the ablest medical practitioners of this State, at their recent State Convention in Raleigh, held, by a unanimous vote, that intoxicating liquors were not necessary for use in illness or for other medical purpose. Besides, there is no evidence in this case that these liquors are imported for the consignee's own use or for medical purposes. Even conceding that they were, the public policy of the State is determined by its people, speaking through their Legislature, and not by the courts. Those who would like for liquors to be either manufactured or imported by a consignee, if for his own use, should apply to the Legislature and not to the courts.

If the law can prohibit a man from bringing liquor into the State by manufacturing it, solely for his own use, it can prohibit him from importing it from another State solely for his own use, and prohibit the common carrier from bringing it. If the law can forbid a barkeeper from selling half a gill of whiskey, it can forbid the purchaser from buying that half a gill. If the law can prohibit, as we have held, any one to have on hand more than a gallon of whiskey at a time, it can forbid him from having any at all. These are matters of public policy which must be determined by the Legislature and which the courts cannot meddle with.

It was formerly held that the State police powers do not attach to intoxicating liquors brought in from another State until after delivery to the consignee. But the Webb-Kenyon law, ratified 1 March, 1913, 37 U. S. Statutes, 699, has taken intoxicating liquors out of the domain of interstate commerce when shipped into a Prohibition State. In *U. S. v. R. & N. Co.*, 210 Fed., 318, *Bean, United States District Judge,* held that the Idaho statute of 1909, page 9, which forbade the shipment of liquor, even when the liquor is intended for the personal use of the consignee, "is not unconstitutional, but was a valid exercise of the police powers of the State." He quoted that the Webb-Kenyon act prohibits "the shipment or transportation of intoxicating liquors of any kind, in any manner, or by any means whatever, from one State into another, which 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," and further held that the Idaho statute being "broad enough to make unlawful all intrastate shipments of intoxicating liquors, although intended for the personal use of the consignee," that since the passage of the Webb-Kenyon law it is unlawful for any common carrier to carry liquors into Idaho, even though they are for the personal use of the consignee. The same ruling has been made by the Delaware Supreme Court, *S. v. R. R.*, 88 Atl., 571, which is cited by *Judge Bean.*

In the Delaware case *Chief Justice Pennewill* refused to follow (108) the only case on the other side of this question in which the Kentucky Court of Appeals, in *Express Co. v. Kentucky,* 157 S. W., 908, held that the express company was not guilty in carrying from Tennessee into local option territory in Kentucky liquors which "were intended by said consignees respectively for their personal use and were so used by them, and were not intended by them to be sold contrary to law, and were not so sold by them." The *Chief Justice* says: "We think the person to whom the liquor is given for transportation and delivery is interested therein within the meaning of the Federal law, and that if he intends when he receives, or has in his possession, the liquor to carry it from a point in one State to local-option territory in another State, into which the carrying is unlawful, the transaction is not protected by the commerce laws of the Federal Constitution and is prohibited by the Webb-Kenyon law, it being a violation of the law of the State into which the liquor is carried. And it may also be said that if such person carries or delivers the liquor into a local-option territory where such carrying or delivery is unlawful, it is used by him 'in violation of the law' of this State within the meaning of the Federal statute. If this conclusion is not correct, then the Webb-Kenyon law furnishes no remedy at all for the evils it was designed to cure." He further adds: "If no one is interested in an interstate shipment of liquor, within the meaning of the Federal statute, except the consignee or a consignor who ships it for the purpose of sale, then, in effect, the Webb-Kenyon act is but a reënactment of this law passed by Congress in 1890, and nothing has been accomplished by the later act, because, in order to show that it applies in any case, it would be necessary, as already said, to prove a sale of the liquor by the consignor or consignee upon or after delivery at destination. How, otherwise, would it be possible to establish the fact that the liquor was intended by the consignor or consignee to be received, possessed, or used in violation of the State law? The mere possession is not unlawful, and if transportation is not contemplated by the Webb-Kenyon act, nothing but a sale would prove an intention to violate such law. It may be argued that it is only necessary to prove that it was the intention of the consignor or consignee to sell the liquor, to bring the shipment within the provisions of the act; but, practically, how can the purpose of the intention be shown without proving the consummated act—the sale?"

The same view of the Webb-Kenyon law is taken by the Supreme Court of Iowa in *S. v. Express Co.,* 145 N. W., 451, in which are cited many other instances in which Congress has withdrawn articles from the protection of interstate commerce or forbidden interstate shipments, as the act of 1803, while Jefferson was President, forbidding the transportation of free negroes from one State into any other in (109)

which they were forbidden to reside. 2 U. S. Statutes, 205; the White Slave Act, *Hoke v. U. S.*, 227 U. S., 308; the Lacy Act forbidding transportation in interstate commerce of game killed in violation of State law, U. S. Criminal Code, sec. 242; the Wilson Act which, even as construed, prohibited interstate shipment of liquors in the original package, and others. To these may be added the prohibition of interstate carriage of lottery tickets, 188 U. S., 358, and *Plumley v. Mass.*, 155 U. S., 474, sustaining the prohibition of the sale of oleomargarine not colored yellow, although it had been brought in from another State. These latter two cases are cited in the Delaware case above quoted. Another late case sustaining the same view of the Webb-Kenyon law and its constitutionality is *S. v. Doe*, 139 Pac., 1169, rendered by the Supreme Court of Kansas.

*Whether it shall be unlawful for a barkeeper to sell a drink to a man for his own use, or for a common carrier to bring him a larger quantity for the same use, are equally matters for the Legislature alone to determine.*

The Legislature might in this act have excepted liquors "brought in for medicinal, scientific, and mechanical purposes, or for personal use of the consignee." But it did not see fit to do so. These are not, therefore, valid defenses, and the common carrier bringing liquor into High Point for any purpose is, in the language of the Webb-Kenyon law, "possessed" of such package to be delivered "in violation of the law of this State."

*Cited: S. v. Davis*, 168 N.C. 146 (c); *S. v. Express Co.*, 168 N.C. 208 (cc); *S. v. Express Co.*, 173 N.C. 755 (d); *McCormick v. Proctor*, 217 N.C. 27 (2c).

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KINSTON MANUFACTURING COMPANY v. J. B. THOMAS.

(Filed 28 October, 1914.)

**Deeds and Conveyances—Timber Deeds—Growth Within the Term—Present Interest—Equity—Injunction.**

A deed to timber growing upon lands "of and above 10 inches at the base when cut, now standing or growing, or which may be during the time allowed for cutting," with certain restrictions upon the grantors that no tree or timber shall be sold or carried off of the land by them which may attain the size specified during the term, conveys a present interest to the grantees in the trees of that size at the time of the conveyance, and of the smaller trees which may attain that size during the period for cutting, etc., and entitles them to equitable relief by injunction against the owners of the land who are attempting to cut and carry away timber under the size stipulated, at the time, but which will attain it within the time prescribed, according to competent evidence.

APPEAL by defendants from restraining order rendered by (110) *Whedbee, J.*, at chambers, in DUPLIN, 3 February, 1914.

This is an action to enjoin defendant from further cutting and removing timber trees which were under the size conveyed, and which, though not over the size at the time of cutting, would become of size during the term given. There are two timber deeds involved under which plaintiff holds, one executed by defendant to Ellington & Guy Timber Company and another executed by William Mercer to Enterprise Lumber Company, the land in which, subject to the timber deed, having been conveyed to defendant.

The material clauses in the Ellington & Guy deed are as follows: "Said parties of the first part have given, granted, bargained, sold, conveyed all the merchantable timber of every description, of and above the size of 10 inches in diameter at the base when cut, now standing or growing or which may be during the ensuing term of ten years, lying, standing, or growing upon the tract of land hereinafter described."

In the clause reserving the right to cut necessary rail timber and firewood, the following is added: "But no trees or timber shall be sold or carried off of said land which may attain to the size mentioned herein before the expiration of the time agreed upon for removal, ten years." The following is the last clause in this deed: "Parties of the second part may cut such of the trees and timber on said land under the size herein conveyed, for the purpose of building tramways and railroads across the said land, and for equipping and operating and running said railroad and locomotives, and also for the purpose of rafting and removing said timber."

In the Enterprise Lumber Company deed the material parts are as follows: "All timber of every description of and above the size of 10 inches in diameter and upwards at the base when cut. The grantors reserve necessary rail timber and firewood," and granted a term of ten years extension, also the right to use such trees, undergrowth, "as may be necessary in the construction, use, operation, and repairing of any road, tramroad, house, or other improvements."

The court found as a fact, among other findings: "That the defendant had cut some trees and merchantable timber under the size of 10 inches in diameter at the base when cut from said lands mentioned in said deeds attached to the complaint, but which trees would within the term mentioned in the said deeds become 10 inches at the base, and that the defendant was continuing to so cut such trees and merchantable timber from said lands until the temporary restraining order issued herein."

The judgment of the court upon this finding was: "That the defendant be restrained from cutting, removing, or in any wise disposing of any merchantable timber or trees on the tracts of land de- (111)

scribed in the complaint herein which now measure 10 inches in diameter at the base or which will measure such within the time or times mentioned and set out in the deeds herein mentioned as the term or terms within which the plaintiff is granted the right to cut and remove such merchantable timber from said lands, with certain provisos as to firewood and rail timber."

To the foregoing parts of the said judgment the defendant duly excepted and appealed.

*G. V. Cowper for plaintiff.*
*Stevens & Beasley for defendant.*

ALLEN, J. The learned counsel for defendant contend that no interest which a court of equity will protect by injunction vested in the plaintiff to the timber under 10 inches, but which might attain that growth within the time limited for cutting.

The question is foreclosed by the decision in *Veneer Co. v. Ange,* 165 N. C., 54, in which *Associate Justice Walker,* speaking for the Court, says in reference to deeds like those before us: "The defendants conveyed to the plaintiff, not only the trees which at the date of the deeds had reached a certain diametric size, but also those which could at any time during the fixed period grow to that size. Discarding irrelevant words, the language is, 'all that growth which is now (of the prescribed diameter) or which at any time within the period of ten years from this date may reach the size of 12 inches on the stump or upwards, when cut, the cutting to be 18 inches above the ground.' They not merely conveyed trees found to be of a certain size at the time of cutting them, but presently passed all that would attain to that size during the time allowed for cutting and removing the same. It was said by *Justice Avery,* for the Court, in *Warren v. Short,* 119 N. C., 39, that 'A deed might be so drawn as to pass all trees that would attain to the size mentioned within a reasonable time fixed by the deed,' and these deeds were presumably framed in accordance with that suggestion.

"It may not be necessary to decide, for the purpose of this appeal and at this time, whether the estate in those trees which would, in the course of natural growth, reach the required diameter, vested absolutely at the date of the deeds, as much so as it did in those which were then of that dimension, it being susceptible of proof that trees of a certain age now will be of the required size before the expiration of the period allowed for cutting and removing the timber; for if the plaintiff has merely a contingent right or interest in the trees, which, by the natural growth of the trees, will ripen into a vested one, we should still protect it by restraining any act of defendant committed or threatened in derogation of that

right or interest. But this is not even a contingent right, as (112) we gather from the findings. It can be determined with reasonable certainty, as we have said, that a tree will within a given period grow to a certain size, measured diametrically, and therefore it cannot well be doubted that the parties intended, at the date of the deeds, that plaintiff should have a present estate, not only in the trees which were then 12 inches in diameter, but in those which should thereafter grow to that size within the stated period. The estate vested in both kinds of trees at the date of the deed, but the enjoyment of it, as to the latter class, or the right to cut the trees of that class, was posponed until they had attained to the regular size."

Affirmed.

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ANNIE M. NOBLE AND MILLS H. HODGES v. JOHN WILLIAMS.

(Filed 21 October, 1914.)

**Descent and Distribution—Whole Blood—Rules of Descent.**

Rule IV and VI of Descents are construed together; and thereunder a collateral relation of the owner of lands, in order to inherit them, must be of the blood of the ancestor from whom the lands originally descended.

APPEAL by defendant from *O. H. Allen, J.*, at chambers in ONSLOW, 23 September, 1914.

Suit for partition in Onslow County. The land in question descended to James L. Mills from his father, Lot Mills. James L. Mills died leaving him surviving a sister of the full blood, Annie M. Noble, and Mills H. Hodges, only child and heir at law of another sister of the full blood, both sisters being children of Lot Mills, deceased. The suit was against John Williams, half-brother of James L. Mills, he being a child of James Mills' mother by a second husband, Mr. Williams. The petition alleged that plaintiffs were heirs at law of James L. Mills, each entitled to half interest in the land; that John Williams was made defendant because he claimed one-third of the land as one of the heirs at law of James L. Mills. Said defendant answered, asserting his ownership of such interest.

The court being of opinion that plaintiffs were the owners, each entitled to one undivided half of the land, so entered judgment, and defendant excepted and appealed.

*J. O. Carr for plaintiffs.*

*Frank Thompson for defendant.*

(113) HOKE, J. The relevant facts and correct legal conclusion therefrom are very well stated in his Honor's judgment, as follows: "It appearing to the court that the petitioners, Annie M. Noble and Mills H. Hodges, claim an undivided one-half interest each in the lands described in the petition as the only heirs of James L. Mills, deceased, and that the said John Williams claims a one-third undivided interest with Annie M. Noble and Mills H. Hodges in said land on the ground that he is a half-brother of the deceased, James L. Mills, and as such half-brother inherits an equal interest with the said Annie M. Noble and Mills H. Hodges; and it further appearing to the court from the admissions in the pleadings that the land described was the land of Lot Mills, deceased, who was the ancestor of Annie M. Noble and Mills H. Hodges, and of the same blood, but who was of no blood relation to the defendant, John Williams, who was a son of the wife of Lot Mills by a second husband; and the court being of the opinion that when Rule IV and Rule VI of Descents are construed together, the said inheritance descends to the next collateral relation, capable of inheriting, of the person last seized, who were of the blood of such ancestor, and that the defendant John Williams was not of the blood of the said ancestor, Lot Mills, from whom the land descended, and that the said John L. Williams has no interest in the said land: It is, therefore, ordered and adjudged that the said Annie M. Noble and Mills H. Hodges are tenants in common of a one-half undivided interest each in the said premises described in the said petition, and that the said John L. Williams has no interest in the same."

The position is in accord with numerous decisions of our Court to the effect that, in order for a collateral relation of the half blood to inherit under Rule IV of our Canons of Descent, he must be of the blood of the purchasing ancestor from whom the lands descend. *Poisson v. Pettaway,* 159 N. C., 650; *Little v. Buie,* 58 N. C., 10; *McMichael v. Moore,* 56 N. C., 471.

There is no error, and the judgment of the Superior Court is

Affirmed.

*Cited: Forbes v. Savage,* 173 N.C. 707 (cc); *Dixon v. Pender,* 188 N.C. 794 (c); *Peel v. Corey,* 196 N.C. 84 (d); *Ex Parte Barefoot,* 201 N.C. 396 (c).

(114)

COUNTY BOARD OF EDUCATION v. THE COUNTY OF WAKE AND THE COMMISSIONERS OF WAKE COUNTY.

(Filed 28 October, 1914.)

**1. Counties—Taxation—Schools—Tax List—County Expenses—Interpretation of Statutes.**

In an action involving the question of whether the school funds of Wake County should be charged with its proportionate expense of preparing and computing the tax lists of the county, it is held that Revisal, sec. 4111, providing, among other things, that the sheriff shall annually pay to the treasurer of the county school fund the whole amount for school purposes, less his lawful commissions, should be construed with section 83, Machinery Act of 1913, providing the compensation for making out the tax lists, and that it shall be paid by the county treasurer out of the county funds; and with Revisal, sec. 4110, that the school tax should be kept in separate columns; and with Revisal, sec. 4154, that, except in certain instances, the money coming into the hands of the treasurer of the school board shall not be paid out by him except upon the order of the county board of education; the various statutes relating to the same subject and being *in pari materia;* and when so construed, the treasurer of the board of education and of the county of Wake are held to be distinctive offices, though held by the same person, and the taxes set apart for the school fund are not chargeable with the expense of making out the tax lists.

**2. Counties—Taxation—School Funds—Mandamus—Alternate Writ.**

In this action of mandamus to compel the county and its commissioners to pay over to the treasurer of the school fund money they had unlawfully retained for preparing and computing the tax list of the county, the judgment appealed from by the commissioners is affirmed, with the modification that an alternate writ issue before a peremptory writ be applied for.

APPEAL by defendant from *Bond, J.*, at July Term, 1914, of WAKE.

This is an action to compel the defendants to pay certain amounts deducted from the school taxes to pay a part of the expense of making out the tax lists.

The substance of the plaintiff's complaint is: That no part of the cost of preparing the tax lists and computing the same is chargeable to any of the several school funds of the county, general or special; that the action of the board of county commissioners in charging against the several school funds of the county their pro rata of the cost of preparing and computing the tax lists for the years 1907, 1908, 1909, 1910, 1911, and 1912, inclusive, in the settlement of the county taxes, was illegal; that the sums so withheld from the several school funds for said years total $10,673.42; that judgment is demanded by plaintiff against the defendants, ordering them to place to the credit of the several school funds the said sum out of the "general county fund," and the cost of this action.

(115) The county commissioners admit the sum of $10,673.42 so applied and withheld from the settlement of the school taxes for the years 1907 to 1912, inclusive, to be correct, but deny that the same was illegally or wrongfully withheld.

The school board relies upon and bases its claim on section 4111 of the Revisal, which directs the sheriff, in his settlement of the school taxes, as follows: "The sheriff of each county shall pay annually in money to the treasurer of the county school fund, on or before the 31st day of December of each year, the whole amount for school purposes collected by both State and county, less his lawful commissions for collecting the same, and such sum as may be allowed on account of insolvents for the current year," etc.

The defendant relies on section 83 of the Machinery Act, which provides that, "The board of county commissioners shall cause the register of deeds to make out two copies of the tax list for each township as revised and settled by the tax listers, according to a form to be furnished to them by the State Tax Commission. But the sum allowed for computing and making out the tax list shall not exceed five (5) cents for each name appearing on the tax list, to be paid by the county treasurer out of the county funds."

No question is presented in this Court as to parties or as to procedure. The attorney for appellant in his brief admits that the question here presented on the first and second exceptions is simply whether or not the school funds are to be included in the denomination of "county taxes" as used in section 83 of the Machinery Act.

There was a judgment for the plaintiff, and the defendants excepted and appealed.

*Percy J. Olive and Little & Barwick for plaintiff.*

*B. C. Beckwith for defendants.*

ALLEN, J. The board of commissioners of the county of Wake is required by the act furnishing the machinery for the listing and collection of taxes to cause two copies of the tax lists for each township to be made out, and provision is made in the act that the compensation allowed by the commissioners for the service "shall not exceed 5 cents for each name appearing on the tax lists, to be paid by the county treasurer out of the county funds."

It is upon the use of the words "county funds" instead of "county fund," and because of the construction placed on the term "county taxes" in *Board of Education v. Comrs.*, 137 N. C., 63, that the defendant rests its contention that it has the right to charge against the school taxes a proportionate part of the expense of making out the tax lists.

The position, dependent upon the language used, would have (116) more force if here was not more than one tax levied, collected, and used in the county of Wake, exclusive of school taxes, which are levied by the State, and it gives no significance to the words "paid by the county treasurer."

The county treasurer is also treasurer of the county school fund, which he is required to keep separate and distinct from all other funds, and he executes a separate bond to secure the faithful performance of his duties as treasurer of the school fund. Rev., sec. 4152.

The register of deeds must furnish to the county board of education an abstract of the tax lists as soon as they are made out, showing the school taxes in separate columns (Rev., sec. 4110). The sheriff is required to pay to the *treasurer of the school fund the whole amount for school purposes, less his lawful commissions for collecting* (Rev., sec. 4111), and the treasurer of the school fund cannot pay out any of the money coming into his hands as such except upon the order of the county board of education and in certain cases upon the order of two committeemen of a school district approved by the county superintendent. Rev., sec. 4154 *et seq.*

These statutes and the Machinery Act, all relating to the same subject-matter, must be construed together and harmonized if possible, so that some significance may be given to each and every part. (*Cecil v. High Point,* 165 N. C., 431), and when so considered it is clear that the treasurer is designated as "treasurer of the school fund" when his duties in reference to the school taxes are involved, and as "county treasurer" when reference is made to the other taxes going into his hands.

The school taxes never reach the county treasurer, as the sheriff must pay the *whole* of them directly to the treasurer of the school fund (Rev., sec. 4111), and no authority is conferred upon the commissioners to make any order which could be paid out of the school fund.

It follows, therefore, that an order "to be paid by the county treasurer out of the county funds" gives no authority to direct any part of the taxes collected for schools.

The tax for schools is a State tax, and it was not intended that they should contribute to the ordinary expenses of the county.

In *Parker v. Comrs.,* 104 N. C., 169, deciding the question as to whether license taxes imposed upon liquor dealers by Revenue Act of 1879, and directed to be paid to the treasurer of the county board of education for the benefit of the public schools in the county in which they were collected, were State or county taxes, the Court says: "That tax thus levied and collected for school purposes is not, in any proper sense, a county tax; it is levied by the State and State authorities as a part of the school fund of the State, and is paid to the treasurer of (117) the county board of education for convenience sake and to facili-

tate its distribution. The county authorities, as such, do not control and use or distribute it as county revenue"; and again, in *Board of Education v. Comrs.*, 113 N. C., 389: "But it would seem that all of the money collected for educational purposes should have been paid over by the sheriff to the county treasurer in his capacity as treasurer of the board of education, and held by him, subject to the orders of said board. . . . *The defendant board (commissioners), as such, had no power* over that fund, unless it was its duty to prosecute a suit to compel its payment to him as a part of the county school fund, and the treasurer was not bound to transfer it on the order of the county commissioners to the fund held by the county for general purposes."

The case of *Board of Education v. Comrs.*, 137 N. C., 63, relied on by the defendant, furnishes an argument in behalf of its contention; but *different statutes were involved, and the decision rests upon a principle* in harmony with our conclusion.

That case held that because of the onerous duties imposed upon the sheriff, and the penalties and forfeitures to which he was subjected by section 4111 of the Revisal, which did not provide at that time any remuneration to the sheriff for his collection of the school taxes and for his responsibility in regard thereto, it was to be presumed that the Legislature *did not intend to impose these duties and burdens upon the sheriff* without compensation, and the Court construed as *in pari materia* section 723 of The Code, which allowed to the sheriff the same commissions on county taxes as allowed to him on State taxes. The Court said: "We are of the opinion that, so far as this action is concerned, the words 'county taxes' include all amounts levied by taxation, and which are to be used in the counties where they are collected and where they are paid to the county treasurer"; *and further:* "We are not inadvertent to the fact that all taxes levied for school purposes are known as State taxes, because they are assessed and levied by the counties by the direct mandate of the General Assembly and the rate of taxation fixed by that body."

In other words, it was decided, as the sheriff was required to collect the school taxes, it was presumed that it was not the intention of the General Assembly that he should receive no compensation for the service; that the school tax was a State tax, and as no commissions were allowed the sheriff in the school law, that he was entitled to be paid under section 723 of The Code (1883), providing that he should receive the same commissions on county and State taxes.

We find no error except in the form of the judgment.

An alternative writ of mandamus should issue before the peremptory writ is applied for. 26 Cyc., 487.

Modified and affirmed.

(118)

## NORFOLK SOUTHERN RAILROAD COMPANY v. THE TOWN OF MOREHEAD CITY.

(Filed 28 October, 1914.)

**1. Cities and Towns—Ordinances—Railroads—Rights of Way—Streets—Obstructions—Equity—Injunction.**

The enforcement of an ordinance making it unlawful and a misdemeanor to maintain any telegraph line at any point upon any of its streets more than 24 inches beyond or outside of the curb line separating the sidewalk from the driveway of the street, providing that the same may be removed under the direction and control of the mayor at the cost of the corporation, etc., maintaining them, and also providing a fine of $50 for a conviction of violating the ordinance, will not be enjoined at the suit of a railroad company upon whose right of way the town has grown up since its acquisition, it appearing that the right of way has since become a part of a principal street of the town, and the telegraph poles thereon are within the driveway of the street; that the placing as required by the ordinance can be made at a comparatively small expense, and the business of the company will not be seriously interfered with by making the change. *R. R. v. Goldsboro*, 155 N. C., 356, and that line of cases, cited and applied; *Muse v. R. R.*, 149 N. C., 443, cited and distinguished.

**2. Criminal Law—Injunction—Cities and Towns—Railroads.**

The courts will not interfere by injunction with the enforcement of the criminal laws of the State, except in very restricted instances, and such relief is not available where a municipality, in the reasonable exercise of power conferred upon it for the public good, has enacted a valid ordinance relating to the placing of poles upon its streets, which does not unduly interfere with the plaintiff's rights or obstruct it in the performance of its duties as a *quasi*-public corporation.

APPEAL by plaintiff from *Daniels, J.*, at June Term, 1914, of CARTERET.

Civil action to restrain the enforcement of a municipal ordinance, heard on demurrer to complaint.

The ordinance in question and the general facts more directly relevant as to its physical effects upon plaintiff's property are stated in the complaint as follows: "That on or about 1 July, 1912, the commissioners of the town of Morehead City attempted to adopt an ordinance of and concerning this plaintiff's line of poles and wires, reading as follows: 'It shall be unlawful for any person, firm, or corporation to erect or maintain any telegraph, electric light, or telephone pole at any point upon any of the streets of this city more than 24 inches beyond or outside the curb line separating the sidewalk from the driveways of said streets. Any person, firm, or corporation violating this ordinance shall be guilty of a misdemeanor, and upon conviction shall be fined $50, and each additional day during which said poles are allowed to re- (119)

main outside the limits above specified shall constitute a separate offense. All poles standing in violation of the provisions hereof shall be removed under the direction and control of the mayor, and the actual cost and expense of such removal shall be charged to and collected from the owner of such poles, and the mayor, in the name of the city, is authorized and empowered to sue for and collect the same.' That in the attempt to enforce said ordinance the commissioners of the town of Morehead City and the town of Morehead City have undertaken and attempted to construe the same to apply to the line of poles and wires erected upon the strip of land used by this plaintiff as its right of way, and which was owned by the Atlantic and North Carolina Railroad Company, and under lease to this company, which said line of poles and wires were erected by the said Atlantic and North Carolina Railroad Company, and has been used and maintained by this company as a necessary part of the conduct of said business of operating its said railroad, and the said commissioners and said town of Morehead City have threatened and are now threatening and attempting so to construe said ordinance as to require this plaintiff to remove its said line of telegraph poles and telegraph wires and telephone wires in and upon said strip of land aforesaid, and to deprive this plaintiff of its rights to use the same in accordance with its contract with the State of North Carolina, as aforesaid, and in violation of its legal rights."

There was judgment denying relief, and plaintiff excepted and appealed.

*L. I. Moore for plaintiff.*
*Guion & Guion for defendant.*

HOKE, J. From a perusal of the complaint and admissions made on the argument, it appears that plaintiff is the owner and in the present enjoyment of the franchise and property rights and privileges of the Atlantic and North Carolina Railroad Company, and, in 1855 or about that time, said road was constructed through the locality now known as Morehead City, having a right of way of 100 feet on each side of its line; that shortly thereafter the defendant town was built up along the railroad and on the territory adjacent thereto and the street known as Arendell Street became and was the principal public thoroughfare of the town, running for a mile and more up and down the road, covering the right of way on either side, which was the driveway for vehicles and in addition thereto were the sidewalks, beginning at the curb on the outer edge of the right of way and extending the usual width further out; that the practical effect of the ordinance, if enforced, will be to require plaintiff to remove the poles used for its telegraph system from their pres-

ent position in the driveway to a point within 24 inches of the (120) curb along the sidewalk, and which would still leave them on the right of way.

Upon these, the facts chiefly relevant, we are of opinion that no cause of action is presented in the complaint, and that the same has been properly dismissed. We have held in several recent cases, notably in *R. R. v. Goldsboro,* 155 N. C., 356, and *State and Morehead City v. R. R.,* that where a railroad right of way has become an established street of a city or town, the same is subject to municipal regulations made in the reasonable exercise of the police power for the public benefit; and the same position has been stated with approval by the Supreme Court of the United States in *Cincinnati, etc., Ry. v. City of Connersville,* 211 U. S., 336, and other cases of like import.

In *Goldsboro v. R. R., supra,* it was held, among other things: "A railroad company accepts a charter from the State in contemplation of and subject to the development of the country, and with the expectation that cities and towns would require new or improved streets across rights of way acquired, and, therefore, by prior occupancy a railroad company can obtain no rights which would impede or render dangerous streets of incorporated towns to whom the power had been granted, in the exercise of their police power for the benefit of the citizens"; and in *State and Morehead City v. R. R., Associate Justice Brown,* delivering the opinion, said: "When the defendant accepted the charter from the State, it did so on the condition necessarily implied that it would conform at its own expense to all reasonable and authorized regulations of the town as to the use of the streets and thoroughfares rendered necessary by its growth for the safety of the people and the promotion of the public convenience." And to like effect in *R. R. v. Connersville, supra,* it was said by *Associate Justice Harlan:* "The railway company accepted its franchise from the State, subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets which had for their object the safety of the public or the promotion of the public convenience, and which might from time to time be established by the municipality—when proceeding under legislative authority—within whose limits the company's business was conducted. This Court has said that 'The power, whether called police, governmental, or legislative, exists in each State, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good.' *Lake Shore, etc., Co. v. Ohio,* 173 U. S., 285, 297."

(121) From the facts in evidence it appears that the ordinance in question is evidently designed to remove an undesirable obstruction from the main part of the driveway; that it can be observed and its provisions carried out at moderate expense; that it in no way hinders or seriously impairs the use and control of these poles still left on plaintiff's right of way, in the proper and efficient performance of the duties incumbent upon the company by its charter and, under the authorities cited, we must hold it to be a valid and reasonable exercise of power conferred upon the town for the public benefit.

In the cases chiefly relied upon by the plaintiff, *Muse v. R. R.,* 149 N. C., 443, and *R. R. v. Olive,* 142 N. C., 257, the power of a municipality to enact ordinances of this character was in no way involved, the cases only presenting the rights of the company over its right of way as against a private citizen or the landowner who had been allowed to subject the land to its ordinary uses until it was required by the company for railroad purposes in the proper management of its business, a view that was taken of these same cases by the Supreme Court of the United States when it affirmed the case of *R. R. v. Goldsboro,* on writ of error. *R. R. v. Goldsboro,* 232 U. S., 548.

We are not inadvertent to the suggestion arising on the record that this may be an unwarranted attempt to stay by injunction the enforcement of the criminal law of the State. It is undoubtedly the general rule in this jurisdiction that such a proceeding will not lie. *R. R. v. Goldsboro, supra; Crawford v. Marion,* 154 N. C., 74; *S. v. R. R.,* 145 N. C., 495; and while the Federal courts seem to have modified the principle in certain causes coming within their jurisdiction, the exceptions established by these cases are in very restricted instances (*Ex parte Young,* 209 U. S., 124), and none of them would uphold such a process on the facts existent here, where a municipality, in the reasonable exercise of the powers conferred upon it for the public good, has enacted a valid ordinance which does not unduly interfere with plaintiff's rights or obstruct it in the performance of its duties.

There is no error, and the judgment dismissing the action is

Affirmed.

*Cited: Weeks v. Telephone Co.,* 168 N.C. 471 (1c); *Jarrell v. Snow,* 225 N.C. 432 (2c).

(122)

H. P. SPEED AND S. T. ALSTON v. WILLIAM PERRY AND J. D. HILL.

(Filed 21 October, 1914.)

**1. Deeds and Conveyances—Description—Identification—Parol Evidence.**

A description of lands in a deed being "a certain tract of land in Franklin County, State of North Carolina, adjoining the lands of P. A. D., known as the J. A. Place," is sufficient to admit of parol evidence of identification.

**2. Trials—Evidence—Nonsuit—Court—Expression of Opinion—Interpretation of Statutes.**

In an action by executors of the grantor to set aside a deed made by him to a former hireling, whose services have been of value to him, and in which said services were recited as the consideration, the grounds for the attack upon the conveyance being that it was obtained by fraud, deceit, and undue influence, and that the grantor did not have sufficient mental capacity to execute it, and also the insufficiency of the description to admit of parol evidence of identification, the judge said, in the presence of the jury, that he would not permit a landlord to acknowledge in his deed that he had received services from a negro tenant, as its consideration, and avoid the deed for vagueness of description, without permitting the tenant to show that he had rendered the services, etc., for which he has not been paid. *Held*, such remarks are, in their tendency and probable effect, an expression of opinion by the judge forbidden by the statute. Revisal, sec. 535, which is explained and discussed by WALKER, J.

**3. Executors and Administrators—Lands—Rules of Descent—Heirs at Law—Parties—Actions.**

The undevised land of a testator immediately descend, at his death, to his heirs at law, and his executors cannot maintain an action to set aside a deed for it, in the absence of some power in the will authorizing him to do so, or when there are no debts for the payment of which the lands may be sold. An executor may sell land conveyed by his testator when the deed is fraudulent or otherwise void, as against creditors, under the statute. Revisal, sec. 72.

CLARK, C. J., did not sit.

APPEAL by plaintiff from *Cooke, J.*, at November Term, 1914, of FRANKLIN.

This action was brought to set aside the deeds, hereinafter mentioned, one by Plummer A. Davis to Billy Perry, for the land described therein, dated 6 February, 1912; a mortgage of the same land, dated 20 August, 1912, by Billy Perry to J. D. Hill, to secure an alleged indebtedness of $50, and a deed from Billy Perry to J. D. Hill for the same land, dated 13 September, 1912, for the recited consideration of $225. The grounds upon which this relief was asked are the mental incapacity of the grantor at the time he signed the deed to Perry, and the fraud and undue influence of Perry in procuring the same.

(123) Plaintiffs allege in the complaint that J. D. Hill was not a *bona fide* purchaser for value and without notice of said facts, but purchased the land, if he paid any consideration therefor, with full notice thereof. It is further alleged that the deeds are void for want of a sufficient description of the land, the same being so uncertain and indefinite as that no land passed by the deeds. The following is the description: "Said P. A. Davis does agree to give Bill Perry ten (10) acres of land in consideration of services as servant rendered by Bill Perry, the receipt of which is hereby acknowledged; has bargained and given and by these presents do bargain and convey to said Bill Perry, heirs and assigns, a certain tract or parcel of land in Franklin County, State of North Carolina, adjoining the lands of P. A. Davis, surrounded by the land of P. A. Davis, known as the Junius Alston place." The mortgage describes it as follows: "A certain piece or tract of land lying and being in Franklin County, State aforesaid, in Sandy Creek Township, and described and defined as follows, towit: Ten acres of land surrounded by the lands of P. A. Davis's estate, known as the Junius Alston place; it being the tract of land conveyed by P. A. Davis to the party of the first part during the year 1912, record of same is hereby referred to and made a part hereof." The deed from Perry to Hill is more definite in its description of it, which follows: "A certain tract or parcel of land in Franklin County, State of North Carolina, adjoining the lands of P. A. Davis's estate and others, bounded as follows, viz.: Beginning at the spring now used by Bill Perry, which is located about 200 yards from the said Bill Perry's dwelling house, in a northerly direction and running thence in a northwestern direction to white oak corner for lands of estate of P. A. Davis, deceased, and Bill Perry, thence in a northerly direction down plantation path to a rock and peach tree; then from said rock and peach tree in westerly direction to the spring and point of beginning, containing 10 acres, more or less, and being the tract of land conveyed by P. A. Davis during the month of February, 1912, and known as the Junius Alston place."

The following is the testimony relating to the location and identity of the land:

Billy Perry testified: "We always called this place with the 10 acres of land the 'Junius Alston' place, because he was the last man that lived there before I went there. Everybody in the neighborhood called it the Junius Alston place. There was about 10 acres of open land around the house. I reckon I know the boundaries of it. Mr. Davis went around it himself. I could go around it and point out the boundary lines. I gave Mr. J. D. Hill a deed for this land some time in September after Mr. Davis's death. The description in that deed is the same as it was generally known at the time the deed was made to me. . . . When I gave

Mr. Hill the mortgage for $50 in August, 1912, he was read- (124) ing the deed, and he got the description from the deed, I suppose. When I gave him the deed for the land, he saw the lines on the old deed and copied it from that. I could not call the lines, but if I was there I could go around them."

Isaac Davis testified: "While we were talking about the land, he said he would let me have 10 acres that he sold to Bill and let him have 10 acres nearer the house, so he could wait on him. I told him the 10 acres did not have any pine straw, but he said he had rather for me to take the 10 acres, and he said that he was going to let Bill have 10 acres near the house, so he would be near him. Bill plowed the 10 acres near me and set out an orchard, intending to build his house near me. He did not get down there, because he was kept busy waiting on Mr. Davis. Mr. Davis said he would sell him a place that had a house on it. He sold him the place that they called the Junius Alston place. I was not there when it was stepped off. I only know he said he was going to let him have 10 acres. Bill fixed the place up and moved over there after he got the deed."

The following verdict was returned by the jury:

"1. Was the deed of P. A. Davis to Billy Perry void for lack of description? Answer: No.

"2. Was the said P. A. Davis mentally unsound and incapable of making a deed at the time he signed the paper-writing in question? Answer: No.

"3. Was the deed from P. A. Davis to Billy Perry executed in consideration of services rendered by Billy Perry or his family to P. A. Davis? Answer: Yes.

"4. Were such services reasonably necessary to the said P. A. Davis? Answer: Yes.

"5. Was the performance of such services a fair consideration for the conveyance of the 10 acres of land? Answer: Yes.

"6. Was the deed from P. A. Davis to Billy Perry executed in pursuance of a contract entered into upon adequate consideration of which P. A. Davis had the benefit and made by Billy Perry in good faith, without fraud or undue influence? Answer: Yes.

"7. Was the deed or paper-writing under which the defendant claims the land in question procured by the fraud and deceit of the defendant Perry? Answer: No.

"8. Did J. D. Hill acquire the said land for value and without notice of any fraud or undue influence, or of the want of mental capacity on the part of P. A. Davis at the time of the execution of the deed to Billy Perry? Answer: Yes."

There were certain remarks of the court upon the motion to (125) nonsuit to which the plaintiff duly excepted. They were as fol-

lows: "I am not going to let a landlord come into this court and acknowledge in a deed that he has received services from a tenant, a negro, and because of some defect in the description of the land which he expresses as a consideration for that much service, the tenant's case is to be dismissed and go. I say that the description may not be what the law requires, and he may not be entitled to hold the land; but I am going to allow him to show, if he can, that he has rendered services that he has not already been paid for."

Upon objection by plaintiff's counsel to these remarks, the court added: "I said what I thought I ought to have said, and you have the right to have the Supreme Court pass upon it. I thought it was understood that I was sitting here as a chancellor to see that justice was done, and I don't intend to violate the law if I can help it; but I do intend that a man shall receive compensation for his services. From what appears from the pleadings of both sides, he is entitled to have the question of the title to the land decided. It may be that legally he would not be entitled to hold the land, but if it should so appear, and the jury should so find, that there were services rendered by the defendant to the testator as consideration for the said land, and for which the defendant has not been paid, then he would be entitled to be paid for such services, and I would not be willing, if it should so appear, that he should have nothing for his sweat. The law would not, upon the pleadings or upon the description in the deed, justify me in dismissing the action; but it may be that he fails to fit the description to the deed. I have given him the benefit of the largest allowance that he was entitled to. I don't believe that any witness testified in support of the contention that there was no such tract. I meant by what I have said that he is entitled, upon the pleadings and the proof which may be offered, to have a jury render its verdict, and I am going to give him an opportunity to show it." Judgment was entered upon the verdict for the defendants, and the plaintiffs appealed, after reserving all of their exceptions.

*William H. Ruffin for plaintiffs.*

*W. H. Yarborough, Jr., and B. T. Holden for defendant.*

WALKER, J., after stating the case: First, as to the description in the deed of Davis to Perry. It is familiar learning, which was aptly stated by *Judge Gaston* in *Massey v. Belisle*, 24 N. C., 170, that every deed of conveyance (or contract) must set forth a subject-matter, either certain in itself or capable of being reduced to a certainty by a recurrence (126) to something intrinsic to which it refers. If the ambiguity in the description be latent, and not patent, oral evidence is admitted to fit the description to the thing intended. We have, therefore, held in

*Carson v. Ray,* 52 N. C., 609, that the words, "my house and lot in the town of Jefferson, Ashe County, N. C.," were sufficiently descriptive to let in proof for the identification of the lot, the Court saying in this connection: "A house and lot, or *one* house and lot in a particular town, would not do, because too indefinite on the face of the instrument itself. See *Plummer v. Owens,* Busb. Eq., 254; *Murdock v. Anderson,* 4 Jones' Eq., 77. But 'my house and lot' imports a particular house and lot, rendered certain by the description that it is one which belongs to me, and upon the face of the instrument is quite as definite as if it had been described as the house and lot in which I now live, which is undoubtedly good." And to the same effect is the language of this Court in *Mfg. Co. v. Hendricks,* 106 N. C., 485, where it was said: "No decree, however, for specific performance can be granted the defendant unless 'his land where he now lives' (the descriptive words of the receipt) is fully identified by competent testimony. These words are clearly susceptible of being applied to a particular well-defined tract of land—*id certum est, quod certum reddi potest*—and if the defendant can supply the requisite proof, he will be entitled to relief." Where a contract to convey land described the same as "one tract containing 193 acres, more or less, it being the interest in two shares, adjoining lands of J., B., E., O., and others," it was held to be sufficiently definite to admit parol evidence to identify the land. *Farmer v. Batts,* 83 N. C., 387. Many cases of the same kind will be found collected in *Blow v. Vaughn,* 105 N. C., 198. The case of *McLawhorn v. Worthington,* 98 N. C., 199, is exactly in point to sustain the description here, as there the description was, "a part of the John Tripp land, adjoining the lands of B. W. and others, containing 100 acres," the only difference between the two cases being that the description in this deed is the more definite of the two. See, also, *Bateman v. Hopkins,* 157 N. C., 470, where the description was, "the farm on which I now live," and *Murdock v. Anderson,* 57 N. C., 77, where the descriptive words were, "my house and lot in the town of Hillsborough," which is not substantially unlike this case. *Hawes v. Lumber Co.,* 166 N. C., 101.

This brings us to the remarks of the court in connection with the motion to nonsuit. We think this language was calculated to prejudice the plaintiffs and unduly to weaken their cause before the jury. It should not have been used. The general tendency of it all was that it required the plaintiffs to carry a greater burden than the law imposed upon them. A judge may clearly indicate to a jury what impression the testimony has made upon his mind or what deduction should be made therefrom, without expressly stating his opinion upon the facts. This (127) may be done by his manner or peculiar emphasis or by his so arraying and presenting the evidence as to give one of the parties an undue advantage over the other; or, again, the same result will follow the use

of language or a form of expression calculated to impair the credit which might otherwise and under normal conditions be given by the jury to the testimony of one of the parties. *S. v. Dancy,* 78 N. C., 437; *S. v. Jones,* 67 N. C., 285. It can make no difference in what way the opinion of the judge is conveyed to the jury, whether directly or indirectly. The act forbids an intimation of his opinion in any and every form, the intent of the law being that each of the parties shall have an equal and a fair chance before the jury. *Withers v. Lane,* 144 N. C., 184. The learned and able judge who presided at the trial, inspired, no doubt, by a laudable motive and a profound sense of justice, was perhaps too zealous that what he conceived to be the right should prevail; but just here the law, conscious of the frailty of human nature at its best, both on the bench and in the jury box, intervenes and imposes its restraint upon the judge, enjoining strictly that he shall not in any manner sway the jury by imparting to them the slightest knowledge of his own opinion of the case. The English practice and also the Federal practice permit this to be done, but not ours. With us the jury are the sole and independent triers of the facts, and we hold the right of trial by jury to be sacred and inviolable. Any impairment of this right to have the jury try the facts uninfluenced by any intimation of opinion of the court in regard thereto, is forbidden by express enactment. Revisal, sec. 535. What *Judge Nash* said in *Nash v. Morton,* 48 N. C., 3, is applicable here: "We all know how earnestly, in general, juries seek to ascertain the opinion of the judge who is trying the cause upon the controverted facts, and how willing they are to shift their responsibility from themselves to the court. The governing object of the act was to guard against such results and to throw upon the jurors themselves the responsibility of responding to the facts of the case. Nor is it proper for a judge to lead the jury to their conclusion on the facts." We follow this clear statement of the rule in *Withers v. Lane, supra,* where we said: "The books disclose the fact that able and upright judges have sometimes overstepped the limit fixed by the law; but as often as it has been done this Court has enforced the injunction of the statute and restored the injured party to the fair and equal opportunity before the jury which had been lost by reason of the transgression, however innocent it may have been; and we must do as our predecessors have done in like cases. Our view that the charge violates the statute is sustained by the cases already cited, to which the following may be added: *S. v. Bailey,* 60 N. C., 137; *S. v. Thomas,* 29 N. C., 381; *S. v. Pressley,* 35 N. C., 494; *S. v. Rogers,* 93 N. C.,
(128) 525; *S. v. Dick,* 60 N. C., 440; *Reel v. Reel,* 9 N. C., 63; *Reiger v. Davis,* 67 N. C., 185; *S. v. Davis,* 15 N. C., 612; *Sprinkle v. Martin,* 71 N. C., 411. *Powell v. R. R.,* 68 N. C., 395, seems to be very much in point, and the following language of *Justice Rodman* is ap-

plicable to this case: 'We think that the general tone of the instructions is warmer and more animated than is quite consistent with the moderation and reserve of expression proper in stating the evidence to the jury in a plain and correct manner, and declaring and explaining the law arising thereon. There are passages which a jury might fairly understand (though not intended) as expressing an opinion on the facts.'" Our statute was adopted to maintain inviolate that popular arbiter of rights, trial by jury, which was, without some such provision, constantly in danger from the will of the judge acting upon men mostly passive in their natures, and disposed to shift responsibility from their shoulders to his. *S. v. Dick*, 60 N. C., 440. Not the slightest intentional wrong can be imputed to the judge who presided at the trial below. The error is one of those casualties which may take place to the most circumspect in the progress of a cause being tried on the circuit, but when once committed, however, it was irrevocable. It was almost, if not quite, impossible to eradicate the unfavorable impression which the words made upon the jury as against the plaintiffs. *S. v. Dick, supra.* We also refer to these cases: *S. v. Cook,* 162 N. C., 588; *Park v. Exum,* 156 N. C., 228. We said very recently in *Starr v. Oil Co.,* 165 N. C., 587: "Courts should be very careful to safeguard the rights of litigants and to be as nearly sure as possible that each party shall stand before the jury on equal terms with his adversary, and not be hampered, in the prosecution or defense of his cause, by extraneous considerations which militate against a fair hearing." And again in *Hensley v. Furniture Co.,* 164 N. C., at p. 152: "It is the highest prerogative of the judge, in any court, and his bounden duty as well, to see that the rights of parties before the law are not prejudiced or impaired by irrelevant or foreign matters of any kind, and for this purpose he is endowed with plenary authority. But in this case the learned judge, intending doubtless to enforce what appeared to him to be the legal rights of the defendant, went too far." No extraneous and irrelevant consideration should be permitted to bias the minds of the jury in finding the truth as to the matter submitted to them. *Ray v. Patterson,* 165 N. C., 512. In this case it was the tone of the judge which was calculated to impress the jury with the idea that, in the opinion of the court, the defendant (Billy Perry) was entitled to something, and that he did not intend "that he should have nothing for his sweat." While the judge referred to the services rendered, they were so intimately interwoven with the other branch of the case as to the validity of the deed, not so much in respect to the decription of the land, but (129) with regard to the question of fraud and undue influence, and in that connection, having an especial bearing upon the consideration of the deed which was based on the services alleged to have been rendered, as to seriously handicap the plaintiffs in presenting that question to the

jury, the idea, at last, being that he should have either the land or the money for his services. The judge should simply have ruled upon the motion for a nonsuit, without any discussion as to the rights of the defendant in the premises; but his remarks, while innocently made, tended to prejudice the plaintiffs in presenting their case to the jury, although there may not have been any direct intimation of opinion against them. While perhaps a commendable plea for justice, it was not altogether harmless to the plaintiffs. We look at the effect the remarks will probably produce, and discard the motive, however good, or even righteous, it may be.

There is another question in the case: The plaintiffs have shown no right to bring this suit. They have no cause of action. The real estate did not vest in them, unless there is a provision in the will to that effect, which is not yet shown. This Court held in *Floyd v. Herring,* 64 N. C., 409, following *Ferebee v. Proctor,* 19 N. C., 439, that "A personal representative has no control of the freehold estate of the deceased, unless it is vested in him by a will, or where there is a deficiency of personal assets and he obtains a license to sell real estate for the payment of debts. The control derived from a will may be either a naked power of sale or a power coupled with an interest. The heir of the testator is not divested of the estate which the law casts upon him, by any power or trust, until it is executed." See, also, *Womble v. George,* 64 N. C., 759; *Fike v. Green, ibid.,* 665; *Beam v. Jennings,* 89 N. C., 451; *Holton v. Jones,* 133 N. C., at p. 401; *Munds v. Cassidy,* 98 N. C., 558; *Perkins v. Presnell,* 100 N. C., 220; *Gay v. Grant,* 101 N. C., at p. 219.

It is admitted that Mr. Davis's estate is solvent, he having had valuable property not encumbered by any debt. This being so, the executors cannot even sell to pay debts, for there are none. We do not know what disposition is made of the estate in the will, and unless they have acquired a right under it to bring this action, they are without any standing in the court. But counsel for both parties requested us not to dismiss the suit on that account, for they wished to try it on its merits, and as in one aspect of the case the executors may become proper parties, we have concluded, as the will is not before us, merely to grant a new trial for the reason above stated, so that the heirs or devisees, as the case may require, can come in and make themselves parties, but as plaintiffs only, as they cannot be brought in against their will, for the purpose of permitting the plaintiffs to attack the deed through them. Their action must be free, as they may elect, if they so desire, to abide by their
(130) ancestor's deed, whether it was purely voluntary or given as a reward or compensation for services rendered. The rule which we have just mentioned is well expressed in *Beam v. Jennings,* 89 N. C., 451. In that case, *Justice Ashe,* with his usual clearness and vigor of style,

has stated the final conclusion in this Court upon the question whether, when a power of sale is conferred in a will, the land descends to the heirs or vests in the devisees until the power is fully executed. He remarks that, "On this question there is, in the decisions of the courts and among the text-writers, considerable diversity of opinion. Some hold, with whom is Mr. Hargrave, in his note on Coke Litt., 113, that whether the devise be to the executors to sell the land, or that the executors shall sell, or that the land be sold by the executors, a fee simple will be vested in the executors; but in Sugden on Powers, 133, and Williams on Executors, 579, it is laid down that until a sale by the executors, where a power of sale of land is given by the will, the land descends in the interim to the heirs at law." He then approves what is said by *Chief Justice Ruffin* in *Ferebee v. Proctor, supra,* that "Nothing can defeat the heirs but a valid disposition to another. Whatever is not given away to some person must descend. The heir takes, not by the bounty of the testator, but by the force of the law, even against the express declaration of the testator to the contrary. If the will does not devise the land, but creates a power to sell it, then upon the execution of the power the purchaser is in under the will, as if his name had been inserted in it as devisee. But in the meantime the land descends, and the estate is in the heir. The power is not the estate, but only an authority over it and a legal capacity to convey it. This, we think, settles the question." We have restated the rule so that there may be no misapprehension, in the further progress of the case, as to what kind of interest the executors must have acquired under the will in order to divest the estate of the heirs or devisees.

It may be advisable that we should direct attention to the statute which authorizes the personal representative of a decedent to sell his land for the payment of his debts, where the personal property is insufficient for that purpose. Revisal, section 69, provides for undevised real estate to be sold first, and section 70 for the sale of such real property as has been conveyed by an heir or devisee within two years from the grant of letters, which conveyances are declared void as to creditors and the personal representative, except those made to *bona fide* purchasers for value and without notice, but which are declared valid if made after the two years. Section 71 provides for the sale by the personal representative or his successor in office, as the case may require, of such land as has been conveyed to him for the benefit of the estate he represents, in the manner and upon the terms prescribed in the statute. Section 72 provides that real estate subject to sale under the statute shall include all (131) the deceased has conveyed in fraud of his creditors, all rights of entry and of action, and all other rights and interests in lands, tenements, or hereditaments which he may devise, or by law would descend to his heirs, the right of *bona fide* purchasers for value and without notice being protected by a proviso.

The above synopsis of the statute shows that the executor's right to sue for the purpose of setting aside his testator's deed for fraud, undue influence, or to attack it for lack of a sufficient description of the land, does not exist, except under special circumstances, when the right, for instance, is derived from the will, or it is necessary to do so to provide a fund for the payment of the decedent's debts.

A new trial is, therefore, awarded, with directions that, if the heirs or devisees, as the case may be, refuse to come in, the action be dismissed, unless, by the will, it appears that plaintiffs have acquired the right to assail the conveyance, as trustees or otherwise, in accordance with the rule laid down in the cases cited, the executors, merely as such, having no interest in the land of their testator.

New trial

CLARK, C. J., did not sit.

*Cited: Alston v. Savage,* 173 N.C. 215 (1c); *S. v. Kline,* 190 N.C. 180 (2c); *S. v. Allen,* 190 N.C. 499 (2c); *Barbee v. Cannady,* 191 N.C. 532 (3c); *S. v. Mitchell,* 193 N.C. 798 (2c); *Cogdill v. Hardwood Co.,* 194 N.C. 747 (2c); *S. v. Griggs,* 197 N.C. 353 (2c); *Hoke v. Trust Co.,* 207 N.C. 607 (3c); *S. v. Rhinehart,* 209 N.C. 153 (2c); *Smith v. Hosiery Mill,* 212 N.C. 662 (2c); *Linker v. Linker,* 213 N.C. 353 (3c); *Jones v. Warren,* 213 N.C. 735 (3c); *Carruthers v. R. R.,* 215 N.C. 678 (2c); *Johnston County v. Stewart,* 217 N.C. 336 (1d); *Thompson v. Umberger,* 221 N.C. 180 (1d); *King v. Lewis,* 221 N.C. 319 (3c); *S. v. Isaac,* 225 N.C. 313 (2c); *James v. James,* 226 N.C. 403 (2c); *S. v. Benton,* 226 N.C. 749 (2c); *Pack v. Newman,* 232 N.C. 401 (3c); *Holt v. Holt,* 232 N.C. 502 (3c); *S. v. Simpson,* 233 N.C. 442 (2c).

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T. J. CARTER AND T. R. PRATT v. CALVIN REAVES ET ALS.

(Filed 28 October, 1914.)

**1. Appeal and Error—Assignments of Error—Rules of Court.**

Where error is assigned on appeal as to admissibility of evidence, referring to the page of record, or to the charge of the court, referring only to appellant's certain numbered exception, it does not come within the requirements of the rule of the Supreme Court, and will not be considered. The evidence excepted to should be set out in the assignment of error, as also the paragraph of the charge which is relied upon for error.

**2. Marriage — General Reputation—Evidence—Corroborative—Communications with Deceased—Interpretation of Statutes.**

Where a party claims lands as the heir at law of his deceased father, and the question arises as to whether his father and mother were man and wife, it is competent to show the fact of marriage by evidence of general reputation thereof in the family and neighborhood, and it is also competent for a witness to testify that he had heard the mother, since deceased, say that the father was her husband, as corroborative of the evidence of reputation, and in mentioning those whom the witness testified he had heard say they were man and wife; and it is further held that the evidence is not prohibited by Revisal, sec. 1631, as a communication with a deceased person, the mother being dead and the *locus in quo* descending from the father.

**3. Appeal and Error—Assignments of Error—Trials—Instructions—Special Requests.**

Error assigned for a failure of the court to instruct the jury upon certain presumptions of law arising from the evidence on a matter at issue will not be considered, for if fuller instructions are desired they should be set out in a prayer for special instruction.

**4. Married Women—Coverture—Adverse Possession—Interpretation of Statutes.**

Coverture is not now a defense in bar of the running of the statute of limitations, since 13 February, 1899. Revisal, sec. 363.

APPEAL by defendants from *Rountree, J.*, at September Term, (132) 1913, of PENDER.

*R. G. Grady and John D. Bellamy for plaintiffs.*
*C. D. Weeks and Stevens & Beasley for defendants.*

CLARK, C. J. The appellees moved to dismiss the appeal for that the alleged errors are not properly assigned. Upon examination we find that but a few of the assignments of error are in accordance with the requirements. For instance, assignment 2 is that the court "erred in admitting the question of F. R. Brink in regard to his claim to possession." This gives us no information and leaves the Court to hunt through the record. It is no cure to this defect that we are referred to the page where we might find the evidence referred to. The same is true as to assignments of error 1, 3, 4, 5, 7, 8, 9, as to evidence which is not set out in the assignments.

Assignment of error 13 is: "The court erred in giving the jury the charge which is excepted to as defendant's 19th exception, on page 34, as there shown in the bracket." This simply refers us to the record, when counsel should have selected the paragraph of the change objected to and set it out in his "assignment of errors." The same is true of assignments 14, 15, 16, 17, and 18.

These matters have been so often called to the attention of counsel that it is strange indeed that the rules as to presenting error on appeal should be thus disregarded in any case. As late as *Wheeler v. Cole,* 164 N. C., 380, the Court again said that "it would not consider exceptions not set out in compliance with the plain requirements of our rules as construed by this Court in *Davis v. Wall,* 142 N. C., 450; *Marable v. R. R., ib.,* 564; *Lee v. Baird,* 146 N. C., 361; *Thompson v. R. R.,* 147 N. C., 412; *Ullery v. Guthrie,* 148 N. C., 417; *Smith v. Mfg. Co.,* 151 N. C., 260; *Pegram v. Hester,* 152 N. C., 765; *McDowell v. Kent,* 153 (133) N. C., 555; *Jones v. R. R., ib.,* 419; *Hobbs v. Cashwell,* 158 N. C., 597." The Court then added: "This rule has been frequently called to the attention of counsel throughout a long period of years. It has been substantially adopted by all other courts and perhaps in all of them it is enforced more rigidly than with us. It bears equally on all, and should be observed, as it is intended for the benefit of litigants and counsel as well as for the better transaction of business in this Court and the more intelligent disposition of causes. It is easily complied with, if our brethren of the Bar will endeavor to meet its requirements. There is no hardship imposed by it, unless we follow the implied suggestion that it be not enforced in some cases, whereas it should be enforced in all equally and with absolute impartiality. If we should fail the least in this respect, it would, of course, be intolerable. But it is sufficient to say that it is a rule of this Court of many years standing, and while it continues to be a rule it must be enforced alike as to all." This case has been cited since with approval in *Steeley v. Lumber Co.,* 165 N. C., 32, and the ruling therein has been applied in a great many cases, besides those above quoted, and without writing any opinion.

As we have had occasion to say at this term of the Court, in *Land Co. v. McKay,* the rules of this Court are not considered sacred nor the best of all possible rules, and when we discover defects in them they are changed from time to time to take effect prospectively. But as long as they remain unaltered they are, in our judgment, required in the interest of the administration of justice, and must be enforced—reasonably, of course, and in accordance with their intent, but impartially as to all.

The only assignments that are properly made are those numbered 6, 10, 11, 12, and 15, and as announced from the Bench in passing upon the Motion of the appellee to affirm the judgment, we shall consider only the assignments that are properly made. Assignment of error 19 is merely formal for error in refusing to grant a new trial and in rendering the judgment. We have, however, looked through these defective assignments, and find nothing which could have changed the result, if such assignments had been properly made.

This action is for the recovery of land described in the complaint. Both parties claim under Fred Lovin. The plaintiffs claim under a mortgage made by Lovin to Satchwell on 27 October, 1855, and under a deed made under foreclosure at Fall Term, 1859, and then under mesne conveyances to the plaintiffs. The suit in foreclosure was instituted after the death of Lovin, the mortgagor, by his three daughters by his wife, Dorcas Brewer, to whom the plaintiffs allege and the jury find that the said Lovin was legally married.

About one year prior to the commencement of this action the defendant Jane Reaves and her husband built a shanty on the land in controversy and began to cut timber, whereupon the plaintiffs re- (134) sorted to this action. She contends that she is the daughter of Fred Lovin and Mag. Pridgen, his second wife, and that she is the only lawful heir; that she married before she was 21, and that she was not made a party to the suit to foreclose.

It is not denied that Jane Reaves is the child of Fred Lovin by Margaret Pridgen, to whom he was formally married in 1845; but the plaintiffs contend that said marriage, though performed in a legal manner, was bigamous and void, because there was a prior subsisting marriage between Fred Lovin and Dorcas Brewer. The plaintiffs did not produce direct evidence of Lovin's marriage to Dorcas Brewer, but there was abundant evidence of the reputation of such marriage in the family and in the neighborhood and of cohabitation in Pitt County, where they lived, and that they separated and that Fred Lovin went to New Hanover, where subsequently, in 1845, as the defendants proved, he was married by the forms of law to Margaret Pridgen. There was no evidence of divorce, however. Fred Lovin died about 1856. Jane Reaves was born in 1853 and was married in 1869, at the age of 16, to her codefendant, Calvin Reaves. Fred Lovin lived on the land at his death. The plaintiffs also relied on adverse possession of those under whom they claimed.

Of the exceptions properly assigned as error, No. 6 is for alleged error in permitting the witness Christine Manning to state that she had heard "Dorcas Brewer say that Fred Lovin was her husband." No. 10 is for permitting the witness J. J. Stokes to state that he heard Dorcas Brewer make the same statement. No. 12 is for the refusal to strike out the above evidence, under Rev., 1631. This evidence was competent for the witnesses in corroboration of their testimony of reputation and cohabitation and in mentioning those whom they had heard say that Lovin was married to Dorcas. 4 Chamberlain Ev., sec. 2932. Section 1631 does not apply, for Dorcas Brewer died in 1878, and the plaintiffs are not claiming under her, nor was she, of course, a witness in the cause.

Assignment 11, for refusal to nonsuit, cannot require discussion. Assignment 15, for "failure to instruct the jury in reference to the pre-

sumptions of law as to the validity of the marriage between Fred Lovin and Margaret Pridgen," cannot be sustained. If the defendants desired fuller instructions, they should have so prayed the court.

It is hardly necessary to consider the defense of adverse possession under color. This action was brought 16 September, 1907, and the statute removing the disability of coverture and providing that coverture should not be a protection against the running of the statute of limitations took effect 13 February, 1899. Rev., 363. The evidence is (135) that the defendants entered upon the land "about one year" before this action was begun, which was, therefore, more than seven years of adverse possession after the passage of the statute.

No error.

*Cited: Rogers v. Jones,* 172 N.C. 158 (1c); *Powers v. City of Wilmington,* 177 N.C. 363 (1c); *Ector v. Osborne,* 179 N.C. 671 (1c); *Butler v. Bell,* 181 N.C. 91 (4c); *Spence v. Pottery Co.,* 185 N.C. 225 (4c); *In re Will of Witherington,* 186 N.C. 154 (4c); *Potts v. Payne,* 200 N.C. 250 (4c); *Buford v. Mochy,* 224 N.C. 247 (4c).

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JUNIUS DAVIS, RECEIVER, v. T. B. PIERCE AND WIFE, SALLIE E. PIERCE, AND H. E. FAISON, EXECUTOR OF H. W. FAISON, ET AL.

(Filed 21 October, 1914.)

**1. Courts—Sale of Lands—Decree of Confirmation—Failure to Pay Purchase Price—Interlocutory Orders—Limitation of Actions.**

Where the court confirms a report of the sale of lands, made under its decree, and directs the commissioner appointed for the sale to collect the purchase price and then make conveyance to the purchaser, the decree of confirmation is interlocutory with regard to these further directions; and where the purchaser has entered into possession of the lands without paying the purchase price, he may not avail himself of the bar of the ten years statute of limitations (Revisal, secs. 1424-1425), for his entry was rightful under the decree, and he must show some hostile act of possession on his part to make good his plea.

**2. Courts—Judicial Sales—Sales of Lands—Failure to Pay Purchase Price—Motion in Cause—Interlocutory Orders—Interpretation of Statutes.**

The remedy to enforce a decree under a judicial sale of land for the collection of the purchase price of the land is by motion in the cause (Revisal, sec. 403), the matter remaining under the control of the court (Revisal, sec. 1524), and in proper instances the court may decree a resale of the land if the purchaser does not pay the price within a specified time —in this case, within sixty days.

**3. Appeal and Error—Abstract Questions—Agreements.**

In this case the purchaser at a judicial sale of lands having paid the purchase price subsequently to the rendition of an order requiring it, and from which this appeal is taken, and it further appearing from the record that this was done to abide the disposition of the appeal, and if in favor of the appellant, the purchaser, the money is to be refunded, it is held that the appeal does not present an abstract proposition which this Court will not pass upon.

APPEAL by defendant from *Whedbee, J.*, at February Term, 1914, of DUPLIN.

Civil action, heard on motion in this cause.

The motion was to enforce collection of the purchase money for a tract of land bought and held by Sallie E. Pierce, a defendant at a judicial sale under decree in this cause. The sale having taken place in July, 1898, and said purchaser having been since in possession of the land and having paid no part of the purchase money, the relief sought was resisted chiefly by reason of the ten-year statute of limitations. (136) There was judgment, in effect, that unless the purchase money and interest were paid in sixty days, the commissioners to proceed to resell the lands and report to the court for confirmation, etc.

Defendant Sallie Pierce having duly excepted, appealed to this Court.

*George R. Ward and H. D. Williams for H. E. Faison, executor, appellee.*

*Stevens & Beasley for defendant Sallie Pierce.*

HOKE, J., after stating the case: On the hearing it was properly made to appear that in the above entitled action at February Term, 1898, the land in question was ordered sold under decree in the cause for the purpose of paying certain debts established in favor of M. W. Faison and H. E. Faison, executors of H. W. Faison, against T. B. Pierce, a codefendant; that H. L. Hill was appointed commissioner, and a sale was had in July, 1898, when Sallie E. Pierce, wife of T. B. Pierce, and also a defendant, became the purchaser at the price of $2,300. The sale was reported to the court and was confirmed at August Term, 1898; and the decree further directed, "That the commissioner collect the purchase money and apply the same to the judgment heretofore rendered in favor of the executors of H. W. Faison, and, upon the receipt of this purchase money, make a deed to the purchaser."

The cause was here "dropped from the docket," and remained so until August Term, 1912, when on motion of H. E. Faison, surviving executor, the same was reinstated for the purpose of enforcing collection of the purchase price of the property by a resale. The motion was continued

from time to time till February Term, 1914, and it appearing that the purchase price had never been paid, and that Sallie Pierce, the purchaser, was still in possession under her said purchase, a decree was rendered, as stated, that unless the said purchase money was paid in sixty days the commisioner resell the land, etc.

Upon these, the facts chiefly relevant, it was contended for defendant that she was protected by the ten-year statute of limitations, and by reason of same collection of the purchase money could not be enforced. But in our opinion that position cannot be sustained. In *Williams v. McFadyen,* 145 N. C., pp. 156-158, speaking of the double aspect of those decrees in which a judgment is foreclosed for a debt and a sale of specific property is rendered to enforce payment of same, the Court said:

"Our statute of limitations applies to final judgments, or to judgments or decrees which partake of that nature, and was never intended to affect interlocutory judgments, and in a cause still pending. The action to enforce a vendor's lien for unpaid purchase money, where the
(137) vendee, defendant, is in possession under bond for title, is in many of its aspects like a proceeding of foreclosure and sale to collect a debt secured by mortgage. Where a definite indebtedness is declared, and judgment therefor entered and foreclosed by sale decree, such judgment is final as to the amount of indebtedness so adjudicated, and it is final also for purposes of appeal as to all debated and litigated questions between the parties preceding such a decree; but as to all subsequent questions arising as incident to the sale, the occupation and possession of the property by the parties of record, the collection and distribution of the proceeds, and the like, the decree is interlocutory, and the cause is still pending. *Knight v. Houghtalling,* 94 N. C., 408; *Clement v. Ireland,* 138 N. C., 136; *Null v. Cumming,* 155 N. Y., 309; *Morgan v. Casey,* 73 Ala., 222. This is true in all jurisdictions where the cause in express terms is retained for further orders and decrees, and it is true with us from the force and effect of such a decree, and whether such a feature formally appears or not, for our decisions are to the effect that a decree for absolute sale, without requiring a report to be submitted for further consideration by the court, is irregular and improper, and will be set aside on motion. *Foushee v. Durham,* 84 N. C., 56; *Mebane v. Mebane,* 80 N. C., 34.

"The double aspect of this class of decrees, being final in some respects and in others interlocutory, is recognized in the authority relied upon by the defendant, *McGaskill v. Graham, supra,* where it is said by *Furches, J.:* 'The judgment of $754.93 was a personal judgment, and was final. The judgment foreclosing the mortgage was the exercise of the equitable jurisdiction of the court, and was not what would have been a final decree in equity, and was not so in this case.' And so it is here.

The judgment as to the debt is final, and on plea of statute, properly entered, could no longer be enforced as a judgment *in personam* and against other assets of deceased; but, in a proceeding *in rem*, the cause is still pending for the purpose of carrying out the provisions of the decree directing a sale of the property and an application of the proceeds to the satisfaction of the plaintiff's debt. We have it, then, that as to the questions involved in this motion the cause is still pending."

And the principle as noted is in accord with authoritative cases here and in other jurisdictions (*Clement v. Ireland,* 138 N. C., 136; *Knight v. Houghtalling,* 94 N. C., 408; *Lord v. Meroney,* 79 N. C., 14; *Kemp v. Kemp,* 85 N. C., 491; *Ellis v. Hussey,* 66 N. C., 501; *Null v. Conway,* 155 N. Y., 309; *Morgan v. Cassey,* 73 Ala., 222), and is distinctly recognized in our statute affecting foreclosure sales, Revisal, secs. 403, 1524-1525. By section 1524 the purchase money due on judicial sales may be collected by motion in the cause and in sections 403, 1525 it is provided that suits by a purchaser, let into possession under a judicial sale, confirmed, which are brought to protect the possession from the (138) date of sale, should be under control of the court ordering such sale.

We find nothing in *McGaskill v. McKinnon,* 121 N. C., 192, to which we were cited, that in any way conflicts with this position, and the reference to the contrary as to this case in *Dardin v. Blount,* 126 N. C., 253, was clearly an inadvertence.

The judgment of his Honor to enforce the collection of this debt by resale of the property is further supported by a line of decisions in this jurisdiction to the effect that in executory contracts for the sale of land the statute of limitations will not operate to protect the possession of the purchaser or prevent a sale for the purchase price until the required time has elapsed after a hostile relationship has been established between vendor and vendee, as by a demand and refusal, etc. *Worth v. Wrenn,* 144 N. C., pp. 656-661, citing *Overman v. Jackson,* 104 N. C., 4; *Allen v. Taylor,* 96 N. C., 37, and other cases.

In *Worth v. Wrenn, supra,* it was said: "The statute of limitations, when properly pleaded, will bar an action for the debt so as to prevent any judgment *in personam* to be collected out of other property of the debtor; but it will not prevent the appropriation of the property held and occupied under the bond until ten years have elapsed from the time when there has been a demand and refusal. This follows, no doubt, from the principle uniformly held with us, that the occupation of the vendee in such cases is permissive and rightful, and that such occupant is entitled to a demand and reasonable notice before he can be required to surrender the possession. *Allen v. Taylor, supra,* and the authorities therein cited."

We are not inadvertent to the position insisted on by plaintiff, that inasmuch as it has been made to appear that since the judgment in the present case was rendered the defendant Sallie E. Pierce has paid the purchase money, with interest, and has received a deed from the commissioner, and that the questions involved in the appeal have become an abstract proposition which the Court will not determine. The principle referred to is well recognized in proper instances, but on perusal of the record and the facts in evidence we think it clearly appears that the money was paid in to abide the disposition of the appeal, and that if the decision had been in favor of the purchaser the money was to be refunded. We have therefore considered the case upon its merits, and find no error in the judgment.

No error.

*Cited: Pendleton v. Williams,* 175 N.C. 254 (2c); *Boseman v. McGill,* 184 N.C. 218 (2c); *Beaufort County v. Bishop,* 216 N.C. 215 (2c).

(139)

## JULIUS MORPHIS v. SOUTHERN EXPRESS COMPANY.

(Filed 14 October, 1914.)

**1. Interstate Commerce — State Statutes—Penalties—Federal Statutes—Carmack Amendment—Federal Control.**

The validity of our statutes imposing a penalty upon a carrier for its failure to pay claims for damages under the conditions therein imposed (Revisal, sec. 2634, amended by chapter 139, Laws 1911), is made dependent, as applied to interstate shipments, upon whether Congress, or the Interstate Commerce Commission acting upon its authority, has assumed control thereof; and our statutes upon this subject having been superseded by Classification No. 22, Rule 9, prescribed by the Interstate Commerce Commission under authority conferred by the act of Congress, known as the Carmack Amendment, an express company cannot now be held liable for the penalty under our statute for failure to pay a claim in the time therein prescribed for interstate shipments.

**2. Same—Interstate Commerce Commission—Prospective Orders—Date of Promulgation—Statutes.**

Where authority has been conferred by Congress upon the Interstate Commerce Commission to assume control of matters relating to interstate commerce, and in pursuance thereof the Commission promulgates an order relative to such commerce, such order supersedes any State statute on the subject, from the time it was promulgated; and when the cause of action subsequently arises under the State penalty statutes, but before the time is made operative, the State statute is ineffectual, and the penalty allowed by it cannot be recovered.

MORPHIS *v.* EXPRESS CO.

APPEAL by defendant from *Peebles, J.*, at May Term, 1914, of CHATHAM.

This is an action begun in a court of a justice of the peace, and tried on appeal in the Superior Court, for the recovery of $2 as damages for the loss of a gallon of whiskey shipped from Virginia to the plaintiff at Merry Oaks, North Carolina, and for a penalty of $50 for failure to pay the claim.

The following issues were submitted to the jury:

"1. Was the loss of the shipment of whiskey from Fall Creek, Va., to Merry Oaks, N. C., caused by the defendant?

"2. What amount, if any, is plaintiff entitled to recover of the defendant?"

The jury answered the first issue "Yes" and the second "$52."

The defendant introduced evidence tending to prove that Classification No. 22, Rule 9, prescribed by the Interstate Commerce Commission 24 July, 1913, effective 1 February, 1914, on file with witness and at all offices of the defendant, is as follows: "In the event of a claim being made in writing, the company shall immediately acknowledge its receipt, and shall within six months from the date thereof notify the (140) claimant in writing of the disposition made thereof. Claims for personal loss or damage shall be given equally prompt disposition."

The defendant requested that the following instructions be given to the jury, which were refused, and the defendant excepted:

"1. This was an interstate shipment of whiskey from Fall Creek, Va., to Merry Oaks, N. C., and all damages for loss of said shipment is governed by what is known as the Carmack Amendment to the Interstate Commerce Act, which provides that 'A common carrier of an interstate shipment is liable to the lawful holder of an express receipt for any loss, damage, or injury to such property caused by it.' If you find from the evidence that the loss of whiskey was not caused by the defendant, then you should answer the first issue 'No' and the second issue 'Nothing.' If you find that it was caused by the defendant, you should answer the first issue 'Yes' and the second issue '$2,' the admitted value of the whiskey.

"2. Congress having taken charge of the subject of payment of claims by express companies for loss or damage to interstate shipments, the State statute on the subject is superseded. I therefore charge you that in no aspect of the case can plaintiff recover penalty of $50 prescribed by the State statute, $2 being the largest amount he can recover, should you answer the first issue 'Yes.'"

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

*A. C. Ray for plaintiff.*

*H. A. London & Sons for defendant.*

ALLEN, J. The statute imposing a penalty on common carriers for failure to pay claims for damages (Rev., sec. 2634 as amended by ch. 139, Laws 1911) has been declared constitutional and valid, as applied to claims arising on interstate shipments, in many cases in our Reports. These decisions rest upon the position that the statute is neither an interference with nor a burden upon interstate commerce, but is in its aid; and a similar statute of South Carolina was sustained in *A. C. L. v. Mazursky,* 216 U. S., 122, against the objection that it was an interference with interstate commerce.

These authorities commend themselves to our judgment, and would be determinative of the present appeal in favor of the plaintiff if conditions had not changed; but it appears that the Interstate Commerce Commission, acting under the authority conferred by Congress, adopted a rule on 24 July, 1913, to be effective 1 February, 1914, applicable to common carriers, providing that "In the event of a claim being made in
(141) writing, the company shall immediately acknowledge its receipt, and shall within six months of the date thereof notify the claimant in writing of the disposition made thereof. Claims for personal loss or damage shall be given equally prompt disposition"; and the question is now presented for the first time as to the effect of this rule.

If it supersedes State legislation, the plaintiff cannot recover the penalty, and if not, the decisions of this Court and of the Supreme Court of the United States, heretofore rendered, sustain the judgment of the Superior Court. Three cases decided by the Supreme Court of the United States, among others, seem to be decisive of the question: *So. Ry. Co. v. Reid,* 222 U. S., 431; *Nor. Pac. Ry. v. Washington,* 222 U. S., 370, and *So. Ry. Co. v. Beam,* 222 U. S., 444.

In the *Reid case* a judgment of the Supreme Court of North Carolina was reversed, which sustained a statute of the State permitting the recovery of a penalty for failure to receive freight, and upon the distinct ground that Congress, having manifested a purpose to take charge of the regulation of freights by the enactment of the Interstate Commerce Act and the amendments thereto, having taken possession of the field, as it is said, this superseded action by the State.

The Court said: "The Supreme Court of the State was of the view that the statute simply regulated a duty which preceded the entry of the goods in interstate commerce, and concluded, therefore, that the statute was 'neither an interference with nor a burden upon interstate commerce'; and it decided that the execution of this duty was not precluded by the provision of the Interstate Commerce Act requiring a schedule of tariffs to be established and charged. It was said by the Court that it was the duty of the railway company to file such schedule, and that the company could not justify the violation of its common law by the neglect

of its statutory duty. The case, however, is not quite in such narrow compass. . . . There may be a Federal exertion of authority which takes from a State the power to regulate the duties of interstate carriers or to provide remedies for their violation. . . . It is well settled that if the State and Congress have a concurrent power, that of the State is superseded when the power of Congress is exercised. The question occurs, To what extent and how directly must it be exercised to have such effect? It was decided in *Missouri Pacific Railway Co. v. Larabee Mills,* 211 U. S., 612, that the mere creation of the Interstate Commerce Commission and the grant to it of a large measure of control over interstate commerce does not, in the absence of action by it, change the rule that Congress by nonaction leaves power in the States over merely incidental matters. 'In other words,' and we quote from the opinion (p. 623), 'the mere grant by Congress to the Commission of certain National powers in respect to interstate commerce does not of itself and in the absence of action by the Commission interfere with the authority (142) of the State to make those regulations conducive to the welfare and convenience of its citizens. . . . Until specific action by Congress or the Commission, the control of the State over those incidental matters remains undisturbed.' . . . The principle of that case, therefore, requires us to find specific action either by Congress in the Interstate Commerce Act or by the Commission covering the matters which the statute of North Carolina attempts to regulate."

In the subsequent case of *So. Ry. Co. v. Beam,* the Court comments on the *Reid case,* and says: "We have shown in the opinion in No. 487, *ante,* p. 424, that there need not be directly 'inhibitive congressional legislation,' but congressional legislation which occupies the field of regulation and thereby excludes action by the State."

These cases establish the proposition that action by Congress or by the Interstate Commerce Commission prevents action by the State, and as the rule adopted on 24 July, 1913, clearly covers the subject-matter of the statute, the statute is no longer operative as to interstate shipments.

It is urged, however, on behalf of the plaintiff that his right to the penalty accrued under the statute on 11 October, 1913, four months after the claim was filed, and that as the rule, although adopted 24 July, 1913, did not become effective until 1 February, 1914, it cannot affect the right to recover in this action, although adopted before he was entitled to sue. This question also seems to be settled against the plaintiff. On 4 March, 1907, Congress passed an act regulating the hours of labor of employees engaged in interstate commerce, and provided that it should not go into effect for one year. In June, 1907, the State of Washington passed an act dealing with the same subject, and the question under review in *Nor. Pac. Ry. v. Washington,* 222 U. S., 370, was an alleged violation of the

State statute occurring in July, 1907, and it was held that although the congressional act did not go into effect for one year after its passage, that all State laws on the subject became inoperative after its enactment. The Court says: "Conceding the paramount power of Congress, the operative force of the State law was solely maintained over the interstate commerce in question because of the provision of the act of Congress providing that it should not take effect until one year after its passage. As a result, the act was treated as not existing until the expiration of a year from its passage. . . . But we are of opinion that this view is not compatible with the paramount authority of Congress over interstate commerce. It is elementary, and such is the doctrine announced by the cases to which the Court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the sub-
(143) ject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the State law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the State. To admit the fundamental principle and yet to reason that because Congress chose to make its prohibitions take effect only after a year, the matter with which Congress dealt remained subject to State power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postponing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control—a manifestation arising from the mere fact of the enactment of the statute.

"But if we pass these considerations and consider the issue before us as one requiring merely an interpretation of the statute, we are of opinion that it becomes manifest that it would cause the statute to destroy itself to give to the clause postponing its operation for one year the meaning which must be affixed to it in order to hold that during the year of postponement State police laws applied. In the first place, no conceivable reason has been, or we think can be, suggested for the postponing provision if it was contemplated that the prohibitions of State laws should apply in the meantime. This is true, because if it be that it was contemplated that the subject dealt with should be controlled during the year by State laws, the postponement of the prohibitions of the act could accomplish no possible purpose."

We are therefore of opinion there was error in refusing to give the instructions prayed for, and a new trial is ordered.

The defendant does not resist a recovery of $2, the amount of the damages, and the costs.

New trial.

(144)

SIMON YELLOWDAY v. MRS. ELIZA PERKINSON ET ALS.

(Filed 5 November, 1914.)

**1. Pleadings—Answers—Counterclaim—Title to Lands—Slander of Title—Equity—Injunction—Trials—Nonsuit.**

The right of a plaintiff to abandon his action and submit to a judgment of nonsuit at any time before verdict rendered, or what is tantamount to it, does not apply where the defendant has pleaded as a counterclaim a cause of action arising out of a contract or transaction set forth in the complaint as a ground for the plaintiff's cause; and where in an action for the possession of land the defendant sets forth his title and, asking for injunctive relief, alleges the insolvency of the plaintiff, his frequent acts of trespass, and that his claim of title constitutes slander upon the defendant's title, depriving him of the opportunity to sell his land, etc., the plaintiff may not take a voluntary nonsuit and deprive the defendant of his right to try out the action to obtain the relief he has demanded.

**2. Appeal and Error—Improper Remarks of Court—Objections and Exceptions—Presence of Jury.**

The appellant may not urge for error on appeal improper remarks of the trial judge without duly noting an exception which appears of record; and certainly when it appears, as in this case, the remarks were not made in the hearing of the jury, or where the appellant is the plaintiff, and has not shown he has a cause of action.

APPEAL by plaintiff from *Cooke, J.*, at April Term, 1914, of WAKE.

This is an action for the recovery of land. The complaint declares that the plaintiff is the owner in fee simple and entitled to the immediate possession of the lands described.

The defendants deny the allegations of the complaint, and by way of further answer allege that the plaintiff had for many years repeatedly committed trespasses upon the lands of the defendants, known as the Perkinson lands; that he had frequently been indicted and convicted therefor, and served several terms upon the public roads on account thereof; that the lines between the property of the plaintiff and defendants has been processioned in the Superior Court of Wake County in 1905, and that the plaintiff still continued repeatedly to invade and trespass upon the lands of the defendants, to cut down and destroy standing and growing timber, wood and timber trees thereon; that plaintiff was insolvent, and that he was doing irreparable damage to the defendants.

That the plaintiff had the reputation of being a dangerous man; that his repeated acts of trespass and his claims to portions of the lands of the defendants had deprived the defendants of the opportunity to sell said lands, and constituted slanders upon the title thereof, and prayed "that the court in this action grant them an injunction permanently restraining and enjoining the plaintiff from trespassing upon and interfering with and damaging their said lands, and for such other and further relief as may be proper."

(145) The plaintiff introduced certain deeds set out in the record, and among them a deed from R. A. Potter and wife, the plaintiff's immediate grantors, which describes the lands as set out in the complaint and contains the following covenant:

"And the said parties of the first part covenant to and with the party of the second part that they are seized of said premises in fee simple, and that they have the right to make this conveyance in fee simple; that the said premises are free from any encumbrances whatsoever, except a certain encumbrance for $500, which the party of the second part assumes to pay." The plaintiff, after introducing evidence to identify the lands in this latter deed as the same lands set out in the complaint, testified himself that he had been evicted about fourteen years before by the sheriff of Wake County from this very land, and that W. A. Mitchell was then living on same.

The defendants introduced the mortgage and the record of its foreclosure to which the lands were subject by the terms of the plaintiff's deed, and the deed executed thereunder by S. F. Mordecai, commissioner, to T. B. Crowder and N. M. Rand, and the deed by the latter to W. A. Mitchell, the party in possession of the lands described in the complaint at the time of the trial.

The defendants also introduced, for the purpose of showing that they were not in possession of any lands of the plaintiff, the record of the processioning proceeding above referred to and their own chain of title to the Perkinson lands.

They then introduced the surveyor appointed by the court in this action, who testified that he had surveyed both the lands described in the complaint and those of the defendants; that the southern line of the lands described in the complaint and the northern line of the defendants' lands, known as the Perkinson lands, was one and the same line, and was visible upon the lands, and evidenced by a heavy railroad tee-iron planted in the ground where the Perkinson tract crosses the old Lynn Adams line, and by an old ditch which extended a considerable distance; that it was also marked by an old hedge-row, and that at least one-third of its western course ran through woodland and was marked by trees. That the Perkinson line was also marked by iron stakes and passed over another heavy

railroad tee-iron planted in the corner of Dock Adams. "That no part of the 84-acre tract of land being known as the Mitchell land and being the land described in the complaint lies south of the line as marked by the said iron stakes and railroad irons." All the issues were found in favor of the defendants, and the court gave judgment as set out in record, and granted the injunction as prayed by the defendants.

When the defendants introduced the mortgage from Potter and (146) wife and the foreclosure proceeding, his Honor inquired as to whether or not the description in the mortgage from Potter to Jones and the decree of foreclosure above mentioned was the same description as called for by the plaintiff's deed, and the plaintiff's counsel, in response to his inquiry, said: "It looks like it." His Honor remarked aside in the hearing of those in front of him at the bar, but not in a tone audible to the jury: "You might as well be looking for the Hebrew children as for that land." No exception was taken to this remark, but thereafter the plaintiff moved to be allowed to submit to a judgment of nonsuit, which was refused, and plaintiff excepted. There was a verdict and judgment in favor of defendants, and plaintiff appealed.

*W. H. Lyon, Jr., and Douglass & Douglass for plaintiff.*

*R. N. Simms and Bart M. Gatling for defendants.*

ALLEN, J. The right of the plaintiff to submit to a judgment of nonsuit is accurately stated, as applied to different conditions of the pleadings, in *McNeill v. Lawton,* 97 N. C., 20, where the Court says: "Generally, a plaintiff may abandon his action and voluntarily submit to a judgment of nonsuit, at any time after bringing his action, and before the verdict of a jury, or what is tantamount to it. *Bank v. Stewart,* 93 N. C., 402, and the cases there cited. He cannot do so, however, under the present method of civil procedure, if the defendant has pleaded a counterclaim—a cause of action arising out of the contract or transaction set forth in the complaint as the grounds of the plaintiff's cause of action. In such case it is reasonable and just that the rights of the parties arising out of such contract or transaction shall be settled at the same time and in the same action, and that one party shall not be allowed to abandon the action without the consent of the other, until this shall be done. The plaintiff cannot justly complain if he is detained in court until the whole merits of his cause of action are tried and the rights of the defendant growing out of the same are settled, if the latter shall so desire. *Whedbee v. Leggett,* 92 N. C., 469. It is otherwise when the counterclaim is a cause of action arising independently of that alleged in the complaint, such as that allowed by the statute (The Code, sec. 244, par. 2). In that case the plaintiff may submit to a voluntary non-

suit as to his own cause of action; but he cannot, by doing so, put an end to the defendant's right to litigate his counterclaim. The action continues for that purpose, unless the defendant shall see fit to withdraw his counterclaim and thus abandon the action with which he has become identified, as seeking redress from the plaintiff, who becomes practically a defendant, while the defendant becomes a plaintiff in the action thus prolonged. *Whedbee v. Leggett, supra.*"

(147) The cases in support of these principles are collected in the annotations to section 1520 of Pell's Revisal.

If, therefore, the defendants have pleaded a counterclaim in the answer, his Honor was correct in refusing to dismiss the action.

In *Cheese Co. v. Pipkin,* 155 N. C., 397, the Court fully approved the definition and description of a counterclaim stated by *Justice Hoke* in *Smith v. French,* 141 N. C., 6, as follows: "Our statute on counterclaim is very broad in its scope and terms, is designed to enable parties litigant to settle well-nigh any and every phase of a given controversy in one and the same action, and should be liberally construed by the court in furtherance of this most desirable and beneficial purpose. Subject to the limitations expressed in this statute, a counterclaim includes well-nigh every kind of cross-demand existing in favor of defendant against the plaintiff in the same right, whether said demand be of a legal or an equitable nature. It is said to be broader in meaning than set-off, recoupment, or cross-action, and includes them all, and secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill would have secured to him on the same state of facts."

These authorities establish the proposition that the plaintiff has no right to submit to a judgment of nonsuit without the consent of the defendant, and dismiss the action, if a counterclaim is pleaded, and that when facts are alleged which would entitle the defendant to maintain a separate action against the plaintiff, legal or equitable, they amount to a counterclaim.

Applying these principles to the pleadings, we are of opinion a counterclaim is alleged.

The defendants claim that they are the owners and in possession of the land, and the plaintiff is insolvent, and upon the facts alleged the defendants are entitled to injunctive relief, not as auxiliary to some other cause of action, but as a cause of action, it being the only relief available.

As was said in *Marshall v. Comrs.,* 89 N. C., 106: "The injunctive relief sought in this action is not merely auxiliary to the principal relief demanded, but it is the relief," and this was approved in *Hyatt v. DeHart,* 140 N. C., 271.

Other citations of authorities where actions have been sustained when the only relief sought was by injunction will be found in Pell's Revisal, sec. 819.

The objection to the remark of his Honor cannot be considered, because no exception was taken, and the case on appeal states that it was not made in the hearing of the jury.

It also appears upon the facts, not seriously controverted, that the plaintiff has no title to the land in controversy, and the remark could not have injured him.

No error.

*Cited: Turner v. Livestock Co.*, 179 N.C. 461 (1c); *Sewing Machine Co. v. Burger*, 181 N.C. 246 (1d); *Sewing Machine Co. v. Burger*, 181 N.C. 258, 259, 262 (1j); *Cohoon v. Cooper*, 186 N.C. 27 (1c); *Thompson v. Buchanan*, 195 N.C. 159 (1d); *Ins. Co. v. Griffin*, 200 N.C. 254 (1cc); *McGee v. Frohman*, 207 N.C. 481 (1c); *Winborne v. Lloyd*, 209 N.C. 487 (2c).

(148)

S. P. WARD, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 7 November, 1914.)

**1. Railroads—Rights of Way—Pedestrians—Look and Listen—Contributory Negligence—Proximate Cause—Trials—Nonsuit.**

Whether a trespasser or a licensee by custom, a person walking along a railroad track is required, by his having thus chosen a dangerous place to walk, to use diligence in protecting himself from being run over or injured by a train passing there, by the use of both his faculties of looking and listening; and the employees of the railroad, having a superior right to the usage of the track for the running of the company's trains, may assume to the last moment that the pedestrian, apparently having a proper use of his faculties, will leave the track in time to avoid an injury; and when he has failed to do so, and the track is unobstructed, and by the use of his faculties he could have perceived his danger in time to avoid the injury complained of, his omission to perform this duty required of him is the proximate cause of his injury, and a recovery of damages will be denied. *Talley v. R. R.*, 163 N. C., 567, cited and distinguished.

**2. Same—Signals—Lookout.**

Where a recovery of damages for a personal injury is denied by reason of the failure of a pedestrian walking on the railroad track to exercise the proper degree of care required of him to leave the track in time to avoid the injury complained of, it is his own negligence which bars his recovery, irrespective of the duty of the employees of the railroad company to keep a lookout in front of the moving train, or give warnings of its approach.

**3. Same—Side-tracks—Noises.**

The doctrine that a pedestrian on a railroad track is required to exercise his faculties to look and listen to protect himself from the consequences of his having used this dangerous place for walking, applies to side-tracks which are customarily used; and where the pedestrian in full use of himself and his faculties has attempted to walk upon the right of way, not far from a station, where there are a main and two side-tracks, one of the side-tracks being then used by a train, and to avoid another train passing on the main line has stepped over to the other side-track, and while walking there is killed by the engine and car from the main-line train backing down upon him, in broad daylight, and when by looking or listening, or in the proper exercise of his faculties he should have seen the engine and car approaching in time to have left the track for a place of safety, his death is solely attributed to his own negligence, without reference to whether the train on the other side-track was making too much noise for the engine and car to have been heard, or whether there was a proper lookout placed or signals given to him.

CLARK, C. J., dissenting.

APPEAL by defendant from *O. H. Allen, J.*, at February Term, 1914, of COLUMBUS.

(149) This action was brought by the plaintiff as administrator of Noah Nobles, to recover damages for the alleged negligent killing of his intestate. The facts are few and simple. The intestate, in broad daylight, was walking on the track of the defendant, known as the Conway branch, towards his home, 3 miles away. He saw a freight train approaching, and stepped from the main line onto the west side-track, and continued on his journey. The passenger train had already passed by that place. The main track was used as a walkway by the people in that vicinity, and while it does not clearly appear whether the side-tracks were so used, we will assume that they were. There were three side-tracks at this point, that is, between a crossing and the place where he was killed, all leading south towards Conway from Chadbourn. He was killed 200 or 250 yards from the passenger station at Chadbourn, at which latter place he had been talking with one of plaintiff's witnesses just a few minutes before, and then started for his home. He was in good health and had possession of all of his faculties; could see and hear well, and had an unobstructed view of the approaching engine and tender which afterwards struck and killed him. The side-track on which he was walking at the time of the accident turns from the main track 50 yards below the crossing, and the place where he was killed is 350 yards from the point where the side-tracks join the main track.

Charles Jolly, one of the plaintiff's witnesses, testified that he saw the engine and tender backing towards Noah Nobles about three minutes before he was killed. "They came in on the main line and then went down to pull the train in. It had not gone down in the direction in which

Nobles was killed until after Nobles had gone down. This train came in there from Conway. The mail-train engine cut loose from the cars to go down to the coal chute after switching on the east side-track. Then it came back on the main line and went on the other track, going to the coal chute. There was another train along there where he was killed—a heavy freight train. That train was shifting on the yard there. It came in to the main line about the time Nobles was killed. It was right against where Nobles was killed." He further said that he did not hear any signal by bell or whistle from the time the engine left the depot until the tender struck Nobles. There were overhanging limbs of trees near the track, but they did not obstruct the view. In regard to the trees, he testified:

"Q. How far from the ground was the lowest limb of those trees? A. They were lower, I judge, than from here to the ceiling. I never measured them. An engine and train of cars could pass under it. You could see a train of cars coming from the east side.

"Q. If you were standing up here to the south of these trees and an engine was coming from the north, you could see it if you were on the track? A. Yes, sir.

"Q. The limbs would not obstruct your view from seeing it? (150) A. No. sir."

There was a train on the main line which was shifting or exhausting steam and making a noise as the engine and tender approached deceased. The engine and tender "were rolling along slowly" and were stopped within 10 feet after the engineer learned that Nobles had been killed. He backed his engine to the place where the body was lying and expressed regret that the accident had occurred.

Fletcher Smith, plaintiff's witness, testified that there was nothing to prevent Nobles from stepping off the track, and that he could have seen the engine approaching him if he had looked. This witness saw him walking on the track just before he was killed. The engineer was in his place in the cab at the time of the accident, but there was no one on the front part of the tender. The killing occurred 80 or 90 yards from the crossing.

Defendant introduced no evidence, and moved to nonsuit. Motion denied, and exception was duly taken. Verdict for plaintiff, judgment thereon, and appeal by defendant.

*D. J. Lewis, Irvin B. Tucker, and H. L. Lyon for plaintiff.*

*Davis & Davis and Schulken, Toon & Schulken for defendant.*

WALKER, J., after stating the case: It is impossible to distinguish this case, in respect to either its general or special features, from those

in which we have held, upon a similar state of facts, that the railroad company is not liable, it being a case of *damnum absque injuria.* There are several of our cases precisely like this one in their facts, and to some of them we will advert hereafter.

The principle we have adopted, and it has met with the concurrence of many other courts whose opinions are entitled to the greatest respect, is that when a person is about to cross the track of a railroad, even at a regular crossing, it is his duty to examine and see that no train is approaching before venturing upon it, and he is negligent when he can, by looking along the track, see a moving train, which, in his attempt to blindly pass across the road, injures him. Even where it is conceded that one is not a trespasser, as in our case, in using the track as a footway, but has implied license by reason of a custom in the neighborhood to so use it, it behooves him to be still more watchful. The license to use does not carry with it the right to obstruct the road and impede the passage of trains. A railroad company has the right to the exclusive occupancy of its track, and especially so when running its trains thereon, and its servants are justified in assuming that a human being, either a trespasser or one walking on it by implied license, who has the use of all his senses, will step off a track before the train reaches him. This was said (151) by *Justice Avery* in *McAdoo's case,* 105 N. C., 140, and is well sustained by the authorities cited therein, viz.: *Bullock v. R. R.,* 105 N. C., 180; 2 Wood on Railroads, sec. 333; *Parker v. R. R.,* 86 N. C., 221; 2 Wood on Railroads, sec. 320. A court of the highest authority has declared that, under such circumstances as those mentioned in the *McAdoo case,* the track, as it seems necessary to repeat with emphasis, is itself a warning to those who may choose to use it as a walkway, even if it is customary for the people in the neighborhood to do so. It is a place of danger and a signal to all on it to look out for trains. It can never be assumed that trains are not on a track, and that there can be no risk to pedestrians from them. But the same has so often been the utterance of this Court that the doctrine has become deeply imbedded in our jurisprudence, and is so just in itself and essential to the public convenience and safety that it would be most unwise to abrogate or even modify it. Public policy and common sense and ordinary prudence alike forbid such a course. The facts of this particular case bring it squarely within the control of that principle, and they so clearly point to the unfortunate negligence of the intestate as the active, direct, and efficient cause of his death, that it would be a hopeless task even to attempt to differentiate it from those cases which have gone before it, and in which we have held, without variableness or the shadow of turning, that there is no negligence to be imputed to the railroad, but all of it is that of the party killed or injured while walking on a track, "in the broad and open day, in front

of an approaching train or engine." We have said the precedents are numerous, and this partial array of them will prove it: *McAdoo v. R. R., supra; Parker v. R. R.*, 86 N. C., 221; *Meredith v. R. R.*, 108 N. C., 616; *Norwood v. R. R.*, 111 N. C., 236; *Hugh v. R. R.*, 112 N. C., 385; *Syme v. R. R.*, 113 N. C., 538; *Bessent v. R. R.*, 132 N. C., 934; *Stewart v. R. R.*, 128 N. C., 518; *Wycoff v. R. R.*, 126 N. C., 1152; *Sheldon v. Asheville*, 119 N. C., 606; *Beach v. R. R.*, 148 N. C., 153; *Lea v. R. R.*, 129 N. C., 459.

All of these cases have so thoroughly established the principle upon facts substantially identical with those in this record that it would seem to be doing something more than our duty or necessity requires to reiterate the doctrine. But the proposition, as having any application to this case, is earnestly contested, and we must, therefore, proceed to show how completely it fits; and in doing so, a more extended reference to former decisions and the facts upon which they were based may be necessary, in order to show the exact analogy between them and the case at bar.

A railroad track, as was said in *Beach v. R. R., supra,* is intended for the running and operation of trains, and not for a walkway, and the company owning the track has the right, unless it in some way restricted that right, to the full and unimpeded use by it. The (152) public have rights as well as the individual, and usually the former are considered superior to the latter. That private convenience must yield to the public good and public accommodation is an ancient maxim of the law. If we should for a moment listen with favor to the argument and eventually establish the principle that an engineer must stop or even slacken his speed until it may suit the convenience of a trespasser on the track to get off, the operation of railroads would be seriously retarded, if not practically impossible, and the injury to the public might be incalculable. The prior right to the use of the track is in the railway, as between it and a trespasser who is apparently in possession of his senses and easily able to step off the track.

In *High's case, supra,* an important case on this subject, which has been approved repeatedly since it was decided by a unanimous Court, it appeared that a woman wearing a long poke-bonnet, which totally obstructed her vision, was walking on a side-track, supposing that the approaching train would take the main track, "as they usually did," but it so happened that on the particular occasion it did not, but used the side-track, and it was held to be clear that she could not recover, as she had no right to speculate on the course the engine would take. This is what the Court said with reference to the facts, which are in every essential respect like those we have here: "If the plaintiff had looked and listened for approaching trains, as a person using a track for a footway should, in the exercise of ordinary care, always do, she would have seen

that the train, contrary to the usual custom, was moving on the siding. The fact that it was a windy day and that she was wearing a bonnet, or that the train was late, gave her no greater privilege than she should otherwise have enjoyed as licensee, but, on the contrary, should have made her more watchful. There was nothing in the conduct or condition of the plaintiff that imposed upon the engineer, in determining what course he should pursue, the duty of departing from the usual rule that the servant of a company is warranted in expecting licensees or trespassers, apparently sound in mind and body and in possession of their senses, to leave the track till it is too late to prevent a collision," citing *Meredith v. R. R.*, 108 N. C., 616; *Norwood v. R. R.*, 111 N. C., 236. And those cases fully sustain the correctness of the proposition.

Referring to this passage from *High's case* in the recent case of *Abernethy v. R. R.*, 164 N. C., 91, this Court unanimously said that the law was there correctly stated, and that both the *Meredith* and *High cases* hold that a pedestrian, when on the track, is under the absolute duty to look and listen, if he can see and hear, exercising both senses for that purpose, and that the rule is not, in the least, modified by the fact
(153) of its being a side-track instead of the main line; and it was added that the public could not be safely and adequately served upon any other principle. If engineers must stop their trains to await the pleasure or convenience of foot passengers in leaving its tracks, when they can step off so easily and avoid injury and not obstruct or retard the passage of trains, the company cannot well perform its public duty as a carrier, and the public convenience, though superior and of prior right, must give way to private interests, contrary to the just maxim of the law.

In *Meredith's case, supra*, which is essentially and so strikingly like this one, in its facts, it appeared that a boy about 13 years old was going from the house of his father to Hot Springs, and was compelled to pass along the defendant's road where three tracks, as in this case, were laid, there being wire fences on both sides of said tracks. He passed a train apparently headed toward Paint Rock, and not long after, seeing another coming towards him from Hot Springs on the track he was using, he stepped over to the side-track on which the train first seen by him was running, but failed to see it approaching him from his rear till it ran against and injured him. He might have stepped off the track and avoided the injury had he seen the train coming up behind him. He was stricken by the engine and his arm was crushed and afterwards amputated. This Court held, with reference to those facts, that actual or implied license from the railroad company to use its track as a footway would not relieve the pedestrian from the duty to exercise ordinary care, and that he must take the consequences of a failure to do so, and that "the license to use the track does not carry with it the right to obstruct

or impede the passage of trains," citing *McAdoo's case.* It was also said that the cases on the subject hold that the speed of the train, whether slow or fast, can make no difference, and does not prevent the application of the principle, because the pedestrian, if he exercises due care, can escape danger as well in the one case as in the other. The Court further said, in *Abernethy's case,* citing the *High* and *McAdoo cases* and *Glenn v. R. R.,* 128 N. C., 184: " 'The railroad track itself was a warning of danger, made imminent by the approaching train. It was then his duty to keep his wits about him, and to use them for his own safety. He knew or ought to have known that he was a trespasser, and it was his duty to have gotten out of the way of the train. The defendant was under no obligation to stop its train at the sight of a man on its track.' The Court further said that it was apparent to the engineer that the plaintiff was in full possession of his faculties and could take care of himself, and the engineer had the right to presume that he would leave the track in time to avoid the injury. That he did not do so was his own fault, and he should suffer the consequences of his folly. The doctrine of the cases already cited and decided in this Court has been firmly established in other jurisdictions, and notably in *R. R. v. Houston,* 95 U. S., (154) 697, where it is said that a person using the track of a railroad company must look and listen, and any failure to do so will deprive him of all right to recover for any injury caused thereby. 'A party cannot walk carelessly into a place of danger,' said the Court in that case, citing several cases from other States. And concluding, it was said: 'It is almost incredible that men will take so many chances under such circumstances. The cases in our courts also hold that neither the fact of an engine being on the south siding and exhausting steam, nor the speed of the oncoming train, which was not, in this case, at all excessive, can make any difference.' *Syme, McAdoo,* and *High cases* and *R. R. v. Houston, supra.*" This Court held in *Norwood's case,* 111 N. C., 236, that it was immaterial whether the intestate went upon the track under a license or as a trespasser, and that if he was apparently in possession of his faculties, and not known to be incapable of taking care of himself, the engineer had the right to assume, up the the very last moment, when it was too late to save him, that he would leave the track and save himself.

No court, perhaps, has expressed itself in more certain and unmistakable terms upon this subject than this one, and with more unanimity. The principle has been often announced, and applied to facts not essentially different from those in this case, that where a person on the track as a trespasser or licensee, is apparently in possession of his senses and faculties, so that he can either hear or see a train, he must listen, and if he cannot hear, he must look, for the approach of trains, and his failure to do so is negligence on his part, which at least concurs, up to the very

time of the injury, with that of the defendant, the railway company, if there be any negligence on its part, and he must be considered in law and, we add, by every rule of justice, common fairness, and common sense, to have brought disaster upon himself, if he is injured or killed.

The rule, as stated in our decisions, and we restate and approve it now, is not one peculiar to this Court. It has been generally, if not universally, adopted by other courts, and is thus epitomized by an eminent author: "The company's employees may presume that one, who is apparently able to do so, will get off the track in time to avoid injury to himself." 3 Elliott on Railroads, sec. 1257 *a*. See, also, *Matthews v. R. R.*, 117 N. C., 640; *McArver v. R. R.*, 129 N. C., 380; *Clegg v. R. R.*, 133 N. C., 303; *Pharr v. R. R.*, 133 N. C., 610.

In *McArver's case, supra,* the Court held: "If the intestate was sitting upright with his back to the cross-ties, or in any other attitude which did not make it apparent to the engineer that he was in a helpless condition and in danger of being stricken by the train, then the engi-
(155) neer could have assumed up to the last moment that he would have gotten out of danger, and the engineer was not bound to either stop his train or slacken its speed, or give him notice by bell or whistle. A lookout by the engineer for such a person in such a position is not required by the law." And in the *Matthews case, supra,* it was said by the *Chief Justice,* that if defendant was negligent in not giving a signal, the act of the plaintiff was much greater carelessness and was the immediate cause of the injury, and he cannot be excused for such disregard of his personal safety. He should have carefully looked and listened for trains, and the engineer had the right to presume that he had done so, and, having failed to do so, his own negligence is regarded as the proximate cause of his injury, citing *Parker v. R. R.*, 86 N. C., 221, and *High v. R. R., supra.*

The case of *Neal v. R. R.*, 126 N. C., 634, is worthy of careful notice in this connection, for it meets the plaintiff's contention at every point, where it is not overthrown by the long line of cases already cited. It was there said that if a person is walking on a railroad track in open daylight, and has an unobstructed view of an approaching train, and was nevertheless run over and injured, he is guilty of such negligence as deprives him of the right to recover damages; and this is so even though an ordinance of a town, as to the train's rate of speed, was being violated at the time, or the bell was not rung as required by the ordinance, or a lookout was not kept by the engineer or fireman, the injury being referred by the law to the plaintiff's own negligence as its proximate cause, citing *McAdoo's case, Syme's case, Meredith's case, Norwood's case, High's case,* all *supra.*

We, therefore, have reached the following conclusions:

1. That the omission to give the signal at a crossing does not, as we have stated, relieve the traveler on the highway of the duty, as a prudent man, to look and listen. *Cooper v. R. R.,* 140 N. C., 209. Both parties are charged with the mutual duty of keeping a careful lookout for danger, and the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring to perform this duty. *Improvement Co. v. Stead,* 95 U. S., 161

2. When a persons uses the railroad track as a footway, it is in itself a place of great danger, and a constant warning to take care of himself and to look out for his own safety, whether he be a trespasser or licensee.

3. He must carefully look and listen in both directions for approaching trains, and an engineer on a train advancing towards him, if he is apparently in possession of his senses, has the right to assume that he has performed this duty to himself, even until it is too late to save him from injury.

4. That the doctrine applies to side-tracks as well as to main (156) tracks, even though the train is moving on the side-track "contrary to custom," and although the train in either case may be late or behind its schedule time. *High's case,* 112 N. C., at p. 389.

5. The fact that an engine is exhausting steam, or other disturbance is being made which is calculated to drown the noise of the approaching train, is no excuse for not looking and seeing the train, and will not, therefore, alter the case. *Syme's case,* 113 N. C., 558; *Beach's case, supra.* If these settled principles are applied to the facts in this record, the plaintiff has shown no reason why he should recover. The case is really a typical one for the application of the doctrine. It has no exceptional features which exempt it from the control of the usual rule.

The plaintiff contends that the case of *Talley v. R. R.,* 163 N. C., 567, sustains his position and entitles him to recover or to have his cause submitted to the jury; but that is very far from being so. In that case it appeared that the plaintiff's intestate was walking on a siding which had not been used for seven years; the train was running near its schedule time, which was known to the intestate, as was the custom of not using the side-track. Upon hearing the whistle of the approaching train, he crossed from the main track to the siding. The switch uniting the main and side tracks had been tampered with after intestate had passed it, and broken, so that the train was shunted upon the side-track and the engineer knew beforehand, by the red signal at the switch, that it was turned to the side-track—an unusual occurrence—and had ample time thereafter to warn intestate of his danger, which the latter could not anticipate by reason of the special circumstances mentioned. The Court, by *Justice Hoke,* fully recognized, and approved with emphasis, the

general principle we have stated; but the majority held that the special and peculiar circumstances of that case warranted its submission to the jury. At the same term, in *Abernethy v. R. R., supra,* the general rule was applied, where the intestate was walking on a siding in use by the company, the Court distinguishing *Talley's case* therefrom and quoting with approval this language of *Justice Hoke* in that case: "We have held in many well considered cases that the engineer of a moving train who sees, on the track ahead, a pedestrian who is alive and in the apparent possession of his strength and faculties, the engineer not having information to the contrary, is not required to stop his train or even slacken its speed because of such person's presence on the track. Under the conditions suggested, the engineer may act on the assumption that the pedestrian will use his faculties for his own protection and will leave the track in time to save himself from injury."

In this case the side-track was in commission, it was a live and not a dead track, apt to be used at any moment, when the necessities (157) of the road required it. The company was engaged, at the time, in its usual and ordinary avocation of running trains and shifting cars at that place, where numerous trains must have gathered, as it had a main track and three lateral tracks. Its traffic made it necessary to call this siding into requisition. There was nothing unusual or extraordinary in doing so, as a majority of the Court thought there was in *Talley's case.* It was merely an ordinary and usual incident of the traffic at that station. A railroad cannot be operated merely for the accommodation of pedestrians who, for their own convenience, may choose to use its tracks, whether the main line or a siding. Private inconvenience must yield to the general good and welfare, and if pedestrians will resort to the tracks as footways, they must accept the privilege with its concomitant burden, and exercise that degree of care which every prudent man should take for his own safety. If he fails to look and listen at a crossing, where he has a right to be, and is injured thereby, the loss must be his, for there is no injury (*injuria*), says the law. *Cooper v. R. R.,* 140 N. C., 212. This being so, why should he not be required to use the same degree of care and vigilance when walking on the track? *Justice Hoke* says in *Cooper's case:* "This rule is so just in itself and so generally enforced as controlling, that citation of authority is hardly required." On this point, *Coleman v. R. R.,* 153 N. C., 322, is a most valuable one. The fact that the engine was backing with tender in front makes no difference, as we have seen from the cases, as it was daylight and they were in full view of the intestate, if he had looked properly for them. *Purnell v. R. R.,* 122 N. C., 832, and that class of cases do not apply, as there the train was backing in the nighttime with no light or flagman in the forward car. But here, if there had been a flagman, it

would not have been his duty to give any signal, for he had the right to assume, as all the cases say, that intestate had looked and listened and would get out of the way. He could have done it easily, as plaintiff's witnesses state, and the defendant was bound to use its track and could not, therefore, change its course.

The intestate was bound to look and listen before proceeding to use the track as a footway and to be on the alert while doing so, in order to avoid an approaching train, and not to walk carelessly in a place of possible danger. Had he used his senses, he would not have failed either to hear or to see the train which was coming. If he omitted to use them, as he seems to have done, and continued to walk on the track regardless of his personal safety, he was guilty of culpable negligence, and so far contributed to his injuries as to deprive him of all cause to complain of others, and his administrator of the right to recover for his death. If using his senses, either or both of them, he saw or heard the train coming, and yet continued on his way in this place of danger, instead of stepping off the track and allowing the train to pass, and was (158) killed, the consequences of his persistence and rashness cannot be charged against the defendant. *R. R. v. Freeman,* 174 U. S., 383.

There is a very apt and forceful statement of the law, which is directly relevant to the facts appearing in this record, in the much cited and strongly approved case of *Chicago, R. I., and Pac. R. Co. v. Houston,* 95 U. S., 697 (24 L. Ed., 542), which so fully sustains the doctrine, as we have just stated it, and almost in the same words, that the pertinent part of it we deem it proper to substantially reproduce. It is this: "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees, in these particulars, was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk thoughtlessly or carelessly into a place fraught with danger. If she had used her senses, she could not have failed to know that the train was coming, as it was plainly visible. If she omitted to use them, and walked heedlessly upon the track, she was clearly guilty of blamable negligence, and so far the author of her own misfortune as to take from her the right to accuse others of wrong to her. If, using them, she saw the train coming, and yet attempted to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case, we cannot see

any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances, the court would not have erred had it instructed the jury, as requested, to render the verdict for the defendant." And essentially to the same effect are *Crenshaw v. R. R.*, 144 N. C., 316; *Royster v. R. R.*, 147 N. C., 347, and *Exum v. R. R.*, 154 N. C., 408. A rational being should not needlessly venture into places of peril, and if he does, he should use proper precautions to guard against injury. If he fails to do either, and suffers damage in consequence thereof, it must be referred to his rash act and gross inattention to his own security as the true and efficient cause. *Express Co. v. Nichols*, 3 N. J. L., 439. But numerous courts have stated this principle with practical uniformity, and we find that it has been applied to facts not unlike those now presented to us, and to the extent of denying the plaintiff's right of recovery. *Crenshaw v. R. R., supra.*

In that case we said: "As much as we deplore the unfortunate (159) accident which has befallen the plaintiff, we are not permitted to relax those rules of the law which must be applied inflexibly and impartially to all cases coming within the principles they have established. 'It is impossible,' said a learned and a just judge, 'to consider the plaintiff's injuries without a feeling of profound sympathy. His misfortune was a severe one; but sympathy, although one of the noblest sentiments of our nature, which brings its reward to both the subject and the actor, has no proper place in the administration of the law. It is properly based upon moral or charitable considerations alone, and neither courts nor juries are justified in yielding to its influence in the discharge of their important and responsible duties. If permitted to make it a basis of transferring the property of one party to another, great injustice would be done, the foundation of the law disturbed, and anarchy result. Hence, every proper consideration requires us to disregard our sympathy and decide the questions of law presented according to the well-settled rules governing them.' *Laidlaw v. Sage*, 158 N. Y., at p. 104. The true function of judge and jury could not be better stated. Railway companies should be held to a strict accountability for the management of their cars and for the performance of their duty to the public which they serve. The care and vigilance required of them should be proportioned to the increased danger and hazard which the nature of their business creates; but while they are, and properly should be, thus answerable, under the law, for any breach of duty, we should not forget that they are also equally under its protection, and should not be made to pay when nothing is due."

It is argued, though, for plaintiff that there were trees near the side-track, which obstructed the view of deceased; but the witnesses state

that there was a clear view, notwithstanding the trees; they did not prevent his seeing the approaching train. Nor is it true that the train not being expected by the intestate can affect the application of the settled principle. The company has the right to the free use of its tracks at all times, and is not bound, in respect to trespassers and mere licensees on them, to adopt schedules for their benefit. It could not perform its duty to the public if such were required of it. But the law is that the pedestrian, if a trespasser, or if a mere licensee, in using his implied privilege, must take care of himself against all kinds of trains, whether backing or not, and the liability is determined by his conduct. The company proves his contributory negligence when it appears from the case that he was walking on the track, when by looking or listening he could see the train and get off before it reached him. This was the doctrine of *Neal v. R. R.*, 126 N. C., 634, the headnote being this: "Where the evidence on the part of the plaintiff (the defendant having introduced none)
is demurred to, and, if true, establishes negligence on the part of (160)
the plaintiff and of the defendant, concurrent to the last moment,
a judgment as of nonsuit, sustaining the demurrer, is proper," the Court citing *High's case, McAdoo's case, Norwood's case, Syme's case,* all *supra; Smith's case,* 114 N. C., 728, and many others. It has been said by this Court repeatedly that failure to keep a lookout, or moving backwards, makes no difference, as if the engineer had actually seen the pedestrian walking ahead of his train, he was not required to stop or slacken his speed, as he would have the right to assume that the track-walker had looked or listened in due time and would step off the track before the train could reach him, and that this right continues down to the very last moment of time, when it is too late to save him. *High v. R. R., McAdoo v. R. R.,* and other cases, *supra.*

*Fitzgerald v. R. R.,* 141 N. C., 534, is far from being in point. It involved a very different question, calling for the application of a different principle. The facts here do not establish "a reasonable probability of actionable negligence" on the part of the defendant, but far from it, as the law refers the injury to or death of the pedestrian to his own lack of due care as the proximate cause of the same. *Neal v. R. R., supra,* and other cases above. *Meroney v. R. R.,* 165 N. C., 611, is equally as far from the point. In that case the plaintiff was injured at a public crossing, and not while walking longitudinally on the track. His right and that of the defendant at the crossing were equal and reciprocal, as we have said, and he was entitled to some warning of the train's approach under the admitted facts of the case. He was, at the time of his injury, standing where he had the absolute right to be, in the transaction of his business. The engineer backed his train against two box cars, the brakes of which had not been turned on, across a public crossing, much

used and frequented by a thickly settled neighborhood, and this was done without the slightest notice to those using it as they had the right to do. This was gross negligence, but is not our case at all.

Upon the conceded facts of our case, we cannot avoid the application of the legal principle established by the cases decided by this Court upon substantially the same state of facts.

We finally conclude that the court should have granted the motion to nonsuit, and its failure to do so was error. Let the verdict and judgment be set aside, and a judgment dismissing the action will be entered.

Reversed.

CLARK, C. J., dissenting: The plaintiff's intestate was killed by a shifting engine running backwards with its tender, without ringing the bell or blowing the whistle, and without any lookout on the front
(161) of the tender as it was running back. The jury found that there was evidence of negligence on the part of the defendant, and the judge sustained that view. The defendant has abandoned all the exceptions except the motion for nonsuit.

The evidence is that the defendant's intestate left the station at Chadbourn, going home along the defendant's track, which had been used by the public as a walkway for fifteen or twenty years. There was no train expected at the time to go in the direction that the deceased was going, and in fact no train went in that direction at that time. Soon after he left, a heavy freight train came in on the main line with a long train of cars making a great noise, and to avoid this he stepped on the side-track on the west side of the main line, which had no train on it, and while walking along this side-track in the rain, and under the trees growing within a few feet of the track, and while defendant's freight engine was opposite him, making a great amount of noise, the defendant detached an engine and tender from the passenger train which was on a side-track east of the main track, facing in the opposite direction, ran it up to the station, and then backed that engine and tender on the west side-track where the plaintiff's intestate was walking, and without giving any warning by ringing the bell or blowing the whistle and without keeping a lookout and without having any person stationed on the end of the backing tender to keep a proper lookout, ran over the plaintiff's intestate and instantly killed him. The defendant's engine and tender were making practically no noise, slipping along at a low rate of speed not exceeding 6 or 8 miles an hour, and could have been stopped within 10 feet.

This is a summary of the evidence. What is there in this evidence that licensed the defendant to kill Noah Nobles without any liability on its part? The defendant's track had long been used as a public walkway.

Nobles in passing the defendant's switch on the side-track saw that it was closed; the heavy freight train was on the main track; the passenger train headed the other way was on the east side-track; and there was nothing to put him on notice that there would be any train coming on the west side-track on which he was walking. The defendant's train gave the intestate no notice by ringing the bell or blowing the whistle, and the engineer on the shifting train must have been negligent or he could have seen the defendant [intestate] on the track in time to avoid killing him, for the evidence is that he could have stopped his train within 10 feet. He evidently was not looking in the direction in which the engine and tender were backing, and he had no outlook there, nor did he ring the bell or blow the whistle. It would be difficult to find a case where the negligence was greater than that shown by the defendant in taking the life of Noah Nobles on this occasion. Had the backing train under these circumstances run over a pig or a cow there could be (162) no question as to the liability of the defendant for such negligence.

There was nothing to require the intestate to "look and listen." He was not crossing the track. There was no train to come on the side-track where he was. He saw both trains that were there and stepped off the main track upon the side-track to the west. He knew the passenger train was on the side-track east of the main track. It was the unusual movement of shifting an engine and tender that was at the head of the mail train on the east side-track across the main track where the freight train was and then unexpectedly running it backwards on the west side-track without signal, without a lookout, and killing the intestate because the engineer did not see the intestate when he should have seen him or should have given him notice, that caused the death of the intestate. All this constituted negligence on the part of the defendant, and if in any way there was negligence on the part of the intestate to exculpate this negligence on the part of the defendant, the burden was on the defendant to allege and prove it.

The authorities agree that it is the duty of the engineer while running his train to keep a lookout, and that the company is liable for any injury which he could have seen and avoided by a proper lookout. Greater care should be required when the engine and tender or train are moving backward, as the operation is more dangerous.

As was well said by *Hoke, J.*, in *Fitzgerald v. R. R.*, 141 N. C., 534: "Direct evidence of negligence is not required, but the same may be inferred from facts and attendant circumstances, and it is well established that if the facts proved establish the reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence."

In Sherman and Redfield Negligence, sec. 58, it is said: "The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this, he is entitled to recover unless the defendant produce evidence to rebut the presumption. It has sometimes been held not sufficient for the plaintiff to establish a probability of the defendant's default, but this is going too far. If the facts proved render it probable that the defendant violated its duty, it is for the jury to decide whether it did so or not. To hold otherwise would be to deny the value of circumstantial evidence."

The plaintiff was walking along the side-track where people had been accustomed to walk for fifteen or twenty years, as the defendant knew. There was no reason to expect any train to come on the side-track at that time, and none came. An engine and tender were detached from
(163) a train on the east side-track, run down to the station beyond the freight train which was on the main track, and were unexpectedly backed on the west side-track where the plaintiff's intestate was walking, and run backwards without any signal, by bell or whistle, to those who might be expected to be walking there, without any outlook on the rear end as the train was backing, and evidently without any outlook on the part of the engineer in the direction in which he was going, for the evidence is that his engine and tender could have been stopped in 10 feet. If he saw the defendant [intestate] thus walking along unconsciously in the rain and deafened by the noise of the freight engine, while his own engine was making no noise, he was criminally liable for killing the intestate. If he did not see him and give notice, it was negligence for which the defendant is liable unless contributory negligence is alleged and proven as required by our statute.

In a very recent case, *Meroney v. R. R.*, 165 N. C., 611, it was held: "It is negligence *per se* for the employees on a railroad freight train to back its train on a side-track without some one on the front to give notice of its approach and to signal threatened danger to pedestrians, and it is actionable when injury is thereby caused." This case cites, among many others, *Purnell v. R. R.*, 122 N. C., 832, where the engine was pushing backward a train of box cars. It also cites among other cases to same purport *Pharr v. R. R.*, 119 N. C., 756; *Bradley v. R. R.*, 126 N. C., 741; *Jeffries v. R. R.*, 129 N. C., 236; *Lassiter v. R. R.*, 133 N. C., 244, and adds: "In *Beck v. R. R.*, 146 N. C., 458, it was held that the Court had over and over again declared that to run an engine suddenly backward without warning or signals, or some one on the rear of the train to give notice, was culpable negligence."

Upon all the evidence it would seem not only that there was evidence sufficient to go to the jury, but the conclusion is unescapable that the death of Noah Nobles was caused by the negligence of the defendant.

*Cited: Watts v. R. R.*, 167 N.C. 346 (cc); *Treadwell v. R. R.*, 169 N.C. 697 (d); *Hill v. R. R.*, 169 N.C. 743 (j); *Horne v. R. R.*, 170 N.C. 658 (j); *Moore v. R. R.*, 179 N.C. 644 (j); *Kimbrough v. R. R.*, 182 N.C. 247 (j); *Davis v. R. R.*, 187 N.C. 148 (c); *Buckner v. R. R.*, 194 N.C. 108 (d).

W. B. TILGHMAN v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 5 November, 1914.)

1. **Appeal and Error—Briefs—Assignments of Error Abandoned—Rules of Court.**

Assignments of error not mentioned and discussed in the brief of appellant are taken as abandoned on appeal under Rule 34, and it is pointed out by the Court that upon mature consideration of counsel in making their briefs it is well for them not to set out useless assignments, so that the attention of the Court may be given to the material propositions of law presented in the appeal.

2. **Pleadings—Amendments—Power of Courts—Trials—Issues—Instructions.**

It is within the discretion of the trial court to permit amendments to the pleadings during the progress of the trial (Revisal, sec. 307), and where by such amendment certain matters formerly at issue have been eliminated, it is proper for the court to rule out evidence relating to the matters eliminated, and to reject issues and prayers for special instructions relating thereto.

3. **Evidence—Depositions—Trials—Witnesses—Courts.**

When the deposition of a witness, taken when he was in another State, has been read on the trial of the cause, in his absence, the trial judge may, in his discretion, permit the witness, then present, to orally testify after his deposition has been read in evidence.

4. **Appeal and Error—Evidence—Questions—Objections and Exceptions.**

Where questions are ruled out as evidence, it must be made to appear of record what the expected answer will be, so that the Court may see their materiality and relevancy, or exceptions taken thereto will not be considered.

5. **Courts — Evidence — Expert Witnesses — Recross-examination — New Matter.**

It is within the discretion of the trial judge to permit an expert witness to testify to new matter on his recross-examination.

6. **Railroads—Train Orders—Copies — Identification — Witnesses — Non-expert Evidence.**

Where damages are sought in an action against a railroad company for a wrongful death alleged to have been inflicted on the deceased by reason

of an erroneous train order, made out in original and carbon, causing a collision of two trains, wherein the deceased met his death, it is competent for a witness who has not qualified as an expert to testify that he had inspected the original order, and that the copy exhibited was not genuine.

**7. Same—Meeting Points—Similarity of Names.**

A railroad company having two stations on its road with similar names, "Grandy" and "Granite," wired from its proper department for two trains going in opposite directions to meet at one of these points, which they failed to do, resulting in a collision and the injury to the plaintiff, and the controversy turned upon the question which point was named in the order, the plaintiff contending that the order he received instructed "Grandy" as the meeting point. The plaintiff having been fully examined and testified he had no doubt that the order read "Grandy" instead of "Granite," was permitted to say that a paper-writing exhibited to him looked nearer like the one he had received than that introduced by the defendant, and that it read that the trains should pass at "Grandy," the name of the station as appearing upon the order being indistinct; and this is held no error.

**8. Railroads—Collisions—Meeting Points — Pleadings — Amendments — Negligence—Issues.**

The damages claimed in this action are sought for the alleged failure of a train order to properly name the meeting point of two of its trains going in opposite directions, whereby an injury was caused to the plaintiff, an employee on one of them. *Held*, the issues of negligence, contributory negligence, and damages were the proper ones, the question of assumption of risk having been excluded from the case by a permitted amendment of the pleadings.

**9. Same—Trials—Evidence—Questions for Jury.**

Where damages are sought in an action against a railroad company for its alleged negligence in giving the proper order for the meeting of trains at a certain station, resulting in an injury to an employee on one of the trains, upon which the evidence is conflicting, the controversy presents issues of fact for the determination of the jury.

**10. Master and Servant—Federal Employers' Liability Act—Contributory Negligence—Damages.**

Under the Federal Employers' Liability Act an instruction that the jury should "deduct," in proper instances, a reasonable amount for contributory negligence, instead of saying the damages should be "diminished on account of the contributory negligence of the plaintiff," is not held for error.

**11. Evidence, Conflicting—Medical Expert—Trials—Questions for Jury.**

Where expert evidence is conflicting as to whether *locomotor ataxia* could result from an injury received in a collision of two railroad trains, it is for the jury to determine the truth of the matter.

**12. Master and Servant—Federal Employers' Liability Act—Contributory Negligence—Measure of Damages.**

*Semble*, that an instruction under the Federal Employers' Liability Act is erroneous, that if the negligence of the plaintiff was equal to the negli-

gence of the defendant, he could not recover, for in such cases the plaintiff would be entitled to the full amount of the damages, less an allowance of one-half to be deducted on account of his contributory negligence.

The Court recommends a change in the statute as to selecting expert witnesses.

WALKER, J., dissenting; BROWN, J., concurs in dissent.

APPEAL by defendant from *Allen, J.*, at May Term, 1914, of (165) WAKE.

*R. N. Simms and Douglass & Douglass for plaintiff.*
*Murray Allen for defendant.*

CLARK, C. J. A large number of the assignments of error have been abandoned by failure of the appellant to make any argument or reference thereto in its brief. Rule 34. This is as it should be. During the progress of the cause counsel, out of the abundance of caution, necessarily take a great many exceptions which on fuller examination cannot be sustained, and in such case they should neither clog the brief nor divert the attention of the Court from the vital errors alleged therein. One vital error is sufficient to secure a new trial, and there is no necessity of urging a large number of exceptions on the attention of the Court when it will be more effective to concentrate the argument on those exceptions in which the counsel have the most confidence.

The following exceptions are thus abandoned: 1, 4, 5, 7, 8, 19, (166) 20, 21, 22, 23, 24, 28, 30, 31, 32, 34, 35, 38, 39, 40, 41, 42, 43, 47, 48, 49, 58, 59, 60, 65, 72, 74, 75, 86, 87, 91, and 94.

Exceptions 3, 6, 9, 10, 11, and 12 are to evidence relating to the "block system," but the judge expressly withdrew the same and instructed the jury not to consider it, after he had made an order allowing the plaintiff to strike out the allegations in the complaint relating to the block system, and this had been done.

Exceptions 13 and 14 cannot be sustained, for it was competent to read the depositions, as the witness was at the time absent in Virginia. Exceptions 15, 16, 18, 26, 27, and 29, to the admission of evidence, are overruled. In neither of them was there an exception to the answer, and as to the last five exceptions the witness was admitted as an expert. Exception 25 was because the court later in its discretion permitted the witness to be examined orally, though his deposition had been previously read. If the witness had testified orally it would have been in the discretion of the judge to have permitted him to be recalled, and the same is true here.

Exception 33 was to a pertinent question to the expert witness in opposition to the testimony of the expert witnesses of the defendant. Nor do we

find any sound reason in favor of exceptions 36 and 37. The witness was an expert. Exception 44 is to a question asked on recross-examination, and permission to do so was entirely in the discretion of the court.

Exception 45 was to the plaintiff's inquiry of the witness Bryant, as to the paper introduced in evidence by the defendant purporting to be the train orders governing the plaintiff's action. The plaintiff contended that such paper was not genuine. This was not a question of an expert on handwriting, but merely required the witness who had seen and inspected the original to state whether or not this alleged carbon copy looked like the original.

Exception 46 is because the plaintiff, who had been fully examined whether he had any doubt about the correct reading of the writing, was permitted to say that the paper-writing looked nearer like the one he saw, and that at the time of reading it he had no doubt that it read that the train should pass at "Grandy."

Exception 50 was to the three issues submitted, which were the usual issues of negligence, contributory negligence, and damages which have been so often approved by the Court.

Exception 51 was to the refusal to submit the ten issues tendered by the defendant. The first six related to the assumption of risk, which had been withdrawn from the complaint and excluded from the consideration of the jury.

(167) Issues 7 and 8 were substantially the same as 1 and 2, which were submitted. The 9th and 10th issues tendered are covered by the 3d issue, which was submitted.

Exceptions 51½ and 52 are to the permission accorded the plaintiff to amend his complaint. This was discretionary. Rev., 507. Exception 53 is the same as 51½.

Exceptions 54, 55, 56, and 57 were to instructions requested as to the block system, telephone system, and the names of the stations, which were properly refused, because the court had stricken out those matters from the complaint and withdrawn the evidence relating thereto from the consideration of the jury.

Exception 61, to the refusal of an instruction that upon plaintiff's own evidence his failure to stop at Granite was negligence on his part, cannot be sustained.

As to exceptions 62, 63, 64, 67, and 68, the defendant in his brief practically concedes that they cannot be sustained.

As to exception 66, the instruction asked could not have been given after the amendment of the complaint.

Exceptions 69, 70, and 71 cannot be sustained, because they related to instructions upon issues 2, 4, and 6, tendered by the defendant, which

were not submitted to the jury because they related to the assumption of risk, which had been stricken out of the case.

The prayer referred to in exception 72 was substantially given by the court, as follows: "A mere proof of a collision is not in itself sufficient to establish negligence on the part of the defendant, and unless you find by the preponderance of that evidence that this collision was caused by negligence of the defendant, you must answer this issue 'No.'" It is *prima facie* negligence. *Marcom v. R. R.*, 126 N. C., 200; *Skipper v. Lumber Co.*, 158 N. C., 324.

The exceptions to refusals to charge as to certain paragraphs of the charge need not be discussed more fully.

The whole case turns upon the question whether there was negligence of the defendant, or of the plaintiff, or of his fellow-servants, in that a train order for train No. 81 to meet train No. 84 was written to pass at "Granite" or at "Grandy," or by the negligence of the operator at Norlina the word "Granite" was so written as to be mistaken for the word "Grandy." By reason of this mistake, however it was caused, a head-on collision took place, to the injury and damage of the plaintiff, as he alleges, but which the defendant denies. These were almost entirely controversies of fact, and while there were numerous exceptions as to the law, we do not perceive any errors in the conduct of the cause by the presiding judge which entitle the defendant to a new trial. There can be no benefit derived from a more minute discussion of the assignments of error.

This action was under the Federal statute which authorizes the (168) jury to abate the allowance of damages in proportion to the contributory negligence, if any, of the plaintiff. We cannot concur with the defendant's counsel that the judge erred in telling the jury that they would "deduct" a reasonable amount for contributory negligence instead of saying that the damages would be "diminished" on account of the contributory negligence. This, it seems to us, is a distinction without a difference, and a jury of twelve men would not know the difference between the two, if there is any beyond a metaphysical distinction. It is true, the act of Congress and the decisions of the Court use the word "diminish," but when one thing is *deducted* from another the larger amount is diminished to that extent. His Honor went further, and charged that the amount deducted must be the equivalent of contributory negligence.

The defendant placed emphasis on its contention that the plaintiff suffered from *locomotor ataxia* and that this disease could not have been caused by an injury received in the collision. The evidence of the experts conflicted on this question. Under the present system of summoning experts, they are selected like witnesses to the fact because it is ascertained before hand that their testimony will be favorable to the side

that summons them. It has long been suggested by leading members of both the legal and medical professions that the method of summoning expert witnesses should be radically changed, and that they should be the "witnesses of the law," and not of either party. There is a strong opinion that experts should not be summoned in any case, civil or criminal, except upon an order made by the judge on motion and notice to the opposite side and upon a finding of the judge that it is expedient that such experts should be summoned, and thereupon the judge shall fix the number, not exceeding three, and shall select the experts and fix their compensation, with a provision that no other experts shall be examined on the trial and they shall receive no other compensation.

This is a matter, however, for consideration by the General Assembly.

Probably the weight of medical opinion is that this disease is never traumatic, but is always produced by one disease (syphilis). But there are those who assert that it is traumatic, that is, produced by an injury, and others still who, admitting the single cause stated, say that it may be accelerated or intensified by an injury. The jury held with one or the other or possibly both of the latter theories. We have no means of determining which set of experts were correct, and the matters was one of fact for decision by the jury.

This cause was very fully and ably discussed before us, as it was also, from the record, before the judge and jury in the trial court. After
(169) a careful consideration of all the exceptions and the arguments thereon we find no reversible error which would entitle the defendant to a new trial. Nor are there any propositions of law whose more elaborate discussion would be of benefit in other cases of like nature. The trial turns almost necessarily, as above stated, upon two issues of fact, *i. e.*, whether and to what extent the negligence of the plaintiff, if any, contributed to the collision, and, further, whether the physical injury of which he complained was caused by said collision or was due to previous disease. The instructions of his Honor upon these two propositions contain nothing which requires elaborate discussion.

If there was any error, it was against the plaintiff, in his Honor's intimation that if the negligence of the plaintiff was equal to the negligence of the defendant he could recover nothing; whereas in such case the plaintiff would be entitled to the full amount of damages, less an allowance of one-half to be deducted on account of his contributory negligence. Or, as the defendant contends, the amount of such damages sustained by the plaintiff, if any, in the wreck should be "diminished" by one-half on account of the contributory negligence of the plaintiff, if it equaled the negligence of the defendant. The charge of the court on this point seems to have been partially if not completely cured by its fur-

ther instruction. Of this instruction the defendant cannot complain and the plaintiff is not appealing.

No error.

WALKER, J., dissenting: I am of the opinion that there was substantial error in the trial of this case. Several errors are assigned which relate to the cause of action, that is, to the question of defendant's negligence, and they raise the question whether the court did not try the case by the old law or that which obtained before the passage of the Federal employers' liability act by Congress and the corresponding legislation in this State by our General Assembly (Public Laws 1913, ch. 6), under which contributory negligence was a complete defense and bar to a recovery of damages, while under these acts it goes merely in diminution of the damages. But I will pretermit any discussion of this serious question and pass to the principal exception argued before us, which was taken to these instructions of the court, not set forth fully in the opinion of the Court, and therefore reproduced here: "If you come to the question of damages, you will assess his reasonable damages under the rule which I have laid down, and then you will make an allowance for his own negligence and deduct that from his damages, if you find it was less than his damages. If you find it was equivalent, that would make his damages nothing; but if you find it was less—a reasonable allowance for his own negligence was less—than the amount of his own damages, you will deduct it and find the result."

After being out for some time, the jury returned to the court- (170) room for further instructions. One of the jurors said: "It seems that one or two of the jurors have understood it one way, and the others another. It seems that part of the jurors say that they understand from your charge that if they were equally negligent, that the plaintiff gets nothing."

The court thereupon gave the following instruction: "I don't think I would put it just that way, but this way: If you find that the plaintiff was injured by the negligence of the defendant under the charge I gave you, you will answer that 'Yes'; and if you find that the plaintiff was guilty of contributory negligence, as charged, you will answer that second issue 'Yes'; and then you will assess the damages that you find he is entitled to, and then deduct from that whatever amount you think would be proper for his contributory negligence. I perhaps did say that, if you find that his contributory negligence amounted to as much as the amount of damages, it would be nothing; but I did not put it that way—if they were equally negligent that he would be entitled to nothing. It would not be that. But you will deduct a reasonable amount from the damages that you think that he is entitled to from the damages, as an allowance

for contributory negligence. It would be for you to say whether it is less or whether it is equal; but I did not put it just that way—that if they were equally guilty of negligence—but that you would just deduct from the amount you find he would be entitled to if he were not guilty of contributory negligence, a reasonable amount for contributory negligence. You would allow all that he would be entitled to for damages, and then, if you find that he was guilty of contributory negligence, you would make a reasonable allowance for whatever you think that would be equivalent to, and deduct that from the amount of damages."

Waiving the confusion in the last instruction, which is alleged by the appellant, and the clear error in the first one, I proceed to consider the correctness of the instruction given to the jury at their request, in explanation of the first and erroneous one. The appellant assigns the following specific errors to these instructions, which I think are well taken: (1) They lay down no rule for the guidance of the jury, but leave the matter subject entirely to the exercise of their discretion; (2) they do not conform to the directions of section 3 of the Federal employers' liability act; and (3) they do not contain the statement that the damages shall be diminished, but merely that the jury *would* deduct a reasonable amount for contributory negligence.

The jury answered the issue of negligence "Yes," the issue of contributory negligence "Yes," and the issue of damages "$7,000." What they found the total amount of damages to be does not appear and can-
(171) not be determined. The answer to the issue, "$7,000," may be the remainder after deducting $10,000 or 10 cents, just as the jury may have found such amount to be a reasonable deduction for the contributory negligence. Or the jury could very readily have regarded the matter of making any deduction at all as within their discretion, and $7,000 may be their finding of the total damages sustained by the plaintiff. However that may be, the defendant was entitled to a correct instruction as to the effect of plaintiff's contributory negligence on the damages to which plaintiff would be entitled, and the failure to give a correct instruction would be such error as would entitle defendant to *a new trial of all the issues.* It would be impossible for another jury to pass upon the issue of damages alone, because it would be necessary to determine the relative negligence of defendant and plaintiff in order to measure the damages. Under the employers' liability act the issues of negligence and damages would seem to be inseparable, as each bears upon the other. The combined negligence of both parties must be compared with the negligence of each in order to apportion the damages, as the act requires the jury to do.

It is to be presumed that the jury would have been controlled by a correct instruction, and therefore there can be no presumption that the

jury, by forming an estimate of a reasonable amount, arrived at the same or a smaller figure than they would have reached after considering the matter under a charge requiring them to diminish the damages in proportion to the amount of negligence attributable to the plaintiff.

If the charge of the court in this case is compared with the charge as approved by the United States Supreme Court in *N. and W. R. R. v. Earnest,* 229 U. S., 114, the error will become apparent. In that case *Mr. Justice Van Devanter* says: "The third section of the employers' liability act declares, subject to a proviso not material here, that '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'; and in its charge the court dealt with the subject of contributory negligence as follows: 'Contributory negligence is the negligent act of a plaintiff which, concurring and coöperating with the negligent act of a defendant, is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the act of Congress, under which this suit was brought, provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his (172) negligence, as compared with the negligence of the defendant. If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence.'" The learned justice (*Mr. Justice Van Devanter*) then proceeds to say that an exception to the instruction was reserved below, which was based upon the ground that the employers' liability act is unconstitutional, but that it was criticised in the higher court because it prescribed a wrong rule for the diminution, in that it directed or permitted it to be made upon a comparison of the plaintiff's negligence with that of the defendant; and in regard to this objection to it, he added: "The thought which the instruction expressed and made plain was that if the plaintiff had contributed to his injury by his own negligence, the diminution in the damages should be in proportion to the amount of his negligence. This was twice said, each time in terms readily understood. But for the use in the second instance of the additional words, 'as compared with the negligence of the defendant,' there would be no reason for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read, 'as compared with the combined negligence of himself and the defendant.' We say this be-

cause the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means, and can only mean, that where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common-law rule completely exonerating the carrier from liability in such a case, and to substitute a new rule, confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee," and for this observation he cites the *Second Employers' Liability Cases,* decided formerly by that high and honorable Court (*Mondou v. N. Y., N. H. and H. R. R.,* 223 U. S., 1 [56 L. Ed., 346]; 38 L. R. A. [N. S.], 44). Another important case, directly in point and which condemns such an instruction as that given below in the trial of this action, is *R. R. v. Lindsay,* 34 Supr. Ct. Rep., 581, in which the same Court thus authoritatively states the true construction of the act and the law applicable to the assessment of damages under it. After the preliminary statement that a recovery is not prevented under the act by the plaintiff's contributory negligence, it proceeds to give the reasons for it in this language: "The statute substitutes for it a system of comparative negligence, *whereby the damages are to be diminished in the proportion*
(173) *which his negligence bears to the combined negligence of himself and the carrier; in other words, the carrier is to be exonerated to the amount of negligence attributable to the employee,"* citing *N. and W. R. R. v. Earnest, supra.*

So we see that it is imperatively required by the act that its rule for the admeasurement of damages should be definitely stated to the jury, with proper explanation of its meaning, so that they may understand how to apply it. This was not done in the trial below. I attach no importance to the use of the words "deduct" or "deducted," instead of the words "diminish" or "diminished." That would be a mere play upon words; but that is not the error, as stated in the opinion of the Court, but the more serious one, that the rule of the act was not applied, or even stated at all, and certainly not explained to the jury. Even if the first instruction given by the court on this question had been correct—and it is far from being so—it surely was not explained enough and was clearly erroneous in one particular already shown, the second charge given (after the jury had returned to the courtroom for an explanation of the first one, and more definite instruction as to the damages) was not, by any means, a compliance with the rule of the statute, as it was left to the jury to deduct a reasonable or proper allowance for plaintiff's negligence without regard to the rule of proportion of the one party to the combined

negligence of both, which is prescribed by the act of Congress. The jury were also told, in explaining the former error, that "You would first deduct from the amount you find he would be entitled to, if he were not guilty of contributory negligence, a reasonable amount for contributory negligence." Nor was the other branch of the instruction correct, viz.: "You would allow all that he would be entitled to for damages, and then, if you find that he was guilty of contributory negligence, you would make a reasonable allowance for whatever you think that would be equivalent to, and deduct that from the amount of damages." But in any view taken of this question in the case, the instructions, if not contradictory, were at least erroneous in part, and the jury not being able to distinguish between the right and the wrong instructions, the erroneous one is supposed to have been followed, and a new trial would result. This, I believe, is the rule in all courts. *Edwards v. R. R.*, 129 N. C., 78; *Tillett v. R. R.*, 115 N. C., 663; *Anderson v. Meadows*, 159 N. C., 406. In this kind of case the new trial must extend to all the issues.

I think my view of the statute and of the incorrectness of the charge of the court thereunder is fully sustained in *R. R. v. Hill*, 139 Ga., 549; *Neil v. R. R.*, 22 Idaho, 74. The question now presented has not been involved in any case heretofore considered by this Court, that I am aware of. We are bound by the decision of the highest Federal court as to the meaning and application of the act and its proper enforcement in actual practice, for it is a Federal question.

There are other errors assigned by defendant, as we have said, (174) but it is not necessary that I should discuss them, as the one already considered is sufficient to reverse the judgment and demand a new trial of the case.

JUSTICE BROWN concurs in this dissenting opinion.

*Cited: Renn v. R. R.*, 170 N.C. 150 (10j); *Meadows v. Telegraph Co.*, 173 N.C. 243 (10p); *Moore v. R. R.*, 179 N.C. 643 (10j); *Cobia v. R. R.*, 188 N.C. 496 (10c, 12c).

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ALTON D. IVIE v. D. F. KING AND T. J. BETTS.

(Filed 6 November, 1914.)

**1. Libel — Conspiracy to Defame — Professional Character — Actionable Per Se.**

A publication in a newspaper of an article falsely charging an attorney at law and others with conspiracy to slander, is a charge of a criminal

offense, and with reference to the attorney acting in his professional capacity, is actionable *per se*, and malice is implied.

**2. Libel—Actionable Per Se—Justification—Damages—Matters in Mitigation.**

In an action for libel, the defendant may show the truth of his statements in defense, but not that they were made in reply to an attack upon him, as a justification, nor where the article complained of is libelous *per se* is the absence of malice a complete defense, though such matters may be urged in mitigation of damages.

**3. Libel—Issues—Trials—Instructions.**

In this action for libel proper issues having been submitted to the jury (*Hamilton v. Nance*, 159 N. C., 59), it is held that issues of good faith and absence of malice were unnecessary, the court having correctly charged the jury upon those matters under the issues submitted.

**4. Libel—Qualified Privilege—Justification.**

The defendant in an action for libel is allowed to repel the libelous charge by denial or explanation; and he has a qualified privilege to reply to a charge in good faith, but his reply must be truthful, and not defamatory of his assailant.

**5. Libel—Conspiracy—Retraction as to Some—Trials—Evidence.**

Where the defendant has published a libelous article as to several persons, charging a conspiracy, one of whom is the plaintiff, it is competent for the plaintiff in his action to show that a retraction had been filed as to the others, but not as to himself.

**6. Libel—Attorneys at Law—Speech to Jury—Evidence—Jurors as Witnesses—Justification.**

Where an attorney at law brings an action for an alleged libelous article published in a newspaper by defendant, which charged a conspiracy by the plaintiff and others to defame the character, etc., of the defendant, and relates, among other things, to a speech the plaintiff has made in a certain action, to the jury, it is competent for the plaintiff to introduce in his behalf the jurors as witnesses to show the impression made on their minds by his speech.

**7. Courts—Expression of Opinion—Predication Upon Findings—Libel—Trials—Instructions.**

Where the trial judge predicates his statements in his charge upon what the jury may find the facts to be, it is not an expression of opinion forbidden by the statute; the jury may consider on the issue as to damages that the defendant had pleaded in defense the truth of the alleged libelous matters, should they find the plea untrue.

(175) APPEAL by defendant from *Devin, J.*, at June Term, 1914, of ROCKINGHAM.

This is an action of libel upon the following article:

DEDICATED TO WOULD-BE CHARACTER ROBBERS.

One of the blackest crimes in the history of Rockingham County was attempted during the trial of the suit wherein The Leaksville-Spray Institute was plaintiff and B. F. Mebane defendant, when A. L. Brooks, C. O. McMichael, and A. D. Ivie, attorneys for the defendant, seemingly colluded together deliberately, premediately [meaning thereby premeditatedly] and with malicious intent for the purpose of going into the Temple of Justice and by falsehood, slander, vilification, misrepresentation, and innuendo, rob me of my good name and character, in an effort to advance the interest of their client. That their efforts resulted in a miserable failure does not lessen the crime, for it was by no fault of their own that they failed to accomplish their hellish purpose, but because I was too well and favorably known. The judge presiding, who has known me from childhood, knew they were lying, and the saddest part of it all is, they themselves knew and were bound to be conscious of the fact that they were lying.

I have been looking for the good that may be gotten out of this crime. It brings me face to face with an opportunity to glorify God and magnify His grace by forgiving these would-be character robbers; and this, by His help and grace, I will do. Already I have buried all purpose and desire for personal revenge. If only by pressing a button I could bring disaster upon them and their homes, and thus get personal revenge, I would not do it; but I feel the rather like saying, "Father, forgive them, for they know not what they do."

The Lord God, whose servant I am, requires me to forgive the sinner, but to hate and condemn his sin. Oh, the magnitude of the sin of the character-robber! Who can compute it? When one is robbed of his wealth, as a rule it is only a part of it, possibly his pocket change; but when you rob a man of his character, you take a priceless possession, and strike a blow at every member of his family—not only the innocent babe in the mother's arms, but children as yet unborn, even to the third and fourth generations.

No man has a right to sell himself to do wrong, and yet these (176) men have sold themselves to commit this crime for the sake of the silver that was in it. This article is not a malicious attack upon them, but only an outburst of righteous indignation and a rebuke to such a crime.

The writers of both sacred and profane history agree that the character-robber is by far a worse man than the highway robber; and if any writer has made him a better man than the murderer, I have failed to discover it. The strong arm of the law and public sentiment have driven the highway robber from the land, but the little jackleg lawyer is still plying his trade in some places and will continue to do so until an awakened public conscience drives him out. If ever there was a day

when such tactics were useful, that day has passed in Rockingham County. Her best citizens stand for truth, honor, and justice.

Now, if what I have written is not true, I have slandered these men; but if, on the other hand, it is true, I have rendered a public service by repudiating and exposing their methods. Let us hope that such a crime as this may never again be repeated in any of our courts of justice.

By some it has been thought a mark of great courage to stand in the Temple of Justice and abuse and slander one's neighbor; but it is the same kind of courage that displays itself when one takes the advantage and conceals himself by the roadside and shoots his neighbor from ambush. The right to practice law does not carry with it the right to abuse, vilify, slander, and lie. The legal profession has, in some instances, been degraded by a few who thought they could not earn their fee without resorting to such methods, but the higher class lawyer feels that he is entitled to his fee when he has rendered a clean, clear-cut service.

I do not believe that either of these men, who appeared for the defendant in this suit, will ever enjoy the fellowship of the Lord Jesus Christ (which is worth more than everything else) until they make public confession of this crime. Nor do I believe they can ever enjoy the esteem, respect, and confidence of their fellow countrymen to the extent they might have enjoyed it but for this crime.

Yours for Justice,
D. F. KING.

Verdict and judgment for plaintiff. Appeal by defendant.

*William P. Bynum, H. R. Scott, P. W. Glidewell, Thomas S. Beall, and Manly, Hendren & Womble for plaintiff.*

*A. W. Dunn and Manning & Kitchin for defendant.*

CLARK, C. J. This is an action for libel, in the publication of an article by D. F. King and T. J. Betts, owners and publishers of (177) the *Weekly Courier,* which charged that the plaintiff, together with A. L. Brooks and C. O. McMichael, all attorneys at law, for money, entered into a conspiracy to slander the defendant King, and unlawfully and maliciously robbed him of his good name and character. The jury found that the defendant Betts published a full and complete retraction of said article within ten days from the service of notice which was given under the statute, and the action was dismissed as to him. The defendant King averred that the article was true as applied to plaintiff.

The jury, in response to the issues submitted, found that the charge was not true, and assessed damages against the defendant King in the sum of $1,500.

The article charges conspiracy to slander, which is a criminal offense, and its references to plaintiff in relation to his profession as a lawyer also make the charge actionable *per se,* and malice is implied. Newell Libel and Slander, 168-185.

Exceptions 1 and 2 are because the court refused to submit an issue whether the article was published by the defendant in self-defense and whether it was published by him in good faith and without malice to the plaintiff. Neither exception can be sustained. The defendant could have proven the truth of his article, but it was not a defense that it was in reply to an attack made upon him. Two wrongs do not make a right. Nor could he show good faith and the absence of malice as a defense for an article which is libelous *per se.* These are matters which could be urged in mitigation of damages only (*Knott v. Burwell,* 96 N. C., 272), and the defendant was allowed so to use them. They were, therefore, not matters requiring an issue. The issues in this case were in accordance with the ruling in *Hamilton v. Nance,* 159 N. C., 59; *Fields v. Bynum,* 156 N. C., 415; *Sowers v. Sowers,* 87 N. C., 303, and cases cited by them.

The issues of self-defense and of good faith and absence of malice were not necessary, for the court told the jury that before they could assess punitive damages they must find that the defendant "was actuated by express malice, ill-will; that the publication was made with design and intent to injure the plaintiff, and that it was published in wanton and reckless disregard of his rights."

Nor was he entitled to an issue as to self-defense. The law allows a man to repel a libelous charge by a denial or an explanation. He has a qualified privilege to answer the charge, but it must be truthful, and not defamatory of his assailant. The rule is thus stated in 25 Cyc., 391: "The law justifies a man in repelling a defamatory charge by a denial or by an explanation. He has a qualified privilege to answer the charge, and if he does so in good faith, and what he publishes is fairly an answer, and is published for the purpose of repelling the charge, and not with malice, it is privileged, although it be false. But the privi- (178) lege under this rule is limited to retorts or answers which are necessary to the defense or fairly arise out of the charges made; and hence if the defamatory matter published by defendant is not a proper reply to the matter published by plaintiff which provoked its publication, it will be actionable irrespective of the question of malice."

Exceptions 3 and 4 as to the rulings upon testimony need not be considered. They were merely incidental matters as to which even if there was error it could not materially affect the result.

Exception 5: The evidence that the defendant filed a retraction as to the other parties denounced in the article as being in the conspiracy with Ivie was competent.

Exceptions 6, 7, 8, and 9, for the refusal to strike out the evidence of the witnesses who were jurors in the trial at which the speech of Ivie was made as to the impression on their minds of the nature of his speech cannot be sustained. This action is not upon that speech, but upon the article written by the defendant, and he cannot justify his libelous article by reason of the nature of the plaintiff's speech, for his article was libelous on its face. While the defendant could show in mitigation of damages that Ivie's speech was violent and provocative, it was competent for Ivie to show by these witnesses, who were jurors on that trial, the impression made on their minds that it was not violent and provocative. This applies also to exception 10, which was for a refusal to charge that if Ivie's speech was false they should answer the second issue in this trial that the charges made by the defendant were true.

Exception 11 is abandoned. Exception 12 is because the court refused to charge that the jury were restricted to actual damages, and could not allow the plaintiff punitive damages under the pleadings in this case. The complaint conforms in language to those in similar cases before this Court in which punitive damages have been allowed.

Exception 13 is for refusal to charge on the issue of self-defense, which the court properly declined to submit, and exception 14 is abandoned.

Exception 15 is upon the ground that the court expressed an opinion upon the facts; but an examination of the paragraph of the charge excepted to will show that the court based it upon the contingency that the jury had found by its response to the second issue that the statements and charges in the article were not true. In that contingency he told the jury that the plaintiff contended that in aggravation "they could consider that the defendant knew the character of Ivie, had lived in the same town; had been many years associated with him in business; knew his personal and professional character; knew the falsity of the charges he was making against him; that after having published so severe
(179) a charge against him and having coupled his name with others, that thereafter he retracted as to another whose name was mentioned in the publication and permitted it to stand as to the plaintiff in this case, was evidence which you should consider." It is apparent by reading the context that this is a part of the statement of the plaintiff's contention, though, as printed, the paragraph stating the plaintiff's contention is divided off before this paragraph begins. The following paragraph states the defendant's contention. However, if this were not so, the judge was stating that if the jury should find that the charge was untrue, then these matters which were not contradicted were legitimately for consideration on the question of damages.

Exceptions 16 and 17 were to instruction that on the question of punitive damages the jury could consider, in aggravation of damages, that

the defendant had pleaded justification in his answer and that he had failed to prove that the plaintiff was guilty of the matters which the defendant had charged in his answer. The court had already instructed the jury that punitive damages could not be awarded unless they found that the defendant was actuated by express malice. If that was so found, the court told them that in assessing the damages they could consider that the defendant, not content with the publication sued on, had answered, pleading its truth, thus making it a part of the permanent court records.

In this we think that there was no error, though there are cases in other states which limit the application of the principle by certain restrictions.

No error.

*Cited: Ivie v. King,* 169 N.C. 261 *S. c.; Lewis v. Carr,* 178 N.C. 581 (1p); *Elmore v. R. R.,* 189 N.C. 671 (1c); *Stevenson v. Northington,* 204 N.C. 695 (1c).

J. B. FORSYTH v. THE ZEBULON COTTON OIL MILL COMPANY.

(Filed 5 November, 1914.)

1. **Trials—Verdict, Directing—Evidence.**

A verdict cannot be directed in favor of a plaintiff where the evidence is conflicting and therefrom the jury may find contrary to the plaintiff's contention, or where there is evidence which will justify them in drawing an inference in defendant's favor.

2. **Master and Servant—Safe Place to Work—Negligence — Trials — Evidence—Questions for Jury.**

Negligence is necessarily a relative term, depending upon the circumstances of each particular case, and the courts will not decide, as a matter of law, the question of negligence, where from the evidence the jury are justified in reaching a conclusion in favor of either the plaintiff or defendant; and where a plaintiff was an employee in the cotton-seed room of a defendant mill, to put cotton seed in a seed conveyor, where he had worked for several weeks, and there is evidence tending to show that the conditions were such that the seed were necessarily piled high in this room for the purposes of storing and feeding the conveyor; that at the time of the injury these seed were piled so high that in leaving his work the plaintiff crawled between the end of the shafting, in operation, and the side of the house, and thus was injured by coming in contact with the shafting; and also evidence that there was another way out which the plaintiff could have safely taken: it is *Held,* it was for the jury to determine, as an issue of fact, whether the plaintiff was injured by the negligent failure of the defendant to provide him a safe way to leave his work.

(180) APPEAL by plaintiff from *O. H. Allen, J.*, at April Term, 1914, of WAKE.

This was a civil action, tried upon the following issues:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: No.

2. Did the plaintiff assume the risk of being injured while in the employ of the defendant? Answer: .....

3. Did the plaintiff, by his own negligence, contribute to his injury? Answer: .....

4. What damage did the plaintiff sustain by reason of the injury? Answer: .....

The plaintiff moved for a new trial. The motion was refused. The plaintiff excepted and appealed from the judgment rendered.

*Manning & Kitchin and J. C. L. Harris for plaintiff.*

*James H. Pou for defendant.*

BROWN, J. The plaintiff sues to recover damages for an injury sustained by him while in the employ of the defendant, alleged to have been caused by its negligence. There are no exceptions to the evidence taken and none to the charge of the judge upon the several issues. The plaintiff rests his whole case upon the refusal of his Honor to give this special instruction, towit: "If you believe the evidence, you will answer the first issue 'Yes.'" Evidently all of the other special instructions prayed for by the plaintiff were given, or were fully covered by the charge of the court. As the plaintiff noted no exception to the charge, we assume that his Honor charged the jury with his usual fullness and care on all the issues and upon every phase of the case presented by the evidence.

The learned counsel for the plaintiff frankly admits that the form of the prayer is faulty, and in his brief says: "We trust this will be waived by the Court in the interest of justice." As we are of opinion that his Honor properly refused to give the instruction, without regard to its form, we are not disposed to criticise its verbiage. It is well settled that the court cannot direct a nonsuit and give judgment in favor of a

(181) defendant on whom no burden rests, when there is more than a scintilla of evidence tending to prove plaintiff's contention, or when there is evidence from which a reasonable person might draw a deduction sustaining the plaintiff's contention.

The converse of this rule is true, and for a stronger reason a verdict can never be directed in favor of a plaintiff when there is any evidence from which the jury may find contrary to the plaintiff's contention, or where there is evidence which will justify an inference contrary to such contention. *Cotton v. R. R.*, 149 N. C., 229; *Deppe v. R. R.*, 152 N. C., 79.

The evidence tends to prove that the plaintiff was employed in the cotton-seed room of the defendant to put cotton seed in the seed conveyor, in which position the plaintiff had been working for several weeks. The room in which the conveyor was operated was a large room with a revolving shaft above, which operated the machinery. The room was usually filled with cotton seed, piled up high. The evidence shows that this was necessary in the operation of the defendant's business, for the purpose not only of storing the cotton seed, but of feeding the conveyor.

At the time of the injury the cotton seed was piled up in the room so that the plaintiff, after work hours, crawled on his all-fours between the end of the shafting and the side of the house, and, coming in contact with the shafting, was injured. The alleged negligence consisted in the failure of the defendant to provide a reasonably safe way for the plaintiff to get out of the building without climbing over the cotton seed near the revolving shaft in the manner in which he did.

There is evidence tending to prove that there was a way provided for the plaintiff and other employees to get out, and that it was possible for them to go from the place where plaintiff was working and cross over to the other side of the building, across the cotton seed, and in that way avoid the shafting and get to the door.

There is other evidence tending to prove that the plaintiff, with a few minutes work with a shovel, could very easily have shoveled aside the cotton seed and thus made his way to the door.

We are not prepared to say that the defendant was not guilty of negligence; nor are we prepared to say that, in any view of the evidence in this case, the defendant was guilty of negligence, and that his Honor should have given the instruction asked. It is very difficult, in the character of business that this defendant was conducting, to keep a way open through such a commodity as cotton seed; but there is some evidence in this case that there was a way out, by which the plaintiff could reach the door with very little trouble by going around the pile of cotton seed, and we think it was fairly a question for the jury to determine from all this evidence whether the defendant had failed to observe that (182) reasonable care and precaution which the circumstances demanded in providing an exit from the cotton-seed room.

Negligence is necessarily a relative term, and depends upon the circumstances of each particular case. What might be negligence under some circumstances at some time or in some place may not be negligence under other circumstances or at any other time and place. All the surroundings or attendant circumstances must be taken into account if the question involved is one of negligence.

It is difficult to say as a matter of law, from all the evidence in this case, that the defendant failed to perform its duty to exercise reasonable

care to protect the plaintiff from injury. From the very nature of the business, it must be impracticable at all times to provide the nearest, easiest, and most convenient method of exit from the cotton-seed room of an oil mill.

Taking all the circumstances into consideration, we think his Honor very properly left the question to be determined by the jury as to whether the defendant had provided, under all the circumstances, a reasonably safe and convenient exit for its employees. As his charge is not excepted to, we assume that in putting this matter before the jury the plaintiff had no grounds of complaint.

We have discussed this matter exclusively upon the question of negligence of the defendant, without regard to the contributory negligence of the plaintiff.

For the reasons given, we think his Honor very properly refused the instruction asked.

No error.

*Cited: Lloyd v. R. R.*, 168 N.C. 649 (1j); *Lamb v. Perry*, 169 N.C. 442 (1c); *Phillips v. Giles*, 175 N.C. 414 (1c); *Dudley v. R. R.*, 180 N.C. 36 (2c); *Malcolm v. Cotton Mills*, 191 N.C. 729 (2c); *Fertilizer Co. v. Hardee*, 211 N.C. 657 (1c); *Light Co. v. Bowman*, 229 N.C. 694 (1j).

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OWEN McPHAUL v. WILLIAM F. WALTERS.

(Filed 5 November, 1914.)

**1. Fraud—Deeds and Conveyances—Consideration—Evidence.**

Where fraud and undue influence is alleged in procuring a deed, the consideration paid by the purchaser is an important and material fact, and in the absence of peculiar conditions, gross inadequacy may become controlling.

**2. Same—Mortgagor and Mortgagee—Inadequacy of Consideration—Trials—Questions for Jury.**

In this action to set aside a deed for fraud and undue influence there was evidence tending to show that the grantee was also a mortgagee of the plaintiff at the time of the execution of the deed, and falsely represented that the deed in question was only a mortgage, and thus induced its execution; that the defendant only had paid $8 an acre for the land, which was worth at the time $30 an acre, and it is *Held*, that the evidence of inadequacy of the consideration paid is, under the circumstances, proper for the consideration of the jury upon the question of fraud.

**3. Fraud—Deeds and Conveyances—Consideration—Inadequacy—Price—Remote Period—Evidence.**

It is the inadequacy of the consideration paid by the purchaser of lands, at the time of the deed which is attacked for fraud, that is evidence thereof, and the admission of evidence of its value nine years thereafter is held for reversible error.

**1. Pleadings—Fraud—Allegations—Issues.**

Allegations of the complaint, in substance, that a deed sought to be set aside for fraud was obtained when the relationship of mortgagor and mortgagee existed between the parties, and that the plaintiff was induced to sign the deed by the false representations that it was a mortgage, is held sufficient to raise the issue; and upon a new trial awarded in this case the Court suggests that the question of actual and constructive fraud be determined upon separate issues.

APPEAL by defendant from *Rountree, J.*, at April Term, 1914, (183) of HOKE.

This is an action to set aside a deed, executed by the plaintiff to the defendant in 1905, upon the ground of fraud.

The plaintiff alleged, in substance, that the relation of mortgagor and mortgagee existed at the time of the execution of the deed, and that the amount paid or advanced by the defendant was less than the value of the land, and also that he was induced to sign the deed by the false representation that it was a mortgage. This was denied by the defendant.

Evidence was introduced tending to support the contentions of both parties. The evidence of the plaintiff as to the value of the land was that it was worth $30 per acre, and of the defendant that it was worth $8 per acre. One witness was permitted to testify that the land was worth $75 at the time of the trial in 1914, and the defendant excepted.

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

*G. B. Patterson, J. P. Wiggins, and S. B. McLean for plaintiff.*
*McIntyre, Lawrence & Proctor for defendant.*

ALLEN, J. When an issue is raised upon the trial of an action involving fraud and undue influence in procuring the execution of a deed, the consideration paid is an important and material fact, and is frequently controlling.

If it is near the value of the land conveyed, it is natural and reasonable to conclude, in the absence of peculiar conditions and circumstances, that there is no fraud, as men are not apt to engage in fraudulent conduct with no hope of gain; and, on the other hand, if there is a gross inequality between the price paid and the value of the property, (184) the inference of mistake or deception arises almost irresistibly.

Some of the authorities upon the subject are reviewed in *Leonard v. Power Co.*, 155 N. C., 16, and the conclusion was then reached that inadequacy of consideration is evidence of fraud, and when grossly so may, standing alone, justify submitting the issue of fraud to the jury.

The Court quotes with approval from *Perry v. Ins. Co.*, 137 N. C., 406, language used in reference to awards which is equally applicable to deeds, that "Where 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"; and from *Goddard v. King*, 40 Minn., 164: "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."

If, therefore, value is a material inquiry, is evidence competent upon the issue that the land conveyed was worth $75 per acre at the time of the trial in 1914?

The fact in controversy was the value of the land at the time of the execution of the deed in 1905, the plaintiff contending it was then worth $30 per acre, and the defendant that it was worth $8 per acre, which is about the amount he paid, and the question is therefore presented, whether it is competent to offer evidence of the value of land nine years after the execution of a deed without further explanation as some proof of its value as of the date of the deed.

We think not. The evidence is too remote, and has a tendency to mislead the jury, and in this case had much additional weight by the failure of the learned judge, inadvertently, to instruct the jury that the adequacy or inadequacy of the consideration was to be determined as of the time of the execution of the deed.

The case of *Gross v. McBrayer*, 159 N. C., 374, is in point, the only difference between that case and this being that the evidence of value excluded in the *Gross case* was anterior to the transaction, while in this it was subsequent; and of this evidence the Court says: "There was evidence that the land brought its full value at the sale, and that which the plaintiff offered to show its value, not at the time of the sale, but many years before, was too remote to have any bearing upon the question."

The allegations in the answer as to value were not introduced (185) and do not affect the competency of the evidence admitted.

The answer is, in our opinion, sufficient to raise the issue of fraud growing out of the relation of mortgagor and mortgagee, as well as because of the alleged false representations, and as a new trial is necessary, it is advisable to submit issues presenting the question of actual and constructive fraud separately.

New trial.

*Cited: Garland v. Allison*, 221 N.C. 123 (1c).

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W. C. NELSON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 5 November, 1914.)

**Railroads—Relief Departments — Advisory Boards — Final Arbitration — Fraud—Notice of Meetings—Trials—Evidence—Nonsuit.**

It having been held on a former appeal in this case that the plaintiff was concluded by the action of the advisory committee of the defendant railroad company's relief department, when such is not fraudulent or oppressive (157 N. C., 194), by amendment the plaintiff, upon another trial, seeks to invalidate the adverse conclusion of the committee upon the grounds stated, and his evidence tends to show that the committee acted in his absence after failing to notify him, as it had promised to do, of the meeting at which it would consider his claim, and the evidence of the defendant, which was not denied, that its superintendent caused a letter of notification to be mailed him, and it appears that several days thereafter the committee received a letter from plaintiff's attorneys inclosing affidavits upon which he based his claim, without intimating his desire or intention to be present, and there is no evidence that the board did not consider the matter fairly and impartially, or that, under the rules, the plaintiff would have been admitted to its consideration of the question had he been present: *Held*, there was not sufficient evidence of fraud on the part of the committee, and a motion to nonsuit is allowed.

ALLEN, J., concurring in result; HOKE, J., concurring in the opinion of ALLEN, J.; WALKER, J., concurring in both these opinions; CLARK, C. J., dissenting.

APPEAL by defendant from *Daniels, J.*, at March Term, 1914, of PITT.

This is a civil action. There was a verdict on a number of issues upon which the court rendered judgment, and the defendant appealed.

*Julius Brown for plaintiff.*

*Harry Skinner and L. G. Cooper for defendant.*

BROWN, J. This case was before this Court at a former term, and is reported in 157 N. C., 194. We refer to that report for a statement of the controversy.

(186) In an elaborate opinion, *Mr. Justice Allen* passed upon every question involved and, in concluding his thorough review of the case, said: "When a member submits his claim to the committee, he is entitled to a hearing, and is not concluded by its action if it is *fraudulent* or *oppressive*, of which the facts on this record furnish no evidence." The opinion clearly holds that there must be other evidence of fraud and oppression than the mere fact that the advisory committee heard plaintiff's appeal in his absence.

When this case was sent back for another trial, plaintiff was allowed to file an amended complaint, charging: "That the pretended hearing and trial before the advisory committee on the plaintiff's appeal conducted by the agents and servants of the defendant company and the officers and agents of the said relief department was a farce and a fraud on the rights of the plaintiff, and was conducted with an unlawful and fraudulent desire, scheme, and purpose to deprive the plaintiff of his just rights under his aforesaid contract, policy, or certificate of membership. And the decision of said advisory committee in hearing said appeal was and is fraudulent, void, and of no effect."

Upon this amendment, the court submitted this particular issue, among many others: "Was the decision and ruling of the advisory committee in plaintiff's appeal, which confirmed the ruling of the superintendent discontinuing the plaintiff's benefits under his certificate, fraudulent and in violation of plaintiff's rights? Answer: Yes."

We have examined this record with care, and find the evidence in all respects substantially the same as on the former trial, and we must therefore adhere to our former ruling that there is no evidence that the advisory board acted fraudulently or oppressively in passing on plaintiff's appeal.

There is not a scintilla of evidence that the plaintiff's appeal was not considered fully and fairly by the advisory committee or that the ten members of the committee, six of whom were selected by the employees themselves, were hostile personally to the plaintiff, or were actuated by any ill-will towards him.

All the evidence shows that the superintendent, Dr. Thomas, mailed plaintiff a letter, of which the following is a copy:

WILMINGTON, N. C., 26 October, 1905.

MR. W. C. NELSON,
*Bethel, N. C.*

DEAR SIR:—This is to advise you that the next meeting of the advisory committee of this department will be held on the 4th day of

November, and that if you have any additional affidavits you wish to have presented to that meeting, you should forward them at once. You will not be expected to appear in person.

Yours very truly, G. G. THOMAS.

The deposit of this letter in the postoffice raises a presumption (187) that the plaintiff received it. *Trust Co. v. Bank,* 166 N. C., 112. There seems to be nothing to rebut such presumption. *Bragaw v. Lodge,* 124 N. C., 154. Plaintiff does not on cross-examination really deny receiving this letter, for he said: "I won't say whether I received this letter; I don't know."

Assuming, however, that the presumption that the letter was received has been rebutted, or there is evidence to justify a finding that the plaintiff would have been present at the hearing in November, there is no evidence, as pointed out in *Justice Allen's* opinion on the other appeal, that he was deprived of such opportunity by any fraud or oppression upon the part of Dr. Thomas or any other agent of defendant company.

Yet it is a most significant and admitted fact that, as requested by Dr. Thomas in the above letter, plaintiff's attorney forwarded to him for the advisory committee on 30 October, 1905, four days after date of the Thomas letter, additional affidavits, with a letter reading as follows:

BETHEL, N. C., 30 October, 1905.

DR. G. G. THOMAS,

*Wilmington, N. C.*

DEAR SIR:—I am inclosing you affidavits of Dr. F. C. James, M. O. Blount, and W. J. James as to W. C. Nelson's physical condition. Trust that you will, or you and the committee will reinstate him to his benefits so as to prevent legal proceedings, as will have to be resorted to if the department continues to act as it is at present.

If the committee should reject or disallow Mr. Nelson's benefits, then please return papers and affidavits filed in said matter.

Yours truly, JULIUS BROWN.

It is manifest from this letter that the plaintiff claimed no right, and manifested no purpose to be present before the committee on 4 November. According to the rules and regulations, those hearings on appeal were had upon affidavits, and there is no evidence whatever that plaintiff's affidavits were not weighed and considered by the committee.

Assuming for argument's sake that the plaintiff had a right, under the rules and regulations of the association (which is by no means manifest) to be present when his appeal was heard, the letter from his attorney is a manifest waiver of such right, and the committee had good rea-

son to assume, when such letter and accompanying affidavits were laid before them, that plaintiff had no intention of being present.

There being no evidence of fraud or oppression, as heretofore held by us, upon the part of the advisory committee, we must adhere to what is so well said by *Mr. Justice Allen* in this case: "We will not quote (188) further from the cases cited, and there are others to the same effect, but they sustain fully the contention of the defendant, that it was the duty of the plaintiff to seek redress inside the department, and that the decision of the advisory committee upon his appeal is conclusive upon him. The doctrine seems to us to be reasonable and just, and necessary to the maintenance, in benefit societies and fraternal orders, of provisions conferring benefits on sick or disabled members."

The motion to nonsuit is allowed.

Reversed.

ALLEN, J., concurring in the result: The contention of the plaintiff is that the defendant promised to let him know when the hearing would be had before the advisory committee, and failed to do so, and that this constituted fraud. There is no controversy upon the record that a letter was mailed by the defendant to the plaintiff, notifying him of the time and place of the hearing, and there is strong evidence that this letter was received; but if it was not, the defendant performed its promise by mailing the letter, and its miscarriage in the mails cannot furnish evidence of fraud.

The question of fraud ought, therefore, to be eliminated from the case, and if this is done it appears that when the case was heard on the former appeal it was held by this Court that the action of the advisory committee was final in the absence of fraud, and the only facts which tend to differentiate the present appeal from the former is that the plaintiff complains that the defendant promised to notify him of the time and place of the hearing, and failed to do so. It appears, however, from the record that no provision is made in the rules and regulations of the relief department for the plaintiff to be present at the hearing; and if he had been there, he would have had no right, except to present his affidavits and evidence, and the record shows that his affidavits were sent to the advisory committee four days before the hearing. His failure, therefore, to be present, he having been afforded an opportunity to present his evidence, could not be prejudicial to his rights and would not justify a reversal of the judgment.

The failure to give notice in this instance has worked no harm.

HOKE, J., concurs in this opinion.

WALKER, J., concurring: I concur in the opinion of the Court and also in the opinion of *Justice Allen,* as I think that his concurring opinion deals more fully, argumentatively, and conclusively with the special matter he considers and the rest of the case presented in it. It is not a question of protracting litigation, but of doing justice according to the rules of law, however long it may take.

CLARK, C. J., dissenting: The jury found upon the evidence, (189) and on the issues duly submitted, that the plaintiff requested the defendant to notify him of the date and place when the said advisory committee would hear his said appeal; that the defendant promised the plaintiff that it would give him such notice; that his appeal was heard by the committee on 4 November, 1905, but that the committee gave the plaintiff no notice; and further, that if plaintiff had had notice, he would have attended the hearing of his appeal before the committee on 4 November, 1905, and that the decision and ruling of the advisory committee on plaintiff's appeal, which confirms the ruling of the superintendent discontinuing the plaintiff's benefits under his said certificate, was "fraudulent and void"; that the plaintiff was injured in the employment of the defendant, as alleged in his complaint, on 6 September, 1902, and that by reason of his certificate of membership and contract he was entitled to recover of the defendant therefor the sum of $909.50.

Upon these findings of fact the judgment of the able and learned judge who tried this cause should be affirmed.

This case was first brought to this Court 147 N. C., 103. It was again before the Court 157 N. C., 194.

This proceeding was brought under the *Relief Department,* which was a system under which the defendant compelled all its employees to contribute monthly a sum which constituted a fund, controlled by the defendant's officers, out of which employees injured by the negligence of the defendant were made to pay the damages for their own injuries. This system has been heretofore described in this case, 157 N. C., at p. 208, and also in same volume at pp. 66-69, which description need not be repeated. It was held to be in violation of the Employers' Liability Act, Rev., 2646, in *Barden v. R. R.,* 152 N. C., 318, and though that case was partially overruled by the majority opinion in *King v. R. R.,* 157 N. C., 44, such "Relief Departments" were afterwards declared invalid in *R. R. v. McGuire,* 219 U. S., 549, and *Schoubert v. R. R.,* 224 U. S., 603, under a similar act, though in those cases, unlike this, the employees were not required to join the relief department. And also in the Federal Employers' Liability Act of 22 April, 1908, there is a provision almost identical with our Revisal, 2646.

This proceeding, it is true, is not to hold the contract invalid, but to enforce an agreement under it by which in return for the payments made by the employees the plaintiff was to receive compensation, out of the fund thus created, for injuries sustained by him in the course of his employment.

Daniel Webster defined "due process of law" as "that law which proceeds only upon inquiry, which hears before it decides, and renders judgment only after trial." Upon the findings of fact by the jury in (190) this case the plaintiff has been denied that right. He was not only entitled to a hearing of the appeal by the committee as a matter of common right, but the jury find that he was promised such hearing and notice thereof, but, notwithstanding such promise, his appeal was heard without notice given him, though he would have attended if given notice. This makes such action "fraudulent and void." Even if it did not, it entitled the plaintiff to be heard by the jury.

The strength of the appeal is really rested on the exception that the motion for a new trial upon the ground that the verdict was "against the weight of the evidence" was denied by the judge below. This is not ground of appeal, though it is set out in the exceptions in this case and really sums up the defendant's contention, which is shaded into an argument that there is no evidence. The evidence of Dr. Thomas, witness for the defendant, is that he dictated but did not sign the notice to defendant, that he "would not swear such notice was deposited in the mail," and no one else swore it. The plaintiff swore positively that he "did not receive any such letter."

The jury thought, not unnaturally on such testimony, that there was a preponderance of evidence for the plaintiff, and twelve men who were charged by law with finding the fact have upon their oaths returned the verdict. *Judge Daniels* refused to set aside the verdict on the allegation of the defendant that the verdict was "against the weight of the evidence." The only direct and positive testimony was for the plaintiff, and the jury believed him.

There is nothing whatever that calls in question the validity of the finding of the jury that the plaintiff was in fact damaged to the extent of $909.50 on 6 September, 1902, while in the employment of the defendant, and we have held in *Burnett v. R. R.*, 163 N. C., 190, following the decisions in *R. R. v. McGuire,* 219 U. S., 549, and *R. R. v. Schoubert,* 224 U. S., 603, that the acceptance of benefits from the Relief Department does not prevent the plaintiff from recovering damages in a court of law, because the stipulation in the contract against such resort is invalid. When an injury of this kind is sustained, the party injured should have the speediest and promptest recovery. They are generally in needy circumstances, and whatever recompense is due them should be speedily

paid. This is elementary justice. Such claimants can usually secure counsel only on credit, while the defendant, with (as we know from the facts in *Goldsboro v. R. R.*, 155 N. C., 364) more than $223,000,000 of property, is able to furnish an unlimited number of counsel. In this case the defendant was injured more than twelve years ago, and has as yet been unable to secure payment of the damages which the jury say he sustained at that time, of $909.50. This same defendant, in *Penny v. R. R.*, 161 N. C., 530, procured a new trial in this Court after four successful verdicts in favor of the plaintiff, approved by four (191) Superior Court judges. We must take it that, as presented, each of these four new trials was properly granted; but this illustrates the inability of claimants in a matter of this kind getting a speedy decision in their favor and the ability of such defendants to allege and prove error. In a more recent case, *Mott v. R. R.*, 164 N. C., 367, this same defendant held off another trial eight years after summons issued before a jury trial could be had. The courts ought not to be blind to the fact that employees in straitened circumstances have not equal advantages in presenting their claims against powerful defendants without some technical irregularity being discovered or pointed out by numerous and able counsel. These three are doubtless but a few instances of the many in which exhausted plaintiffs in such contests with their powerful opponent have been compelled to abandon or compromise their just rights. We must presume that the courts in each case did what was right upon the facts and the law as presented to them, but we must consider the immense advantage to the defendant and the disadvantage to the plaintiffs in procuring the means to have their causes presented in a court of justice. The jury and the judge in this case have found that the plaintiff was deprived of his just rights in this matter by means that were fraudulent and void, and there is ample evidence to sustain that view of the judge and jury, as above set out.

In a much cited instrument (*Magna Carta*) King John was forced by the insurgent barons to promise that "justice should not be delayed" to any freeman, but they forced him to promise that in suits against themselves they should be tried by their fellow barons only, and not in the king's courts. Such instances of protracted litigation at the hands of powerful defendants should not go unnoticed by the courts.

When this case was before us, 157 N. C., 194, the Court held that the plaintiff was entitled to a hearing before the committee. The jury have found by their verdict upon the evidence (which *Judge Daniels* held was not inferior in weight to that of the defendant) that the plaintiff has not had such hearing and was fraudulently deprived of it. Indeed, the weight of evidence was, as the jury found, decidedly in favor of the plaintiff, for Dr. Thomas would not swear that the letter was put in the

mail, and therefore no presumption arose even that it was delivered, and the plaintiff swore positively that he did not receive the letter.

Upon such testimony the action of *Judge Daniels* in refusing to set aside the verdict was, in my opinion, proper and just.

*Cited: Cordell v. Brotherhood of Locomotive Firemen and Enginemen,* 208 N.C. 639 (c).

(192)

WILLIE McGOWAN v. THE IVANHOE MANUFACTURING COMPANY.

(Filed 7 October, 1914.)

**1. Master and Servant—Cotton Mills—Employment of Children—Negligence—Causal Connection—Interpretation of Statutes.**

Revisal, sec. 1981 (*a*), makes it unlawful for any factory or manufacturing plant to work or employ a child therein under 12 years of age, and a willful violation of this section on the part of a mill owner, superintendent, or other person acting in behalf of the establishment, is made a misdemeanor by Revisal, sec. 3362; and it is held that a violation of this statute by reason of which an injury was caused to such child, unlawfully employed, constitutes an actionable wrong, and whenever the injury has arisen from placing the child at work in the mill and subjecting it to the risks naturally incident to such work or environment, it is actionable negligence for which a recovery may be had without the necessity of showing that the child received the injury when engaged in the very work he was employed to do or by reason of it.

**2. Same—Knowledge Implied.**

Where with the knowledge of the owners of a cotton mill, or its superintendent or other agents representing the owner or management of the plant, a child under 12 years of age is permitted to work around the mill, though not on its regular pay roll, or has so continuously worked there that the management or its representatives should have observed that he was so engaged, it is in violation of our statute, Revisal, sec. 1981 (*a*), prohibiting the working or employment of children at such places under 12 years of age.

**3. Same—Trials—Evidences—Acts of Vice-Principal — Scope of Employment.**

In this case a child under 12 years of age was injured in the lapper room of the defendant cotton mill. There was evidence tending to show that the plaintiff was not on the pay roll of the mill, but had for a length of time been continuously at work around the mill, with the knowledge and approval of the superintendent and foreman; that the foreman of the lapper room, when plaintiff was passing through, ordered and forced him "to throw cotton from the lapper while the machine was in motion," which resulted in the injury complained of. *Held*, evidence sufficient to show that the act of the foreman in causing the said injury was within the

scope of his employment, and one for which the defendant is responsible, whether at common law or under the provisions of our statute. Revisal, sec. 1981 (*a*).

APPEAL by plaintiff from *Peebles, J.*, at April Term, 1914, of JOHNSTON.

Civil action to recover damages for injury done plaintiff while wrongfully being worked at defendant's cotton mill; plaintiff, at the time of the occurrence, being a minor between 8 and 9 years of age.

It was admitted in the pleadings that Mr. Gordon was superintendent and Mr. Holt was foreman and boss of defendant mill at the time, and as such had full "charge, management, control, and supervision, etc., of the lapper."

The plaintiff, a witness in his own behalf, testified, on his ex- (193) amination in chief, as follows: "I was living in Johnston County in 1911, and am going on 12 years old. I worked for the Ivanhoe Mills under Mr. Holt and Mr. Gordon, and I worked as long as I stayed there, twelve months; I did not work every week, or day, during that time; I just went there and they would tell me to go and do so and so. Mr. Gordon paid me a quarter for work and Mr. Holt promised me 20 cents, but never gave it to me. At the time I was injured I started through the lap room, and John Johnston told me to throw the cotton back over the lap pin, and I said, 'I shan't do it,' and he grabbed me by the wrist and forced me to throw the cotton from the lap pins while the machine was in motion, and my hand was caught between the rollers and hurt. My hand was hurt while in the machine. The work I did, I took bobbins out of a quill box and put them into doff boxes under the instructions of Mr. Holt and Mr. Gordon. I done this work in their presence when they were looking at me. They saw me in the mill at work just about every day. I run the waste machine. Mr. Holt instructed me to do it and saw me do it. Also, I went to the store for Mr. Holt to get some soap. I was hurt about 12 o'clock. Dr. Rose attended me. I lost one finger. The doctor attended me about two weeks."

On cross-examination, he testified: "At the time I was hurt my father and mother both were working in the mill. The day I was hurt my father was working in the speeder room. I was hurt in the lapper room. The lapper room and the speeder room are a good distance apart, and there is a door that goes from the speeder room; there is also a side door. Just before I was hurt I came in the door out of the speeder room into the lapper room. I had been in the lapper room before that morning. No one had run me out of the lapper room. When I went in the lapper room Mr. Johnson was weaving the loop about 2 feet from the machine where I was hurt. When he grabbed me, I was in front of the lapper, going towards the side door. He took my hands by the wrist and put

them in the lapper and stopped the machine. Just before he caught me, Johnson said: 'Throw the cotton over the lap pin,' and I said, 'I shan't do it'; then he grabbed me by the hands and put them in the roller. Mr. Gordon paid me something for working around there. Mr. Holt did not pay me anything. My father and mother were both working at the mill, and there was no one left at home. I run the waste machine twice. Mr. Holt promised to pay me 20 cents for both times."

Redirect, as follows: "Mr. Holt was foreman and boss of the lapper room; Mr. Johnson run the lapper."

There was other testimony tending to support the plaintiff's evidence as to his working about the mill in the presence of the superintendent and foreman.

(194) Among other witnesses, Enoch Brewer, on his examination in chief, testified: "Prior to December, 1911, I worked at the Ivanhoe Mills and saw Willie McGowan working in this mill. I was an extra hand, doing just one thing and another, and I saw Willie McGowan taking up bobbins and putting them in boxes. I saw him do this in the presence of Mr. Gordon and Holt. I never heard either Gordon or Holt order him out of the mill. I saw this boy putting on bobbins every day he was there. I do not know how long I was there. I have seen Mr. Gordon pick him up and put him in the bobbin box. Mr. Holt and Mr. Gordon had charge of the lapper room. Gordon was superintendent and John Johnson had charge of the machines in the lapper room."

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

*F. H. Brooks and Langston, Allen & Taylor for plaintiff.*

*Abell & Ward for defendant.*

HOKE, J. Our statute, Rev., sec. 1981 (a), provides that, from and after 1 January, 1908, no child under 12 years of age shall be employed or *worked* in any factory or manufacturing establishment within this State, and, by section 3362, the willful violation of the former section, on the part of mill owner, superintendent, or other person acting in behalf of the establishment, is made a misdemeanor, except in oyster canning and packing manufactories where the work is paid for by the gallon or bushel.

In several decisions on this subject, notably *Starnes v. Mfg. Co.*, 147 N. C., 556, and *Leathers v. Tobacco Co.*, 144 N. C., 330, it is held that a violation of the statute causing injury to the minor constitutes an actionable wrong, and that it is not necessary to establish a causal connection that the child should have received the injury when engaged in the very work he was employed to do or by reason of it, but it will be held to exist

whenever the injury may fairly be said to arise from placing a child of immature years at work in a mill and subjecting it to the risks naturally incident to such work or environment. Speaking to the question in *Starnes' case, Associate Justice Brown,* delivering the opinion, said: "It is true that the plaintiff was not engaged in performing his duties in the spinning room, and had gone to the lower floor, where the carding machines were, and got his hand caught in one and badly cut. Under such circumstances there are respectable courts which hold that the injury is not the proximate result of a violation of the statute, because not received in performing the work the child was assigned to do, and that therefore the employer is not liable."

We are not impressed with the persuasive authority of those precedents and are not inclined to follow them. To do so would, in our opinion, unduly restrict the liability of the employer and would (195) be contrary to the evident intention of the Legislature.

The act was designed not only to protect the health, but the safety, of children of tender age from the indiscretion and carelessness characteristic of immature years. One who knowingly and willfully violates its provisions is not only guilty of an indictable offense, but he commits a tort upon the rights of the child, and should be judged as a culpable wrongdoer and not as one guilty of mere negligence. The injury done the child is a willful wrong and does not flow from the negligent performance of a lawful act. The distinction between the two is well stated by *Mr. Justice Walker* in *Drum v. Miller,* 135 N. C., 208.

We think that the breach of the statute constitutes actionable negligence wherever it is shown that the injuries were sustained as a consequence of the wrongful employment of the child in the factory, in violation of the law. In this case we think there is a direct causal connection between the unlawful employment of the plaintiff and the injuries sustained by him. By employing this boy of 10 years in violation of the law, the defendant exposed him to perils in its service which, though open to observation, he by reason of his youth and inexperience could not fully understand and appreciate. "Such cases," says *Judge Cooley,* "must frequently occur in the employment of infants."

In that case the duties of the minor were to sweep out the spinning room and make bands, but, on the day in question, he went to another part of the factory, as he had frequently done before, to see his father, who was running a carding machine. When the father was 20 steps distant, tending another machine, the child attempted to pick a pad of cotton off the card, and got his hand caught and injured in the cylinder of one of the machines, and it was held: "There was direct causal connection between the unlawful employment of the child and the injuries sustained by him, for which the defendant is liable, occasioned by his

being employed on the premises where he was subject, through childish carelessness incident to his years, to tamper with dangerous machinery."

In the cases referred to, the fact of the minor being a regular employee was unquestioned, while in this present case it may become a matter of dispute, but the language of the act is that no child under 12 shall be employed or *worked* in any factory, etc.; and if this child, though not on the regular pay roll, was permitted to work at the mill to the knowledge of the owner, superintendent, or other agent, fairly representative of the management, or if he worked there so openly and continuously that the management should have observed and noted his occupation and conduct, his case would come within the terms and meaning of the law. According to the facts in evidence as they now appear, this plaintiff had for a length of time been continuously at work in the mill, with the knowledge
(196) and approval of the superintendent and the foreman; one witness saying he had observed this boy putting on bobbins every day he was there. The plaintiff himself testified that Gordon, the superintendent, had himself paid him for work at the mill. In addition, plaintiff testifies that on this occasion, Jack Johnson, "who had charge of the machinery in the lapper room" (see evidence of Lonnie Carlisle, Record, p. 13), ordered plaintiff to do some work there, and when he refused, he grabbed plaintiff and forced him to do the work.

It is argued for defendant, as we understand his position, that this was a wanton act on the part of Johnson, for which the company can, in no sense, be made responsible, and an excerpt from the opinion in *Starnes' case* is relied upon: "That although defendant had violated the statute in employing a child of tender years, the defendant was not liable for an injury caused by the willful and malicious act of a workman in knocking him against dangerous machinery." The entire portion of the opinion on this point is as follows: "We do not mean to hold that the employer violating the act would be liable in damages for every fatality that might befall the child while in its factory. For instance, had the plaintiff died of heart disease, or from a stroke of paralysis, or been seriously injured by the willful and malicious act of a workman in knocking him against a machine, or injured from some cause wholly disconnected from the unlawful employment, the defendant could not be held liable in damages simply on account of the employment in violation of the statute."

It will thus be seen that the writer was referring to the willful and wanton act of some ordinary employee who, of his own malicious purpose, might have assaulted the child, and the suggestion gives no support to defendant's position on the facts of the present appeal. As the matter now stands, there are facts in evidence which permit the inference that Johnson was in charge of the machinery of the lapper room and, in the course and scope of his employment, ordered the boy to do the work, and,

when he refused, compelled him to do it, and tending to fix responsibility for this injury on the defendant, either with or without the provisions of the statute, under the principles presented in *Jackson v. Telegraph Co.*, 139 N. C., 347.

There was error in entering judgment of nonsuit, and the same must be set aside.

New trial.

*Cited: Evans v. Lumber Co.*, 174 N.C. 35 (3c); *Williamson v. Box Co.*, 205 N.C. 352 (1d).

(197)

W. H. HUGGINS v. T. N. WATERS.

(Filed 5 November, 1914.)

**Contracts—Covenants—Parties—Misjoinder—Torts—Election — Separate Actions.**

While a plaintiff, who has brought his action against two defendants, alleging as to one a breach of an implied covenant of quiet enjoyment of leased premises in respect to sewer connections, and as to the other, a tort in wrongfully stopping up the sewers running underground across his adjoining lands, must elect as to which cause of action he will prosecute, he may nevertheless take a nonsuit in that action and bring separate actions at the same time against each of the defendants for the same damages: against one for the breach of the implied covenant and against the other for the tort; but a recovery in one of these actions will preclude a recovery in the other.

APPEAL by plaintiff from *Whedbee, J.*, at March Term, 1914, of SAMPSON.

Civil action. Judgment was rendered upon the pleadings, viz.: "That this cause coming on to be heard before his Honor, H. W. Whedbee, and a jury, and being heard, and it appearing to the court that on .... day of ....., 19...., the plaintiff instituted this action against T. N. Waters and on the same day instituted another action against F. K. Borden, and that the complaints in both actions were filed on the same day, and that both actions were brought to recover damages against each of the defendants separately for the same cause, and the court being of the opinion that the plaintiff was required to elect, in Supreme Court decision, 154 N. C., 446, which one of the defendants he would sue for the recovery of damages for said cause of action, and having sued both and failing to elect, the court is of the opinion, and so holds, that the plaintiff is not entitled to recover against the defendant T. N. Waters."

Plaintiff excepted and appealed.

*G. E. Hood, H. L. Stevens, John M. Robinson, Fowler & Crumpler for plaintiff.*

*No counsel for defendant.*

BROWN, J. We think the learned and able judge who tried this case misconceived the true purport and meaning of the judgment in *Huggins v. Waters,* 154 N. C., 444.

The only point decided in that case is that the alleged cause of action against Waters and the alleged cause of action against Borden could not be combined in the same action. The allegations of the complaint in that case, taken to be true, made out a cause of action arising *ex contractu* and based upon an implied covenant of quiet enjoyment. In that
(198) opinion the cause of action against Waters is stated as follows:

"It is alleged, and evidence offered by plaintiff tending to prove, that at the time Waters leased the hotel building to the plaintiff Huggins it was fitted up with bath tubs, sinks, and closets. The sewerage thereof was connected with a private drain pipe running through the lands of F. K. Borden, and the plaintiff had a right to believe that the lessor had good right and title to drain the sewage from the hotel through said private drain. Upon this theory, it would seem to be settled that the plaintiff has made out a cause of action against Waters, unless the latter can establish allegations of his answer that he apprised the plaintiff at the time of the lease that he had no legal right to discharge sewage through this private drain, or establish some other valid defense. The implied covenant of quiet enjoyment extends to those easements and appurtenances whose use is necessary and essential to the enjoyment of the demised premises."

The cause of action, as stated against Borden in the complaint in that case, arises *ex delicto* and not *ex contractu,* for it is alleged that "the defendant Borden maliciously, wrongfully, wantonly, and unlawfully severed and stopped up effectually the drainage aforesaid, so that the sewage from the hotel sinks, bath tubs, closets, etc., could not pass through said drain pipe and out into the basin."

The covenant of quiet enjoyment in respect to the sewerage connections does not extend to the acts of trespassers and wrongdoers, but only those whose rights in the property covered by the lease are superior to the lessor. *Sloan v. Hart,* 150 N. C., 274; *King v. Reynolds,* 67 Ala., 233.

These two distinct causes of action, one in contract and the other in tort, against different individuals, cannot be combined in the same suit. They are inconsistent, and the one necessarily excludes the other.

When we said that an election must be made between them, we meant that if the plaintiff purposed to continue that action, he must elect be-

tween the two causes of action, and reform his complaint accordingly. Instead of doing that, he submitted to a nonsuit and commenced two separate actions; one against Waters and one against Borden, as he had a right to do. Under the principles as stated in a former opinion, the plaintiff cannot recover against both.

If he recovers in this action, it must be on the theory that Waters had no right or title to the sewerage connections, and therefore there was a breach of the implied covenant of quiet enjoyment. If he recovers against Borden, it must be on the theory that Waters had title to the said easement from Borden, and that Borden was a trespasser and wrongfully interfered with it by destroying the connections on his land.

While these causes of action may not be combined in one action, (199) we see no reason why the plaintiff may not bring two different suits, as he has done. He probably did so to stop the running of the statute of limitations.

Reversed.

*Cited: Grady v. Warren*, 201 N.C. 694 (c); *Walker v. Packing Co.*, 220 N.C. 160 (p).

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MILES W. FEREBEE v. W. E. SAWYER ET AL.

(Filed 14 October, 1914.)

**1. Mortgages—Foreclosure—Provisions as to Notice—Strict Compliance.**

In foreclosure proceedings under a power of sale contained in a mortgage, the requirements of the statute and the contract stipulations of the instrument not inconsistent with the statute in respect to notice and other terms on which the power may be exercised shall be strictly complied with; and when such has not been done, no title can pass under the sale in respect to the immediate parties thereto.

**2. Same—Postponements.**

The strict compliance with the terms of the mortgage and statutory provisions required to make a valid sale upon foreclosure does not apply when a postponement is had by reason of the sale being enjoined or for other reasonable purposes, for in the absence of statutory or contract provisions to the contrary, as in this State, a notice of postponement made in good faith, and reasonably calculated to give proper publicity of the time and place, is held sufficient.

**3. Same—Insufficiency of Notice.**

Under the facts of this case a sale under a power contained in a mortgage was adjourned not less than four times, the only published notice of the postponement being memoranda at the bottom of one of the original notices, without satisfactory evidence that a proclamation was made at more

than two of the dates, or testimony informing the court of the number of persons within hearing when the same was made, except the first time, and then only a half-dozen were present. *Held*, the notice of postponement was insufficient.

**4. Mortgages—Sales—Postponement—Sheriffs—Sales by Order of Court—Interpretation of Statutes.**

Revisal, sec. 645, authorizing the postponement of sale from day to day for not more than six days is held to apply to sales by the sheriff or persons acting under court decrees, and not to apply to sales under power contained in a mortgage.

**5. Courts—Jurisdiction—Pleadings—Judgment—Estoppel.**

When a court having jurisdiction of the case and the parties renders judgment therein, it estops the parties and their privies as to all issuable matters contained in the pleadings; and though not issuable in a technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined in the hearing.

**6. Judgments—Mortgages—Sales—Notice—Estoppel.**

The mortgagor of lands brought suit to restrain the mortgagee from making conveyance thereof under a sale of foreclosure under the power contained in the mortgage, and issue was joined, among others, upon the question of the sufficiency of notice of the postponement of the sale, and judgment was rendered establishing, among other things, the sufficiency thereof. In the present action the purchaser at the sale sues the mortgagor for possession of the lands, and it is *Held*, the present defendant is estopped by the judgment in the former proceedings to deny the sufficiency of the notice of postponement.

(200) APPEAL by plaintiff from *Ferguson, J.*, at December Special Term, 1913, of CAMDEN.

Civil action to recover a tract of land.

Plaintiff claimed title under a deed from Calvin Upton and J. M. Cartwright, made pursuant to a foreclosure sale under and by virtue of a mortgage with power of sale executed by defendant W. E. Sawyer and wife to plaintiff's grantors, dated 14 December, 1909.

Defendant resisted recovery on the grounds set up by answer, that no valid foreclosure of said mortgage had been made, in that the sale was not properly advertised as "provided by the trust or by law."

(2) That the mortgage had never been "proved, executed, or acknowledged."

In reference to the alleged defective advertisement, it appeared that the sale was originally advertised to take place at the courthouse door on 17 October, 1910, and mortgagees, by their agent and attorney, appeared for the purpose of making the sale, when he was stayed by reason of an injunction sued out and served at the instance of one Hinton, who also held a mortgage on the property; that pursuant to the exigencies of the

writ, the sale was first postponed for an hour, to enable the agent to examine into the regularity of the process, and then to 12 November, and again to 26 November, and again to 10 December, and finally to 22 December, when the writ of injunction having been dissolved, the sale was had pursuant to the last notice, and deed made to present plaintiffs, who were purchasers for value at said sale; that the original notices of the sale were in all respects full and regular; that as to the postponed sale, the agent of the mortgagees made a memorandum of such postponed date at the bottom of the original notice at the courthouse door and also made announcement of same at the courthouse door, and as to subsequent notices, memoranda of postponement were made at the bottom of the original notice at the courthouse door and proclamation of postponement was also made at courthouse door at one or more of the additional postponements.

It was further made to appear in evidence that on 23 December, 1910, the present defendant, W. E. Sawyer, had instituted an action against the mortgagees, Upton and Cartwright, and filed his com- (201) plaint, alleging that the mortgage was given to secure the purchase price of a sawmill bought by complainant of the mortgagees for $2,500, and by reason of the breach of certain binding stipulations incident to the sale, complainant had been damaged in the sum of $3,500. It was further alleged in said complaint (section 8) that the mortgagees "had advertised said lands and attempted to sell the same on 22 December, 1910, and said sale was illegal and void because *not properly advertised.*"

On the complaint and supporting affidavits, a temporary injunction was obtained restraining the mortgagee from selling or making title pursuant to the sale.

Defendants answered, denying any breach of contract on their part and making further specific averment that the said sale was properly advertised and in all respects regular.

The cause was tried on issues as to breaches of the contract stipulations alleged against the mortgagees, defendants, no issue having been tendered as to the regularity of sale, and, on verdict for defendants, it was adjudged that they go without day, etc.

In the present trial, on issue submitted, there was verdict for plaintiff. Judgment on the verdict, and defendant excepted and appealed.

*Ward & Thompson for plaintiff.*

*Aydlett & Simpson for defendant.*

HOKE, J., after stating the case: In foreclosure proceedings, under power of sale, our decisions hold, and they are in accord with doctrine generally prevailing elsewhere, that the requirements of the statute and

of the contract stipulations of the instrument not inconsistent with the statute, in respect to the notice and other terms on which the power may be exercised, shall be strictly complied with. *Eubanks v. Becton,* 158 N. C., 230; *Brett v. Davenport,* 151 N. C., 56. In *Brett v. Davenport* the Court said: "In an instrument of this kind (a mortgage with power of sale) the law is that a statutory requirement or contract stipulation in regard to notice is of the substance, and unless complied with, a sale is ineffective as a foreclosure, and even when consummated by deed the conveyance only operates to pass the legal title, subject to certain equitable rights in the purchaser, as of subrogation, etc., in case he has paid the purchase money in good faith"; and the position is approved in *Eubanks v. Becton,* in a well sustained opinion by *Associate Justice Allen,* citing, among many other authorities, 27 Cyc., 1465, as follows: "A power of sale contained in a mortgage or deed of trust must be strictly pursued and all its terms and conditions complied with in order to render the sale valid"; and, on page 1466: "It is essential to the validity of a sale under a power in a mortgage or deed of trust, to comply fully (202) with its requirements as to giving notice of the sale"; and page 1472: "That directions of the statute or of the mortgage as to the length of time the notice must be published, or the number of times it must appear, are imperative, and a sale made without strict compliance therewith is invalid and passes no title"—a position which certainly obtains with us as to the immediate parties to the sale. *Hinton v. Cohoon,* at the present term. A perusal of these and other authorities bearing on the subject will disclose that the principle has been established in reference to an original or independent notice of sale, and does not prevail to the same extent in reference to the postponement of a sale which has been in all respects regularly advertised. In such case, and in the absence of some statutory or contract provision to the contrary, a notice of postponement, made in good faith and reasonably calculated to give proper publicity of the time and place, has been deemed sufficient. *Richards v. Holmes,* 59 U. S., 143; *Allen v. Cole,* 9 N. J. Eq., 286; *Way v. Dyer,* 176 Mass., 448; *Stevenson v. Dana,* 166 Mass., 163; 7 Cyc., 1476; 28 A. and E. Dec., p. 806.

There are cases to the contrary, and holding that an entirely new notice should be given, but the weight of authority seems to be in support of the position as stated. In 27 Cyc., it is said: "Where a mortgage foreclosure sale is postponed or adjourned, a new and sufficient notice of the time and place for the sale must be published; but it is generally held that it need not be published or advertised for the same length of time that is requisite in the first instance, such notice as will give reasonable publicity being sufficient, provided the notice is given in good faith, and contains all the essential requisites of a notice of sale"; and in A. and E., *supra:*

"When a sale is postponed or adjourned, proper notice thereof must be given. Statutory provisions or terms of the power applicable to the giving of such notice must of course be complied with. If there be no such provision, reasonable notice is sufficient."

Section 645 of the Revisal, authorizing the postponement of a sale from day to day for not more than six days, from its terms and juxtaposition, clearly has reference to sales by the sheriff or persons acting under court decrees, and does not apply to sales under power contained in the instrument. While we decide that a sale of this character may be postponed and, unless the statute or some stipulation of the contract otherwise provides, that a reasonable notice of the postponement may suffice, we do not think that the notice attempted in this present case can be upheld. The evidence showing that the original sale, set for 17 October, was adjourned not less than four times and the only published notice of the postponement was a memorandum at the bottom of one of the original notices and no satisfactory evidence that proclamation was made at more than two of the dates and no testimony informing the court of the number of persons who were in hearing when the same was made, except (203) the first time, and then only a half-dozen present.

The sale and foreclosure, therefore, must be declared invalid; but, on the record, the position cannot be made available to defendant for the reason that, in our opinion, he is precluded from asserting it by reason of the verdict and judgment had in the case of W. E. Sawyer, the present defendant, against the mortgagees, who sold and conveyed to the present plaintiff. In that case, as herebefore stated, the present defendant instituted the action to recover damages and to restrain the mortgagees from making the deed to plaintiff, and on the express ground, among others, that a sale was had without the proper notice.

The mortgagees answered, making direct averment that the sale was in all respects regular, and this suit having been concluded and judgment entered that defendants therein go without day, the present defendant is estopped from making further question as to the regularity of this sale. In *Tyler v. Capehart,* 125 N. C., 64, the Court held: "A judgment is decisive of the points raised by the pleadings, or which might be properly predicated upon them; but does not embrace any matters which might have been brought into the litigation, or causes of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings." The principle has been approved and applied in numerous decisions of the Court before and since that well considered case. *Owen v. Needham,* 160 N. C., 381; *Caudle v. Morris,* 160 N. C., 168; *Coltrane v. Laughlin,* 157 N. C., 282; *Gillam v. Edmonson,* 154 N. C., 127; *Bunker v. Bunker,* 140 N. C., 18. In *Coltrane's case* the doctrine is stated as follows: "It is well recognized here and elsewhere

that when a court having jurisdiction of a cause and the parties renders judgment therein, it estops the parties and their privies as to all issuable matter contained in the pleadings, and though not issuable in the technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined on the hearing," citing *Gillam v. Edmonson,* 154 N. C., 127; *Tyler v. Capehart,* 125 N. C., 64; *Tuttle v. Harrell,* 85 N. C., 456; *Fayerweather v. Ritch,* 195 U. S., 277; *Aurora City v. West,* 74 U. S., 82, 103; *Chamberlain v. Gaillard,* 26 Ala., 504; 23 Cyc., pp. 1502-4-6.

In *Gillam v. Edmonson* it was held that an estoppel of record will bind parties and privies as to matters in issue between them, and, delivering the opinion, at page 130, the Court said: "It has come to be well recognized that the test of an estoppel by judgment is the identity of the issues *involved in the suit.*"

We were referred by counsel for the defendant to the case of *Clothing Co. v. Hay,* 163 N. C., 495, as an authority supporting defendant's
(204) position; but a perusal of that case will show that in holding that a judgment was an estoppel only as to points actually investigated and decided, *Associate Justice Allen* was careful to note that the principle as stated "applied to cases where the second suit was based upon a different cause of action from that in which the judgment had been entered, and that when the cause of action was one and the same, in such case a final judgment in the former suit is conclusive, not only as to matters determined, but as to all issuable matter presented in the pleadings or necessary to the proper decision of the cause." In support of the distinction, the learned judge quotes from *Cromwell v. Sac,* 94 U. S., 351, as follows: "The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But when the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." And the case of *Jones v. Beaman,* 117 N. C., 259, to which we were also cited, can be sustained, if at all, only on the same distinction: that the second suit was on a different cause of action than that presented by the pleadings or necessarily involved in the first. In the suit of Sawyer, however, the present defendant, against the mortgagees, the validity of the sale and on account of insufficient notice was

made a direct issue in the pleadings, and judgment having been entered on that record in favor of the mortgagees, it cannot be again debated in this case where the same issue is directly involved, towit, the validity of the sale at which the plaintiff purchased. The objection to the probate of the mortgage is without merit, and was very properly not insisted on in the brief of counsel. Even if the justice who took the acknowledgment was not regularly appointed, he was an officer *de facto,* and, under our decisions and on the facts in evidence, the probate must be held sufficient. *Spruce Co. v. Hunnicutt,* 166 N. C.,202; *Hughes v. Long,* 119 N. C., 52.

There is no error, and judgment in plaintiff's favor is affirmed.

No error.

*Cited: Banking Co. v. Leach,* 169 N.C. 716 (3c); *Cropsey v. Markham,* 171 N.C. 45 (5c); *Propst v. Caldwell,* 172 N.C. 598 (5c); *Hayden v. Hayden,* 178 N.C. 263 (5c); *Moore v. Harkins,* 179 N.C. 169 (5c); *Swain v. Goodman,* 183 N.C. 534 (5c); *Blue v. Wilmington,* 186 N.C. 325 (5c); *Power Co. v. Power Co.,* 188 N.C. 132 (5c); *Brown v. Jennings,* 188 N.C. 160 (1c); *Freeman v. Ramsey,* 189 N.C. 798 (6d); *Whitley v. Powell,* 191 N.C. 477 (2c); *Distributing Co. v. Carraway,* 196 N.C. 60 (5c).

(205)

D. A. HELSABECK v. S. G. DOUB, ADMINISTRATOR.

(Filed 5 November, 1914.)

**1. Evidence—Deceased—Transactions and Communications—Husband and Wife—Interpretation of Statutes.**

In an action against an administrator to recover the value of services the plaintiff alleges he has rendered the deceased, the wife of the plaintiff has no "direct, legal, or pecuniary interest in the event" which would bar her testimony as to a transaction with the deceased, under Revisal, sec. 1631, and it is competent for her to testify to the contract relied upon by her husband, the plaintiff. *Linebarger v. Linebarger,* 143 N. C., 231, cited and distinguished.

**2. Limitations of Actions—Services Rendered—Payment at Death.**

Where the parties have agreed that A. should receive compensation for services rendered B. at the death of B., the statute of limitations does not begin to run until the death of B.

APPEAL by defendant from *Devin, J.,* at March Term, 1914, of FORSYTH.

This is an action to recover the value of certain services rendered by the plaintiff to the intestate of the defendant. During the progress of

the trial the wife of the plaintiff was permitted to testify, over the objection of the defendant, that the defendant's intestate agreed with the plaintiff to pay for the services, and that payment was not to be made until after death. The defendant excepted.

The defendant requested his Honor to charge the jury that the plaintiff could not recover for services rendered more than three years before the commencement of the action. This was refused, and the defendant excepted.

The defendant pleaded the three years statute of limitations. There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

*Watson, Buxton & Watson for plaintiff.*

*Jones & Clement and Lindsay Patterson for defendant.*

ALLEN, J. The evidence of the wife as to the contract between the plaintiff and the intestate of the defendant was objected to under section 1631 of the Revisal, upon the ground that, while not a party to the action, she was interested in the result.

The language of the statute is, "interested in the event," and this is held in *Jones v. Emory,* 115 N. C., 163, and in *Sutton v. Walters,* 118 N. C., 495, to mean a "direct, legal, or pecuniary interest." In this sense the wife had no interest, as upon a recovery by the plaintiff no right growing out of the married relationship would attach to the money recovered.

(206) In the case of *Bradshaw v. Brooks,* 71 N. C., 322, the plaintiff brought an action to recover the amount of a certain bond which the defendant had collected and had not paid to the testator, his father-in-law, and the defendant's wife, the daughter of the testator, was held to be a competent witness to prove that her husband, the defendant, offered to pay her father the money, but was told by him to keep it, as he intended it as an advancement to himself and the witness; and this was approved in *Paul v. Holleman,* 136 N. C., 34.

The case of *Linebarger v. Linebarger,* 143 N. C., 231, is not in point, because the property in controversy was land, and the wife's inchoate right to dower attached immediately upon the recovery by her husband.

We are, therefore, of opinion that the wife was a competent witness, and that her evidence was properly received.

The exception to the refusal to charge the jury that there could be no recovery for services rendered three years prior to the commencement of the action is fully met by the cases of *Miller v. Lash,* 85 N. C., 54, and *Freeman v. Brown,* 151 N. C., 115, holding that where services are rendered upon an agreement that compensation is to be made at death, that

the amount does not become due until death, and that the statute of limitations does not begin until that time.

We find

No error.

*Cited: Ins. Co. v. Woolen Mills,* 172 N.C. 537 (1c); *Shoe Store Co. v. Wiseman,* 174 N.C. 719 (2c); *In re Gorham,* 177 N.C. 275 (1c); *Smith v. Allen,* 181 N.C. 58 (2c); *Pinnix v. Smithdeal,* 182 N.C. 413 (2c); *McNeill v. Mfg. Co.,* 184 N.C. 425 (2d); *Herring v. Ipock,* 187 N.C. 461 (1c); *Fertilizer Co. v. Eason,* 194 N.C. 249 (2c); *Brown v. Williams,* 196 N.C. 250 (2c); *Honeycutt v. Burleson,* 198 N.C. 39 (1d); *R. R. v. Hegwood,* 198 N.C. 316 (1c); *Dill-Cramer-Truitt Corp. v. Downs,* 201 N.C. 483 (1d); *Vannoy v. Green,* 206 N.C. 83 (1c); *Lipe v. Trust Co.,* 207 N.C. 796 (2c); *Burton v. Styers,* 210 N.C. 231 (1c); *Price v. Askins,* 212 N.C. 587 (1c); *Allen v. Allen,* 213 N.C. 273 (1c); *Neal v. Trust Co.,* 224 N.C. 107 (2p); *Stewart v. Wyrick,* 228 N.C. 432 (2c).

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AGNES SEAGROVES v. CITY OF WINSTON.

(Filed 5 November, 1914.)

**Cities and Towns—Streets and Sidewalks—Negligence—Trials—Evidence—Nonsuit.**

In an action against a city for damages alleged to have been negligently inflicted on the plaintiff by reason of the defendant allowing a ditch or excavation to remain unlighted and unguarded on its street, at night, it was shown that the city issued a permit to plumbers to make sewer connections there, which were completed and the ditch properly filled and the bricks of the sidewalk replaced nine days before the occurrence; that less than an hour before the plaintiff's injury occurred a sunken place, alleged to be the cause thereof, came into the sidewalk, where the street was well lighted, evidently resulting from a cave-in from an excavation in a private lot: *Held,* this evidence was insufficient, unsupported by other evidence, to be submitted to the jury on the question of defendant's actionable negligence.

APPEAL by defendant from *Devin, J.,* at March Term, 1914, of FORSYTH.

*Louis M. Swink and Alexander, Parrish & Korner for plaintiff.* (207)

*Jones & Patterson, W. M. Hendren, and B. W. Stras for defendant.*

CLARK, C. J. This is an action against the defendant for damages sustained by reason of the defendant's alleged negligence in allowing a ditch or excavation on East Fourth Street to remain unlighted and unguarded at night, in consequence of which the plaintiff alleges she fell in and sustained serious injuries. There was an excavation on the lot of William Black, and the city had issued a permit to a plumbing company to make sewer connections from said lot across the street and sidewalk to the city's sewer main. This ditch was 2½ to 3 feet deep. On 22 December the pipe was laid in this ditch, making connection with the sewer main. The evidence was that the pipe had been laid to a point beyond the sidewalk line over on the lot of Black, the work finished, the earth securely packed and tamped, and the brick replaced in the sidewalk on said 22 December.

The evidence also was that if any hole or defect existed in the sidewalk, it developed after 6 p. m. on 31 December, and less than an hour before the plaintiff fell in; that the street was well lighted, there being an incandescent light 100 feet from the spot where the injury was alleged to have been sustained and an arc light of high power about 250 feet from this point, and that there was nothing to deflect or obstruct the light, and the defendant contended that if a defect actually existed in the walk, it should have been seen or discovered by the plaintiff.

The defendant excepted because the court in effect told the jury that if they should find by the weight of the evidence that parties acting under a permit from the city in making the sewer connection left a ditch or excavation in the sidewalk unguarded or unlighted, whereby the alleged injury was caused to the plaintiff, and that such or a similar result could have been foreseen by the exercise of reasonable care, the jury should answer the issue of negligence "Yes." The submission of any question of fact to a jury without sufficient evidence to warrant a finding is error. In *Sutton v. Madre,* 47 N. C., 320, it was held that circumstances raising a possibility or conjecture, unless sustained by other evidence, should not be left to the jury as evidence of a fact which a party is required to prove. This has been repeated in numerous cases, and indeed is a fundamental principle. If the hole occurred about 6 p. m., 31 December—and there is no evidence whatever that it existed before that time and much evidence to the contrary—there was no evidence to justify this instruction of the court.

The doctrine established in *Bailey v. Winston,* 157 N. C., 252, and other cases may thus be summed up: "When an excavation or opening is made in a street or sidewalk of a city with its consent or per-
(208) mission, the city is liable for an injury occurring by reason of the negligence of the person doing the work, and likewise it may be liable for injuries occurring from defects left in the street after the com-

pletion of the work and for failure to inspect the work at its termination and ascertain whether it is left in a reasonably safe condition." The principle cannot be extended further. The city can be held responsible only for injuries occurring from negligence during the progress of the work or for failure to exercise ordinary care as to the safe condition of the street by inspection after the completion of the work.

The uncontradicted evidence in this case shows that the work for which the permit was issued by the city across the street and sidewalk was terminated on 22 December, nine days previous to the injury, and that the excavation was filled, the earth properly packed, and the bricks replaced on the sidewalk at that time. There was nothing further that the city could do. The prosecution of the work on the private property was outside the city's jurisdiction. There is positive testimony, uncontradicted, by the foreman and others who were excavating on the property of Black, that when work was suspended 10 minutes to 6 on 31 December he inspected the excavation, and there was then no hole or defect on the sidewalk. The hole must therefore have occurred by a cave-in soon thereafter, and there was no evidence of negligence on the part of the city in not discovering its existence in the few moments that elapsed before the plaintiff fell in the hole then developed. It was not negligence in that city that it did not discover it instantly, and there is no evidence tending to show that the city should have anticipated a cave-in.

There was no evidence of negligence on the part of the defendant to be submitted to the jury, and there was error in refusing the instruction asked for. These errors require a

New trial.

*Cited: Seagraves v. Winston,* 170 N.C. 619 *S. c.; S. v. Martin,* 191 N.C. 407 (c); *Jordan v. R. R.,* 192 N.C. 376 (c); *Taylor v. Lumber Co.,* 194 N.C. 356 (c); *Kirby v. Reynolds,* 212 N.C. 280 (c); *Gettys v. Marion,* 218 N.C. 269 (c); *S. v. Alston,* 228 N.C. 558 (c); *Lunsford v. Marshall,* 230, N.C. 612 (c).

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J. W. ROUSE v. E. R. ROUSE, TRUSTEE.

(Filed 5 November, 1914.)

**1. Trusts and Trustees—Active Trusts—Title—Execution Sales—Statute of Uses.**

A trustee created by deed for the purpose of collecting rents and profits from lands and paying them over to the *cestuis que trustent* named in the conveyance is a trustee of an active trust, which is not executed by the

statute of uses, and during the continuance thereof the interests in the lands of one of the *cestuis que trustent* may not be sold under execution of a judgment obtained against him, the title to and the possession of the land necessarily being in the trustee.

**2. Trusts and Trustees—Active Trusts—Title and Possession—Execution Sales—Trustee a Purchaser—Limitation of Actions.**

Where the wife of the grantor is to share in the rents and profits of certain lands, to be held in trust, with his children, and at her death the lands to be divided between his children; and during the lifetime of the wife a personal judgment is obtained against one of the children and his interest in the lands is sold under execution of the judgment and purchased by the trustee named in the deed, who immediately declares his possession of said interest in his own right, and so notifies the judgment debtor, the sale of such interest is void, and the latter having no present right to the possession of his interest in the land, the title and possession being in the trustee for the purposes of the trust, the statute of limitation will not run in favor of the trustee, his possession being also the possession of all of the *cestuis que trustent*.

(209) APPEAL by defendant from *Whedbee, J.*, at June Term, 1914, of LENOIR.

Civil action. The plaintiff moved for judgment upon the pleadings. His Honor rendered judgment that the plaintiff be declared the owner of a one-tenth undivided interest in and to the land described in the pleadings, and that the defendant, trustee, be directed to convey said interest to the plaintiff by good and sufficient deed, the court being of the opinion that the plaintiff is the owner of a one-tenth undivided interest in and to said land and that he is entitled to a conveyance thereof. The judgment further directs that an accounting be had between the plaintiff and defendant with respect to the rents and profits of the land.

From this judgment the defendant appealed.

*Harry Skinner and Albion Dunn for plaintiff.*
*Loftin & Dawson and L. R. Varser for defendant.*

BROWN, J. The facts alleged in the complaint and admitted in the answer appear to be as follows: On 13 January, 1887, W. J. C. Rouse and wife, Martha Rouse, executed and delivered to their eldest son, E. R. Rouse, the defendant herein, a deed for the tract of land described in the pleadings upon the following trusts, towit: "That the said E. R. Rouse shall have and hold the said granted premises for the use and the benefit of said W. J. C. Rouse and his wife, Martha Rouse, upon the following conditions: That the said E. R. Rouse shall rent and lease the said land, and pay out the rents and profits thereof to the said W. J. C. Rouse during his lifetime, and in the event that he die, leaving his wife surviving, then in that event the said E. R. Rouse shall pay to her, the said

Martha Rouse, the sum of $100 annually out of the rents and profits of the lands in lieu of her dower; the residue of the rents and profits he shall pay over and distribute pro rata among the heirs of W. J. C. Rouse; that upon the death of the said W. J. C. Rouse and his wife, Martha, the said E. R. Rouse shall convey the said land to the heirs of (210) W. J. C. Rouse in fee simple. The heirs shall share and share alike, except E. A. Rouse, who shall first account for 30 acres heretofore deeded him by his father; that the said W. J. C. Rouse and wife, Martha Rouse, shall have the use and occupancy of the dwelling-house during their natural lives."

On the day of the delivery of said deed the said W. J. C. Rouse had ten children, one of whom is the plaintiff in this action. W. J. C. Rouse died 22 November, 1887, leaving his wife, Martha Rouse, surviving, who died on 30 May, 1905.

On 21 January, 1885, a judgment was rendered in Lenoir County in favor of George B. McCotter v. the plaintiff in this action, in the sum of $93.34. On 29 March, 1889, after the death of W. J. C. Rouse, and during the lifetime of Martha Rouse, execution was issued on said judgment. The interest of the plaintiff J. W. Rouse was levied on and sold under execution, and purchased by the defendant E. R. Rouse, the trustee in said deed in trust.

Immediately upon the execution of the trust deed by W. J. C. Rouse in 1887, the trustee, E. R. Rouse, went into possession of the lands described therein, and has been in possession ever since. Shortly prior to the commencement of this action the plaintiff, who is entitled to a one-tenth interest in said lands, made demand upon the defendant to convey to him his interest therein according to the terms of the trust deed, and to account for the rents and profits. The trustee refused said demand.

These facts appearing to be clearly admitted in the pleadings, we think his Honor was correct in granting to the plaintiff relief demanded in the complaint. The defendant acquired no title to the interest of the plaintiff at the execution sale, for the reason that his interest was not subject to sale under execution.

The defendant was the trustee of an express trust, which trust was not a passive, but an active trust. He held the lands in trust after the execution of the said deed for the purpose of collecting the rents and profits and paying them over to the beneficiaries named therein. It was evidently the intent of the grantor in the deed that the legal title should remain in the trustee in order that he might execute the uses designated. He could no execute such uses without retaining the legal title, as well as the actual possession of the land.

The trust, being active, is not executed by the statute of uses, and the lands, therefore, are not subject to execution sale, issued on a judgment

debt of one of the *cestuis que trustent.* These principles are settled by a multitude of authorities: *Lummus v. Davidson,* 160 N. C., 484; *Tally v. Reid,* 72 N. C., 339; *Love v. Smathers,* 82 N. C., 372; *Everett v. Raby,* 104 N. C., 480; *Gorrell v. Alspaugh,* 120 N. C., 367; *May v.*
(211) *Getty,* 140 N. C., 320; *Hicks v. Bullock,* 96 N. C., 164; Tiedeman on Real Property, sec. 494; Lewin on Trusts, vol. 1, p. 210; *Perkins v. Brinkley,* 133 N. C., 158.

It is plain, therefore, that the defendant acquired no title to the interest of the plaintiff in the land under the execution sale; and this would be true even had the defendant not occupied a fiduciary relation to the plaintiff. But the defendant insists that the action is barred by the statute of limitations, and that he has acquired title to the plaintiff's one-tenth interest in the land by adverse possession.

The defendant avers that immediately after the execution sale he offered to the plaintiff to reconvey to him upon repayment of the amount paid out, with interest thereon, and the plaintiff refused to accept the said offer, and that thereupon the defendant notified the plaintiff that he would hold the plaintiff's interest in the land discharged of any trust or equity in the same. This would not put the statute of limitations in motion as against the plaintiff's rights. The defendant's possession in the land was not by any right or title of his own, but by virtue of his fiduciary relation as trustee under the deed in trust, and that fiduciary relation would continue until the trust is fully discharged.

As between a trustee and *cestui que trust,* in the case of an express trust, the statute of limitations has no application, and no lapse of time constitutes a bar. The relation of privity between the parties is such that the possession of one is the possession of the other, and there can be no adverse claim or possession during the continuance of the relation. The statute of limitations will never commence to run in favor of the trustee of an express trust against the beneficiary thereof before the duties of the trust have been fully performed and the trust has terminated.

There are some exceptions to this rule, and there may be conditions which would put the statute in motion, but nothing of the sort is set out in the answer in this case. At the time this alleged offer was made, Martha Rouse was living and the defendant was in possession of the land under the terms of the deed in trust for the purpose of collecting the rents and profits and distributing them as therein provided. His attempted acquisition of the plaintiff's interest under execution sale and his attempted repudiation of the trust was a nullity, and had no effect to set the statute of limitations running at that time. His possession continued under the terms of the trust to be the possession of all of the *cestuis que trustent. Miller v. Bingham,* 36 N. C., 423.

It is an invariable principle of equity jurisprudence that a trustee cannot derive any profit or advantage from the sale of the trust property committed to his guardianship, and all of the advantages which he might thus improperly acquire result to the benefit of the real beneficiaries of the trust.

Besides, in the case at bar the plaintiff had no right to demand (212) a conveyance, and had no cause of action against the defendant until after the death of his mother, Martha Rouse, in May, 1905.

The judgment of the Superior Court is

Affirmed.

*Cited: Rouse v. Rouse,* 176 N.C. 172 *S.c.; Cole v. Bank,* 186 N.C. 519 (1c); *Hospital v. Nicholson,* 190 N.C. 121 (2c); *Tire Co. v. Lester,* 190 N.C. 415 (1d); *Crews v. Crews,* 192 N.C. 683 (2d); *Sorrell v. Sorrell,* 198 N.C. 466 (2c); *Miller v. Miller,* 200 N.C. 461 (2d); *Patrick v. Beatty,* 202 N.C. 460 (1c); *Chinnis v. Cobb,* 210 N.C. 108 (1c); *Fisher v. Fisher,* 218 N.C. 47 (1c).

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CHRISTINE CLOW v. A. L. MCNEILL AND WIFE.

(Filed 5 November, 1914.)

**1. Actions—Venue—Accounting—Personal Property—Incidental Relief.**

Where the main relief sought in an action is for an accounting by the defendant of promissory notes, moneys, and other personal property of the plaintiff's in his hands, and the possession of the property is incidental thereto, it is error for the court to remove the cause to the county of the defendant's residence upon his motion therefor; and where it is alleged that the defendant wrongfully induced the plaintiff to sign a paper, falsely representing it to be a power of attorney for certain purposes, which in fact was a deed to lands, that the defendant sold these lands and had received certain moneys, notes, etc., therefor, to the possession of which the plaintiff was entitled, and demanded an accounting and settlement, the defendant's motion to remove should be denied.

**2. Same—Jurisdiction—Equity—Injunction.**

Where the court erroneously orders a cause of action removed to the county of the defendant's residence, upon the ground that it was an action to recover personal property, the main relief sought being that for an accounting, and at the same time continues the plaintiff's restraining order, arising in said cause, to the final hearing, exception to the latter order on the ground that it was made in a county where the court was without jurisdiction cannot be sustained.

APPEAL by both parties from *Cooke, J.*, at August Term, 1914, of CUMBERLAND.

This action was commenced in the county of Cumberland, summons being returnable to the August Term, 1914. Plaintiff is a resident of the county of Cumberland, and the defendant A. L. McNeill and Ida Rankin McNeill are residents of the county of Lee.

The plaintiff filed her complaint, in which she alleged, among other things, that the defendant A. L. McNeill was, at the times complained of, the agent, confidential adviser, and attorney of the plaintiff; that on 24 January, 1905, while the plaintiff was preparing to board a train for Florida, the defendants told her it would be necessary for her to give them power of attorney to execute deeds for certain lots of land which the defendants were to sell, and that the plaintiff, reposing absolute confidence in the defendants and relying upon their statements, executed to
(213) the defendant Ida Rankin McNeill a paper-writing which she understood to be a power of attorney, but which was, in fact, a deed conveying valuable lands; that the defendants thereafter sold said lands to different persons, about forty in number, and executed deeds therefor and received the purchase price; that among other deeds executed by the defendants was one to S. B. Hatch, trustee, for the consideration of $24,000, one-half of which was paid in cash and the other half in notes; that the defendants have failed to account to the plaintiff for any of the sums of money so received by them.

The plaintiff further alleges:

"10. That as plaintiff is informed and believes, one-half of the consideration for the aforesaid conveyance to S. P. Hatch, trustee, is represented by three notes, towit: one for $3,000, maturing 25 October, 1914; one for $3,000, maturing 25 January, 1915, and one for $6,000, maturing 25 April, 1915, all dated 25 April, 1914, and bearing interest from date at the rate of 6 per cent per annum, and the same are held by the defendants.

"11. That, as plaintiff is informed and believes, upwards of $10,000 of the cash payment received for the aforesaid conveyance to S. P. Hatch, trustee, has been invested in North Carolina State bonds, which are now held by the defendants.

"12. That a part of the aforesaid cash payments has been, and is now, on deposit in the Citizens National Bank at Raleigh, N. C.

"13. That the defendants have failed and refused to account for and pay over to the plaintiff any part of the moneys and other property by them received for any of the conveyances hereinbefore mentioned.

"14. That the defendants, and each of them, are insolvent.

"Wherefore the plaintiff prays judgment for an accounting to ascertain the amounts due by defendants to plaintiff, and judgment therefor; that the proceeds from the sales of the lands be declared the property of the

plaintiff, and that the defendants be required to deliver the same to her; that pending this action a receiver be appointed to take charge of said assets; for the costs, and such other and further relief as she may be entitled to and that may seem just and proper."

On 4 August, 1914, after the summons in the action was issued, the plaintiff applied for and obtained an order restraining defendants from transferring or in any manner interfering with or disposing of any moneys, stocks, bonds, notes, or other property or things of value, representing any part of the purchase price of the lands referred to in the affidavit, including the notes received as part payment for said lands, the North Carolina bonds, and the funds deposited in the Citizens National Bank of Raleigh, N. C., or elsewhere, which order was returnable before the Hon. C. M. Cooke, judge of the Superior Court, at Raeford in the county of Hoke, on 20 August, 1914.

On the return day of the restraining order His Honor was ill, (214) and it was agreed that the motions made thereon should be thereafter heard at the September Term, 1914, of Cumberland Superior Court.

At the August Term of the Superior Court of Cumberland the defendant filed a motion to remove the action for trial to the county of Lee, upon the ground that it was for the recovery of certain specified personal property, towit, certain North Carolina bonds, notes and money, alleged by the plaintiff to be the proceeds from the sale of certain lands in Lee County. Both of said motions, one being to continue the restraining order to the hearing and the other to remove the action to the county of Lee, were heard at September Term, 1914, of the county of Cumberland, when his Honor made one order continuing the restraining order until the final hearing of the cause, or until the further order of the court, and another order removing the action to the county of Lee. The plaintiff excepted to the order of removal, and the defendant excepted to the order continuing the restraining order to the hearing.

*Sinclair & Dye and Williams & Williams for plaintiff.*

*Shaw & McLean, Hoyle & Hoyle, and A. A. F. Seawell for defendants.*

PLAINTIFF'S APPEAL.

ALLEN, J. The action was improperly removed to the county of Lee, as it is an action for an accounting, and the ownership of the notes and bonds was only raised incidentally.

The case of *Woodard v. Sauls*, 134 N. C., 274, is directly in point. In that case it was alleged that the defendant was indebted to the plaintiff by promissory notes and for further large sums, and that, to secure such indebtedness, had turned over to the plaintiff sundry notes; that the defendant afterwards got possession of a portion of said notes, to be col-

lected by him as agent of the plaintiff and applied on said indebtedness, which the defendant had not done, and that the defendant got possession of another portion of said collaterals surreptitiously, without the knowledge or consent of the plaintiff, and retained the same, to recover which notes plaintiff sued out the ancillary proceeding of claim and delivery; and it was held that where the recovery of personal property is not the sole or chief relief demanded, an action need not necessarily be brought in the county in which the property is located, and that the action ought not to be removed.

This case is not in conflict with *Brown v. Cogdell,* 136 N. C., 32, and *Edgerton v. Games,* 142 N. C., 223, as in the first of these cases the only question involved was the ownership of certain furniture, and in the second a separate and distinct cause of action was alleged in the complaint for the recovery of a horse.

The order removing the action to the county of Lee is

Reversed.

(215) DEFENDANT'S APPEAL.

ALLEN, J. The objection to the order continuing the restraining order is upon the ground that, as the action had been removed to the county of Lee, the judge holding the court of the county of Cumberland was without jurisdiction.

In our opinion, his Honor had the power to make the order, notwithstanding the removal, as the court had jurisdiction until the action was removed (*Comrs. v. Lemly,* 85 N. C., 341); but it is unnecessary to decide the question, as we have held upon the plaintiff's appeal that the action was properly constituted in the county of Cumberland.

Affirmed.

*Cited: Piano Co. v. Newell,* 177 N.C. 535 (1c); *Fairley v. Abernathy,* 190 N.C. 498 (1d); *Marshburn v. Purifoy,* 222 N.C. 222 (1d).

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SAMUEL TYSON, ADMINISTRATOR, v. THE EASTERN CAROLINA RAILWAY COMPANY.

(Filed 5 November, 1914.)

**Railroads—Negligence—Persons on Track—Helpless Condition—Outlook Ahead—Insufficient Headlight—Trials—Evidence.**

The plaintiff's intestate was killed at dusk on the defendant's railroad track. There was evidence tending to show that he had been seen drink-

ing and staggering some fifteen minutes before the occurrence, and that while on his way home he came upon the defendant's roadway and sat upon the end of a cross-tie, and while sitting there with his head and body leaning forward upon his knees, the defendant's train came upon him, using a poor quality of oil for its headlight, striking his body in the region of the ribs, and causing his death; that the track was straight and unobstructed for a mile at this place, which was up-grade, that a person sitting upon the track could have been seen for 300 yards, and that by applying the brakes the train could have been stopped in 50 yards. Upon a motion to nonsuit, it is *Held*, that contributory negligence being admitted, the evidence was sufficient to be submitted to the jury upon the issue of the last clear chance as to whether the engineer could have seen the intestate sitting upon the cross-tie, if the headlight had been a proper one, or by a diligent outlook ahead he could have done so in time to have avoided killing him. *Holder v. R. R.*, 160 N. C., 7; *Stout v. R. R.*, 164 N. C., cited and distinguished.

APPEAL by defendant from *Daniels, J.*, at February Term, 1914, of GREENE.

Civil action, tried upon these issues:

1. Was the plaintiff's intestate injured by reason of the negligence of the defendant? Answer: Yes.

2. Did the plaintiff's intestate by his own negligence contribute to his own injury and death? Answer: Yes.

3. Notwithstanding the negligence of the plaintiff's intestate, (216) could the defendant by the exercise of reasonable care have avoided the injury to the plaintiff's intestate? Answer: Yes.

4. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $500.

*G. V. Cowper and J. Paul Frizzelle for plaintiff.*

*John L. Bridgers for defendant.*

BROWN, J. The defendant in apt time moved to nonsuit, which motion was overruled. This brings up for review the sufficiency of the evidence. It is well settled that it must be construed and accepted in the light most favorable for the plaintiff. The testimony tends to prove that the intestate of the plaintiff was killed by the defendant's train on its track on 7 August, 1911; that at the time he was 57 years old, in good health, and that his capacity and ability for work was good; there were four members of his family, whom he helped to support, and he had an earning capacity of $300 to $400 per year.

The evidence tends to prove that his body was broken up and that the blow that killed him was one on the side of his body in the region of the ribs; that at the point where he was killed the railroad was straight and clear of all obstruction for more than a mile in each direction, and that

a man upon the track could have been seen at the time the intestate was killed 300 or 400 yards easily from either direction; that he was killed on an up grade, and that the train could have been stopped, if the brakes had been applied, within a distance of 50 yards.

The testimony tends further to prove that the intestate was in a store at Maury fifteen minutes before he was killed; that he was drinking and staggered; that on leaving the store he went in the direction of his home; that on reaching the railroad track he seated himself on the end of a cross-tie; that at the time when the defendant's engine approached him, both the head and body of the intestate were bent over and rested upon his knees. At the time, the testimony tends to prove that the engine had a very poor oil headlight.

It is useless to consider any matters relating to the first and second issues, because it is admitted that the intestate was guilty of contributory negligence, and, therefore, his administrator should not be permitted to recover unless there is sufficient evidence to support the finding of the jury upon the third issue, to the effect that, notwithstanding the negligence of the intestate, the defendant's engineer, by the exercise of ordinary care, could have avoided the injury. *McAdoo v. R. R.*, 105 N. C., 140; *Abernethy v. R. R.*, 164 N. C., 93.

The principle of law governing this case is well stated by *Mr. Justice Allen* in *Holder v. R. R.*, 160 N. C., p. 7, to which we give our full
(217) approval: "As no presumption of negligence arises from the killing of the deceased, and as the engineer had the right to presume up to the last minute he would get off the cross-tie, if he was sitting up, the burden was on the plaintiff to prove that his appearance while on the cross-tie was such as to lead a man of ordinary prudence in charge of a train to believe he was unconscious or helpless, and we find nothing in the evidence that amounts to more than conjecture or speculation as to this fact."

This case differs materially from the *Holder case* in that in this case we have the positive evidence that the deceased, immediately before he was killed, was huddled up and bent over with his head and body on his knees, sitting on the end of a cross-tie, in such condition that must have indicated to a watchful engineer that he was practically helpless.

In a similar case the Supreme Court of Kentucky said: "We do not think, as a principle of law, it can be stated that where a trespasser is seen sitting upon the track with his head in his hands and his hands resting on his knees, apparently asleep or unconscious, the presumption is that he will hear and obey signals of the engineer, warning him of the approach of the train. This undoubtedly would be true if the trespasser were walking or standing on the track. In that case the very fact that he was moving, or standing up, would indicate that he was not asleep or

unconscious, but had possession of his faculties, and the engineer would have the right to suppose that he would hear and obey the danger signals. But the same would not necessarily prevail where the situation is as detailed in this case. A man seated on a cross-tie of a railroad track, apparently asleep or unconscious, presents an unusual, not to say extraordinary, spectacle, and we think it was the province of the jury to determine whether or not an engineer of ordinary prudence, seeing a man so seated, ought not to commence checking the train in time to prevent injuring him, if it should transpire that he was unconscious or asleep." *Starrett v. R. R.*, 110 S. W. Rep., 283, quoted in *Smith v. R. R.*, 162 N. C., p. 35.

There was no evidence in the *Holder case* that the position of the body during life was as described by the witness in this case. There is no evidence in that case that the head and body were bent over on the knees at the time the man was injured.

*Mr. Justice Allen* says: "The circumstance that the head was bent over at the time the body was found, chiefly relied on by the plaintiff, is explained by the strong probability that a blow causing death could not have been received without making some change in the position of the body, and when death ensued it was natural for the head to drop."

There is evidence in this case that the engineer, by keeping a watchful lookout, with a good headlight, could have seen the intestate in the position described by the witnesses, and, going up grade, could (218) have stopped his train within 50 yards. There is evidence that he had a very poor oil headlight, and that it was about dusk at the time when his train killed the intestate.

Taking all of these facts together, we think there is sufficient evidence to have gone to the jury for their consideration to the effect that if the engine had been properly equipped with a proper headlight, and the engineer had kept a diligent lookout ahead of him, he could have discovered, by reasonable care, the condition of the intestate and could have stopped his train in time to have saved his life.

The case of *Stout v. R. R.*, 164 N. C., p. 384, is relied upon by the defendant. We must admit that the syllabus of that case is apparently an authority for the defendant's position, but an examination of the original record shows quite a distinction between the two cases.

In the *Stout case* the evidence of the witnesses shows that he was sitting on the cross-tie with his elbows on his knees, and his head bent. A double-header freight train came along and the engineer evidently discovered the position of the deceased, for the train blew repeatedly and there was evidence tending to prove that it could not have been stopped in time to save the life of the deceased. The Court was of opinion, upon an analysis of the evidence, that it fell within the principle laid down in the *Holder case.*

We think the case at bar differs materially from both.
No error.

*Cited: Hill v. R. R.*, 169 N.C. 743 (cc); *Hopkins v. R. R.*, 170 N.C. 486 (c); *Horne v. R. R.*, 170 N.C. 649 (c); *Horne v. R. R.*, 170 N.C. 662 (j); *Jenkins v. R. R.*, 196 N.C. 469 (cc).

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J. D. DANIEL v. W. P. BETHELL ET AL.

(Filed 5 November, 1914.)

**Partnership—Service on One Partner—Judgment—Property Subject to Execution—Service After Judgment—Interpretation of Statutes.**

Where a judgment has been obtained in an action against a partnership (here a husband and wife) and summons therein has been issued and served only on one of the partners, and the other has not made himself a party or taken proper steps by independent action to prevent it, execution may issue on the partnership property and on the property of the individual member who has been served with process (Revisal, sec. 413); and as to the partner not served with summons, he may be made a party after judgment rendered, and then execution may issue against his separate property. Revisal, secs. 413, 414.

APPEAL by defendant from *Devin, J.*, at June Term, 1914, of ROCKINGHAM.

(219) *No counsel for plaintiff.*
*C. O. McMichael and H. R. Scott for defendants.*

CLARK, C. J. This is an action for the recovery of $305.91 alleged to be due for services rendered as clerk to the firm of W. P. Bethell & Co. The summons was issued against "W. P. Bethell and Mary Sue Bethell, partners, trading under the firm name of W. P. Bethell & Co." The complaint alleged that they were partners doing business in that style, and that the services were rendered by the plaintiff under a contract with them, on which there was a balance due of $305.91. The answer denied the partnership. The summons was served on W. P. Bethell alone. The answer alleged that Mary Sue Bethell was the owner of the farm on which the mercantile business was conducted, and that W. P. Bethell was her husband and agent, and denied the partnership. The jury in response to the issues submitted found that W. P. Bethell and Mary Sue Bethell were partners, trading as W. P. Bethell & Co., (Laws 1911, ch. 109), and that W. P. Bethell was indebted to the plaintiff for the services

alleged in the sum of $305.91. The judgment was rendered that the plaintiff recover that sum of W. P. Bethell and W. P. Bethell & Co.

The jury having found that the partnership existed, the defendant W. P. Bethell, who alone was served with summons, was liable individually for the debts of the firm, and also the firm was liable, since the summons was served upon one of the partners. The defendant Mary Sue Bethell was not served with summons and did not appear in the action. Of course, the judgment is not binding on her individually, and execution cannot issue thereon against her individual property unless she should be brought in and made a party, which could be done after judgment. Rev., 413 and 414; *Davis v. Sanderlin,* 119 N. C., 84.

The chief contention of the defendant is that the issues did not cover the whole matter in litigation. But it is not necessary that all the members of an alleged partnership should be served with summons in the action. Rev., 413; *Hanstein v. Johnson,* 112 N. C., 254. A partnership is represented by the partner who is served, and as to him the judgment is binding on him individually and as to the partnership property. If the other partner denies the partnership, it is open to her by proper proceedings to prevent the execution being levied upon the partnership goods; but W. P. Bethell is estopped by the verdict and judgment. In the absence of proceedings on the part of Mary Sue Bethell either to make herself party to this action or by an independent action to stay the execution, it can be levied on the partnership property.

No error.

*Cited: Johnston County v. Stewart,* 217 N.C. 335 (c); *Dwiggins v. Bus Co.,* 230 N.C. 239 (cc).

(220)

LUTHER A. MANLY v. M. B. ABERNATHY.

(Filed 11 November, 1914.)

**1. Interpretation of Statutes — Motor Cars — Negligence — Intersecting Streets.**

Public Laws 1913, ch. 107, providing, among other things, that a person operating a motor vehicle, when approaching an intersecting highway or traversing it, shall have the car under control and operate it at a speed not exceeding 7 miles an hour, having regard to the traffic then on the highway and the safety of the public, is construed with reference to its subject-matter and the purpose and intent of the act gathered from the language employed, and it is held that the word "intersecting highways" includes all space made by the junction of frequented streets of a town,

though one of the streets enters the other without crossing or going beyond it.

**2. Same—Trials—Instructions.**

It appearing in this case that the defendant knocked the plaintiff down and injured him, while the former was running his motor vehicle at an excessive speed upon a public and frequented street that ran into but did not cross another, which he was approaching, without slowing down or giving the signal required by section 1, chapter 107, Public Laws 1913, it was error for the trial judge to charge the jury that the second section of said chapter did not apply to the facts of the case, upon the ground that to come within the meaning of the statute the defendant must have been running his car on a street which crossed beyond the other street he was approaching in order for the streets to have been intersecting each other.

APPEAL by plaintiff from *Devin, J.*, at Spring Term, 1914, of ROCKINGHAM.

*Johnston, Ivie & Dalton for plaintiff.*
*P. W. Glidewell and C. O. McMichael for defendant.*

WALKER, J. This action was brought to recover damages for injuries sustained by plaintiff as the result of the negligent running and operation of defendant's automobile, whereby he was knocked down by the said car in a public street, where he had the right to be, and severely injured. There seems to be not the slightest room for doubt, if the evidence of plaintiff is true, that defendant negligently ran his car at an excessive rate of speed, 45 miles the hour, in a much used and frequented public thoroughfare, and without giving any signal of his approach. The case turns upon the applicability of Public Laws 1913, ch. 107, at p. 188, which reads as follows: "(1) When approaching a pedestrian who is upon the traveled part of any highway, and not upon a sidewalk, and upon approaching any intersecting highway or a curve, or a corner in a highway where the operator's view is obstructed, every person operating a motor vehicle shall slow down and give a timely signal with his bell, (221) horn, or other device for signaling"; and (2) when approaching an intersecting highway, a bridge, dam, sharp curve, or steep descent, and also in traversing such intersecting highway, bridge, dam, curve, or descent, a person operating a motor vehicle shall have it under control and operate it at such speed, not to exceed 7 miles an hour, having regard to the traffic then on such highway and the safety of the public. The court charged that the second branch of the statute did not apply to the facts of this case, and defendant (appellee), in his well prepared brief, states that the instruction was given to the jury "because the accident did not take place at an *intersection* of a highway, but in front of Walker & Co.'s mill," which is not at a place, as he contends, where one

street enters into or connects with or crosses another street, and for the further reason that "West Market Street enters into a street which runs by Walker & Co.'s mills, but said West Market Street does not *cross* the other (Settle) street, and therefore is not an intersecting street within the meaning of the statute. The street, which is not given a name by defendant in his brief, and which joined with West Market Street, is known as Settle Street (by plaintiff's own evidence, Record, p. 8). Plaintiff excepted to the ruling of the court upon the statute and appealed from the judgment.

Defendant testified in his own behalf as follows: "I came out of Settle Street in front of the mill. There was nothing, I think, to obstruct my view of Manly. There were several wagons there, and I think a wagon was coming in from the other street, and there were several people standing there. . . . Manly was struck about the middle of (the place) where West Market Street would cross Settle Street, if it (Market Street) continued on and across Settle Street." So that there was some evidence, proceeding from the defendant himself, who testified in his own behalf, that plaintiff was knocked down and injured at the intersection of two streets, provided it is not necessary that one street should cross another in order for it to be said that the former intersects the latter, within the meaning of the law and the intent of its makers, for the latter should be added, as every law, when ambiguously worded, should be construed according to its true intent, to be gathered, of course, from its language.

Webster defines the word "intersect" as follows: "To cut into or between," and, secondly, "to cut or cross mutually." The ordinary meaning may be "to cross," but its true sense in the particular statute or writing must be ascertained by a full reference to the context in which the word appears. It would violate the elementary rule of construction not to construe it in that way, for we are told that the words in a statute are to be construed with reference to its subject-matter and the objects sought to be attained (23 A. and E. Enc., 322; *Brewer v. Blougher,* 14 Pet. (U. S.), 178, 10 L. Ed., 408; Sedg. St. and Const. Law, 359), (222) as well as the legislative purpose in enacting it; and its language should receive that construction which will render it harmonious with that purpose, rather than that which will defeat it (*id.,* 319; *Taylor v. Washington County,* 67 Ind., 383; *People v. Lacombe,* 99 N. Y., 43). When uncertain, its general intent, as gathered from the statute, furnishes a key by which its ambiguities may be solved, and thus its words given that meaning which will harmonize with that intent. Suth. St. Const., secs. 218, 219. Conditions with reference to the subject-matter of the act, which it is apparent from its context it was necessary to provide for, may also be considered in ascertaining what is meant by that which is apparently ambiguous. *People v. Lacombe, supra;* 17 A. and E. Enc.

(2 Ed.), p. 33. In *Calhoun Gold Mining Co. v. Ajax G. M. Co.*, 59 Pac. Rep. (Colo.), 607, the Court said: "It is evident from the provisions of section 2322 that the intent of Congress was to give to the locator of a claim, to which no adverse right had attached, every vein apexing within the surface boundaries of his location, unless its intent is negatived by section 2336. The words 'intersect' and 'cross,' as used in this section, are not strictly synonymous, and in using both it must be presumed it was intended to provide for different conditions. Veins might *intersect,* either on their strike or dip, and not cross. In that event it was necessary to provide which location should have the ore at the space of *intersection,* and it was declared that the prior location should have the ore within that space. In case they crossed, then a further provision was necessary, and it was provided that the junior locator should have the right of way through the space of *intersection,* for the convenient working of his mine." We are clearly of the opinion that the Legislature intended to use the word in the sense of "joining" or "touching," or coming in contact with, or "entering into," and did not intend that the word "intersect" should be so restricted in its meaning as not to protect pedestrians and other persons using a public street, at a point or space where another street comes into it, although it does not cross it. We should, therefore, give the word its broader meaning, which will include all space made by the junction of streets, where accidents are just as likely to occur as where the two streets cross each other. "Like reason doth make like law *(Ubi eadem ratio, ibi idem lex),"* and "then is the law most worthy of approval when it is consonant to reason." Broom's Legal Maxims (6 Am. Ed.), pp. 122, 123, and cases in note, which illustrate the maxim and show the nature and extent of its application. We have seen that the word "intersect" is defined by Dr. Webster, "to cut into one another," and also "to meet and cross each other," and an illustration of the latter meaning of the term is found in the intersection of any two lines, or any two diameters of a circle at its center; but the latter is not its only signification, as the former part of the definition is to be taken into account and given its proper weight in the solution of the disputed question. "To cut into" does not necessarily mean to divide by crossing between two objects, but may rightly be construed as entering into, but not passing beyond; and as thus reasonably understood, it embraces the open space or place made by the entrance of Settle Street into the larger street known as West Market, just as a tributary enters or flows into the main stream without crossing it, the point of confluence being that of the intersection of the two streams.

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Those who handle these machines, which are highly dangerous if driven rapidly, especially along a crowded thoroughfare, and more especially when turning at the angle of two intersecting streets or roads, should

strictly obey the law and exercise that degree of care generally which is commensurate with the great hazard produced by a failure to do so. They should hold their cars well in hand and give timely signals at points where people should reasonably be expected to be and where they have the right to be. But these questions may be postponed for fuller consideration hereafter, as our ruling disposes of the case, and the other exceptions presenting them may not arise again.

We, therefore, conclude that the learned judge erred in his interpretation of the statute, which requires that a new jury be called to hear the case.

New trial.

*Cited: Board of Agriculture v. Drainage District,* 177 N.C. 224 (1c); *Guano Co. v. Walston,* 187 N.C. 672 (1c); *Spitzer v. Comrs. of Franklin County,* 188 N.C. 33 (1c); *Mt. Olive v. R. R.,* 188 N.C. 334 (2d); *S. v. Stallings,* 189 N.C. 105 (2c); *Davis v. Long,* 189 N.C. 135 (2cc); *Fowler v. Underwood,* 193 N.C. 403 (2c); *Goss v. Williams,* 196 N.C. 220 (2c); *Roach v. Durham,* 204 N.C. 590 (1c).

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STATE EX REL. R. H. SALISBURY v. A. B. CROOM AND BOARD OF DIRECTORS OF STATE HOSPITAL, RALEIGH.

(Filed 11 November, 1914.)

**1. Public Officers—Appointment—Constitutional Law—Legislative Powers—Hospitals for the Insane—Directors.**

By amendment to Article III, sec. 10, of our Constitution by the Convention of 1875, the express inhibition of the General Assembly to appoint officers to offices created by statute was taken away, and the inherent right of the Governor to appoint is now restricted to constitutional offices and where the Constitution itself so provides; and all offices created by statute, including directorates in State institutions—in this case, the State Hospital at Raleigh—the power of appointment, either original or to fill vacancies, is subject to legislative provision as expressed in a valid enactment.

**2. Public Officers—Hospitals for the Insane—Directors—Appointments—Interpretation of Statutes—Concurrence of Senate.**

Revisal, sec. 4547, providing directorates for hospitals for the insane, enacts, among other things, that each corporation shall be under the management of a certain number of directors, divided into classes, the terms of each class expiring at different times, "nominated by the Governor and, by and with the advice and consent of a majority of the Senators-elect, appointed by him," and after making provisions as to quorums, etc., concludes that "after the expiration of their said respective terms of office, all appointments shall be for a term of six years, except such as are made

to fill unexpired terms." *Held*, it was the design and purpose of the Legislature that the consent and approval of the Senate, as stated, be required for a valid appointment by the Governor to fill unexpired terms as well as full terms, and that the sole power of appointment of the Governor is derived under Revisal, sec. 5328, subsec. 3, to fill vacancies when the Senate was not in session, and until it met and concurred in his appointment. *Boynton v. Heartt*, 158 N. C., 488, cited and distinguished; *State's Prison v. Day*, 124 N. C., 362, overruled.

**3. Public Officers—Appointments—Ouster—Process—Concurrence of Senate—Color of Right—Interpretation of Statutes.**

Revisal, sec. 2368, providing in effect that a person "admitted and sworn into any office shall be held, deemed, and taken, by force of such admission, to be rightfully in such office, until by judicial sentence, upon a proper proceeding, he shall be ousted therefrom," etc., applies to such persons who, having duly qualified, are performing the duties of the office under color of right, and not to the facts of this case, where the appointee of the Governor, requiring the concurrence of the Senate in order to hold his office for the full unexpired term of his predecessor, is holding over after the Senate has met and concurred in the appointment of another.

**4. Public Officers—Quo Warranto—Ouster — Process — Interpretation of Statutes.**

A relator in *quo warranto* proceedings to try title to office accepts the position that he has been displaced in the office by the form of action in which he seeks to assert his rights, and may not therein avail himself of the position that under our statute, Revisal, sec. 2368, he should have been ousted therefrom by a judicial sentence, under a proper proceeding, etc.

(224) APPEAL by plaintiff from *Bond, J.*, at July Term, 1914, of WAKE.

Civil action to try title to position as director of the Central State Hospital, heard on case agreed. The facts submitted were as follows:

R. H. Salisbury and A. B. Croom claim the title to the same office of director of the State Hospital at Raleigh, the office being the one occupied by J. D. Biggs and by him resigned, and the terms therein expiring in 1917.

1. J. D. Biggs, in March, 1911, with the confirmation of the Senate, was appointed for a full term of six years to said office, and qualified.

2. In 1912 J. D. Biggs resigned said office, and thereafter, on 8 November, 1912, the Governor of the State, while the Legislature was not in session, appointed by commission, a copy of which is hereto attached, R. H. Salisbury a director to fill the vacancy created by the resignation of said Biggs, and said Salisbury accepted and qualified as such director.

(225) 3. R. H. Salisbury's name was never sent to the Senate, and his said appointment was not confirmed by the Senate.

4. In March, 1913, the Governor of the State nominated and the Senate confirmed and the Governor appointed by commission, a copy of which is hereto attached, A. B. Croom a director to fill the same vacancy in the term expiring in 1917, which was then held by R. H. Salisbury, and said Croom accepted and qualified as such director.

5. That on 17 December, 1913, the board of directors of the State Hospital, by a majority vote on a resolution, excluded Salisbury from further participation as a member of said board.

6. That plaintiff duly applied for leave to bring this action; the Attorney-General duly granted the same; all proper bonds have been given, and the summons has been duly served.

7. It is agreed that if as a matter of law said Salisbury's appointment for the full vacancy in said term was valid, without confirmation and approval by the Senate, then judgment shall be entered for plaintiff, relator, confirming his right to said office; and it is agreed that if Salisbury's appointment was invalid for the full vacancy, or if Croom's appointment under the facts was legal and valid, then judgment shall be entered for A. B. Croom, confirming his right to said office and approving the action of the board excluding Salibury.

By Governor's commission, the relator, R. H. Salisbury, was appointed to fill the vacancy "caused by the resignation of John D. Biggs for the term expiring 28 February, 1917," and conferred upon him "all the rights, privileges, and powers useful and necessary to the just and proper discharge of the duties of his appointment."

Upon these facts, the court rendered judgment as follows:

The parties in this action of *quo warranto,* involving the title to the office of director of the State Hospital at Raleigh, having agreed that the same should be tried at this term of the court upon a statement of facts agreed, wherein it was submitted that if as a matter of law the plaintiff's appointment was valid without approval of the Senate, then judgment shall be entered for plaintiff, relator, confirming his right to said office; and that if the plaintiff's appointment was invalid for the full vacancy, or if the defendant Croom's appointment was legal and valid, that judgment shall be entered in favor of the defendants, confirming the said Croom's right to said office, etc. And the court being of opinion that the appointment of the plaintiff, relator, was invalid, for that the same had not been confirmed by the Senate, it is, therefore, ordered, considered, and adjudged that the title to the office of director of the State Hospital at Raleigh is in the said defendant (226) A. B. Croom, and that the defendants recover of the plaintiff their costs and disbursements in this action, to be taxed by the clerk.

W. M. BOND,
*Judge Presiding.*

From this judgment plaintiff excepted and appealed.

*Manning & Kitchin for plaintiff.*
*R. C. Strong for defendant.*

HOKE, J. The Constitution of 1868, Article III, sec. 10, made provision that the Governor, by and with the advice and consent of a majority of the Senators-elect, appoint all officers whose offices are established by the Constitution or *which shall be* created *by law* and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly.

Construing this and cognate sections of the Constitution in reference to vacancies, etc., it was held in various decisions that the term, "unless otherwise provided for," meant unless otherwise provided for by the Constitution itself, and that, except in specified and restricted instances, the Legislature had no power to appoint to office or to fill vacancies therein. *Nichols v. McKee,* 68 N. C., 429; *Welker v. Bledsoe,* 68 N. C., 457; *Clark v. Stanly,* 66 N. C., 59. This interpretation and consequent method of appointment to office and filling vacancies therein not being satisfactory to the dominant sentiment in the State, this article and section of the Constitution, as it then existed, and others of kindred nature, were altered by the Convention of 1875, and it was then established and now remains as follows (Art. III, sec. 10): "The Governor shall nominate and, by and with the advice and consent of a majority of the Senators-elect, appoint all officers whose offices are established by this Constitution and whose appointments are not otherwise provided for." It will thus be noted that the inhibition on the legislative power to appoint to office is removed and the inherent power of the Governor to appoint is restricted to constitutional offices and where the Constitution itself so provides. Accordingly, it has since been the accepted view that, in all offices created by statute, including these directorates and others of like nature, the power of appointment, either original or to fill vacancies, is subject to legislative provision as expressed in a valid enactment. *Cherry v. Burns,* 124 N. C., 761; *Cunningham v. Sprinkle,* 124 N. C., 638. In *Cherry's case* it was held:

"1. Constitutional offices must be filled in the mode designated in the Constitution.

"2. Under the amended Constitution of 1875, the Legislature may provide for the filling of any office created by statute.

(227) "3. The office of keeper of the Capitol is a legislative office. By the act of 23 February, 1899, amending section 2301 of The Code, the Legislature conferred upon themselves the power to fill that office—and on 6 March, 1899, elected the plaintiff."

This being the status of the matter so far as the question of power is concerned, in Revisal, ch. 97, sec. 4547, the General Assembly enacted that: "Each corporation shall be under the management of a board of nine directors, no two of whom shall be resident of the same county, nominated by the Governor and, by and with the advice and consent of a majority of the Senators-elect, appointed by him, of whom five shall be a quorum, except when three of their number are in this chapter empowered to act for special purposes. Each board of directors shall be in classes of three, as they are now divided, and the term of office of such classes shall expire as follows: Those of the first class on 1 April, 1905; of the second class, on 1 April, 1907; and of the third class, on 1 April, 1909. At the expiration of their said respective terms of office, all appointments shall be for a term of six years, except such as are made to fill unexpired terms."

A perusal of this statute will disclose that it is the design and expressed purpose of the Legislature that these institutions shall be controlled and managed by a directorate who are appointed by the Governor, by and with the advice and consent of a majority of the Senators-elect, and from the closing paragraph it also sufficiently appears that this careful and circumspect method shall prevail not only for the full term, but for unexpired terms, and, while the Governor alone, under the general power to fill vacancies conferred by section 5328, subsec. 3, of the Revisal, "That he is to make appointments and supply vacancies not otherwise provided for in all departments," may make appointments to this position when the Senate is not in session, such action could only be for the interval until the Senate meets and the two agencies, specially provided by the law, towit, the Governor and the Senate, shall concur in appointing his successor.

This principle, that when the Constitution and statutes especially applicable require that the Governor and the Senate shall concur in making an appointment, the appointee of the Governor, *ad interim,* under a general power, shall, unless the Constitution or some statute otherwise provides, hold only until his successor has been regularly selected and qualified, finds support in the position obtaining here, that in cases permitting construction, the correct rule of interpretation favors a recurrence to the original methods of selection (*Rodwell v. Rowland,* 137 N. C., 617), and is, we think, in accord with right reason and is well sustained by authority. *People ex rel. Laine v. Tyrrell,* 87 Cal., 475; *People ex rel. Cagman,* 20 Cal., 504; *State ex rel. Meyer,* 27 La. Anno., 569; *S. v. Raveshede,* 32 La. Anno., 934; *In re Marshalship So. Ala.,* (228) 20 Fed., 379; *State ex rel. Robert v. Murphy,* 32 Fla., 138; *Krop v. Smoot,* 62 Md., 172; Throop on Public Officers, sec. 328; Mechem on Public Officers, sec. 139.

The decision upholding the term of an *ad interim* appointment till the end of the next legislative session is by reason of some positive provision of the Constitution or statute, as in the case of the Federal Constitution, Art. II, sec. 2, and is an extension of the tenure which would otherwise prevail. And the fact that the Governor, in the designation of the relator as director, mistaking his power, essayed to appoint him for the whole unexpired term, does not affect the result. The appointment holds till the proper appointing powers concur in selecting his successor, and then expires. Throop on Public Officers, sec. 313.

The authorities relied upon by the relator are chiefly decisions construing the Constitution of 1868, and the only authority in this State favoring plaintiff's position under the Constitution as amended in 1875 is that of *State Prison et al. v. Day,* 124 N. C., 362, and, in reference to the issue now presented, the majority of the Court, making only a casual reference to the question, rested its decision on *People v. McIver,* 68 N. C., 467, a case construing the constitutional provision as it formerly stood. This was pointed out with great effect in the vigorous and learned dissent of the present *Chief Justice* in *Day's case,* a dissent which has since prevailed and recognized by a unanimous Court in *Mial v. Ellington,* 134 N. C., 159, and other decisions, as the law of the land. And the case of *Boynton v. Heartt,* 158 N. C., 488, in no way conflicts with our decision. That case was concerning the position of public administrator, and it appearing that there was no time fixed by the statute for an appointment to begin or terminate, and that the filling of an unexpired term was neither provided for nor contemplated, it was held that an appointment to that position should always be for a full term; but in the present case the statute, section 4547, fixes definitely the termination of each office and there is express provision for the filling of unexpired terms and, by correct inference, in the same way as that of original appointments, except for an intervening period when the Senate is not in session, in which case a temporary appointment may be made, under section 5328, the same as we have stated, and expires by limitation whenever the office is filled by the regularly constituted appointing power.

We were further referred by counsel to Revisal, sec. 2368, to the effect that "Any person who shall, by the proper authority, be admitted and sworn into any office shall be held, deemed, and taken, by force of such admission, to be rightfully in such office, until, by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared *void;* . . ." The
(229) position being that the board acted without warrant of law in inducting respondent into office; but the portion of the section, as quoted, may not avail plaintiff. It can only apply, in any event, to persons who, having duly qualified, are filling the duties of the office under

color of right: as we have endeavored to show, the appointment of the relator only held until his successor was regularly appointed by the concurrent action of the Governor and the Senate. His commission expiring at that date, he must be held, from that time, without color. *S. v. Taylor,* 108 N. C., 196; *Kimball v. Raymond,* 45 Miss., 151; Throop on Public Officers, sec. 623 *et seq.;* Mechem on Public Officers, sec. 319.

Apart from this, the relator has accepted the position of having been displaced by the form of action on which he now seeks to assert his rights. If, in violation of this section, he had been wronged by the action of the board, some remedy might be open to him, but in the present form of action the only question presented is, Which has the right to office? Throop on Public Officers, sec. 781; 17 Enc. Pl. and Pr., 452.

For the reason heretofore indicated, we are of opinion that the matter has been correctly decided, and the judgment for respondent is

Affirmed.

*Cited: Rogers v. Powell,* 174 N.C. 390 (d).

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ESTHER J. HAYES v. J. W. AND J. T. WRENN.

(Filed 11 November, 1911.)

**Estates—Leases—Tenants — Remaindermen — Rents — Interpretation of Statutes.**

The common law relating to the crops of a tenant growing upon lands, at the termination of the life estate of his lessor, withholding from the remainderman his part of the rent for the land during the current crop year, and accruing after the life estate has fallen in, has been changed by statute, Revisal, sec. 1990, the effect of which is to extend the lease for the current crop year, upon the consideration of the payment of rent; and where the rent under the contract of lease is for a certain fixed sum of money, the remainderman is entitled only to his proportionate part of that sum, according to the period of payment elapsing after the termination of the life estate of the lessor.

APPEAL by plaintiff from *Lyon, J.,* at May Term, 1914, of GRANVILLE.

This is an action to recover rent. The plaintiff's grandmother owned a tract of 365 acres of land in Vance County. By her will the grandmother left the property to plaintiff, subject to the life estate of Mrs. Callie Hayes (or Clayton), mother of plaintiff. The life tenant died 18 May, 1913, and the property passed to plaintiff.

In 1912 the life tenant rented the place to defendants for five (230) years from 1 November, 1912, for $500. This rent was paid in

advance by the Wrenns. They then sublet to their codefendants, the Dickersons. These subtenants paid rent of about $500 for the place in 1912. In 1913 they raised a crop on the place worth $3,250. Out of this they paid guano bills of $312.45 and paid one-fourth of the balance to the Wrenns.

In the fall of 1913 plaintiff returned to this State from Dallas, and at her request a guardian was appointed for her. He demanded possession of the place from the Wrenns, together with 227/365 of the actual rent received for that year. Both demands were refused by defendants until January, 1914, when possession of the place was relinquished by them, but division of the rent was still refused. Thereupon this action was instituted, the guardian contending that he is entitled to 227/365 of the rent actually paid, and the defendant that he is only entitled to recover a proportionate part of $100, the rent for the year reserved by the lease.

His Honor charged the jury that plaintiff was bound by the contract entered into by her mother; that the remainderman was entitled to a part of the rent for the rental year in proportion to the time that elapsed after the death of the life tenant as compared with the time that elapsed before her death, and therefore that if the jury should find that the lease introduced in evidence was executed by Mrs. California Hayes (or Clayton), then they should answer the issue "Yes," and allow plaintiff a proportional part of the $100 agreed upon between defendants Wrenn and the life tenant for the year from 1 November, 1912, to 1 November, 1913. Plaintiff excepted.

Under the instructions of the court the jury answered the issue "Yes; $45.50," and from the judgment rendered thereon the plaintiff appealed.

*John A. Hester and D. G. Brummitt for plaintiff.*

*T. T. Hicks for defendant.*

ALLEN, J. Under the common law, "the tenant for life, or his representative, shall not be prejudiced by any sudden determination of his estate because such a determination is contingent and uncertain. Therefore, if a tenant for his own life sows the lands, and dies before harvest, his executor shall have the *emblements* or profits of the crop, for the estate was determined by the act of God, and it is a maxim in the law that *actus dei nemini facit injuriam.* The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labor and expense of tilling, manuring, and sowing the lands, and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege the law can give it." 2 Bl. Com., 122; Taylor on L. and T., 355; *Gee v. Young,* 1 Hay., 17; *Poindexter v. Blackburn,* 36 N. C., 286.

"A tenant of lands for an uncertain term, such as a tenant for (231) life or at will, is entitled by way of emblements to the annual production of his annual labor, although his estate may have been terminated by the act of God or of the law before he shall have harvested the same. Where the tenant for life makes a lease for years, and dies before the expiration of the term, the undertenant or tenant for years is likewise entitled to emblements." 24 Cyc., 1070-1.

The General Assembly of this State, having in mind these principles and considering the injustice to the remainderman of withholding from him the part of the rent for his land accruing after the life estate had fallen in, enacted the statute which is now section 1990 of the Revisal, which reads as follows: "Where any lease for years of any land let for farming on which a rent is reserved shall determine during a current year of the tenancy by the happening of any uncertain event determining the estate of the lessor, the tenant, in lieu of emblements, shall continue his occupation to the end of such current year, and shall then give up such possession to the succeeding owner of the land, and shall pay to such succeeding owner a part of the rent accrued since the past payment became due, proportionate to the part of the period of payment elapsing after the termination of the estate of the lessor to the giving up of such possession."

Before this statute was passed the remainderman would have received no part of the rents in controversy, and his right now is, therefore, dependent upon the construction of the statute, which was considered in *King v. Foscue*, 91 N. C., 116, in which it was held that it was its plain purpose to extend the lease for the current year to the extent of occupancy upon the part of the tenant until the end of the lease year current at the time of the death that terminated it.

The lease is not valid except as supported by the consideration to pay rent, and if the lease is extended, it would seem to follow that it was only upon condition that the rent reserved shall continue, and that it alone should be paid. The language of the statute is that the tenant shall pay to the succeeding owner a part of the rent accrued since the last payment became due proportionate to the part of the period of payment elapsing after the termination of the estate of the lessor. No rent has accrued except under the terms of the lease.

If the construction contended for by the plaintiff could be maintained, it would render it difficult for a life tenant to make a contract of lease, as the tenant would be subject to the danger of paying rent under the lease for a part of the year, and if the lease was terminated by death, he could be held responsible for a higher and different rent by the remainderman.

We are, therefore, of opinion that the ruling of his Honor was (232) correct. There is no allegation in the complaint demanding pay-

ment of rent for the time the land was occupied by the tenant after 1 November, 1912, the end of the current year under the lease, until its surrender by the defendants—a period of about two months.

*Cited: Collins v. Bass,* 198 N.C., 101 (c).

J. B. DUNNEVANT v. SOUTHERN RAILWAY COMPANY.

(Filed 11 November, 1914.)

**1. Appeal and Error—Trials—Evidence—Facts—Admitted.**

The exclusion of evidence relating to facts admitted at the trial is not erroneous.

**2. Trials—Contributory Negligence—Evidence—Nonsuit.**

A motion to nonsuit upon the evidence is properly allowed when the plaintiff's own evidence discloses such contributory negligence as bars his recovery.

**3. Carriers of Passengers—Stations—Safe Egress—Contributory Negligence—Trials—Questions for Court.**

Where a person *sui juris* is lawfully on the platform of a railroad company, at night, with a lighted lantern near him, which he had used in going there, and knew the existing conditions, that the platform was elevated some distance from the ground and was without guard or railing at a certain place used for the handling of freight, which was a dark and dangerous place at the time; and the light from his lantern was shining upon some steps near him from the platform to the ground, a shorter distance, where the railroad had provided a railing or guard, his attempting to leave the platform, without his lantern, by the dangerous way, instead of by the safe way opened to him, is such contributory negligence, as a matter of law, as will bar his recovery in his action for damages against the railroad company for its alleged negligence in failing to provide a safe place for the use of its passengers.

APPEAL by plaintiff from *Lane, J.,* at August Term, 1913, of CASWELL.

This is a civil action for personal injury. From a judgment of nonsuit the plaintiff appealed.

*E. F. Upchurch, L. M. Carlton, R. N. Simms, and W. H. Lyon, Jr., for plaintiff.*

*Manly, Hendren & Womble for defendant.*

BROWN, J. The defendant offered no evidence. The plaintiff's evidence tends to prove that he was rightfully at defendant's station at Pel-

ham on the night of 14 June, 1912, with relatives, to see them safely on the defendant's train. The track at Pelham runs north and south. The station is a rectangular building running parallel with the (233) railway tracks, with a platform extending around the west, south, and east sides.

In the south end of the station are two waiting-rooms, with one door opening from each waiting-room onto the south platform. Two flights of steps lead down from the south platform, one at the west corner and one at the east corner. There is a railing extending along the edge of the south platform from one flight of steps to the other. The platforms on the west and on the east side of the station were used for loading and unloading freight, and had no railings.

On the night of the accident the plaintiff and relatives went to the station about 11:30 o'clock. Just before the accident, the plaintiff was sitting on a bench between the two waiting-room doors, on the south platform. The plaintiff had carried a lantern with him to the station, and had placed the lantern at a point on the platform between the west end of the bench on which he was sitting and the steps at the southwest corner. The plaintiff was sitting on the west end of the bench, near to the lantern. The plaintiff had been to the station often in the daytime, and was familiar with the construction of the depot and its surroundings.

According to his statement, he started to leave the platform to answer a call of nature, but instead of going down the steps at the southwest corner, which were nearest him, and across which his lantern was shining, or of taking the lantern with him, with full knowledge of the conditions, he went into the dark toward the steps at the southeast corner, went around on the platform east of the waiting-room, a distance variously estimated by plaintiff's witnesses from 1½ feet to several steps, and fell off the platform.

The platform at the west side next to the steps at the southwest corner is 4½ feet from the ground, and on the east side near the steps at the southeast corner 7 feet 3 inches from the ground.

The only exception to the evidence relates to the fact that the plaintiff was at the station for a rightful purpose, and the question which was excluded was for the purpose of showing that he carried Miss Whitlar to the station and paid her railroad fare. This is immaterial, in view of the fact that the defendant admits that the plaintiff was rightfully at the station.

We think his Honor properly sustained the motion to nonsuit. It is well settled in this State that where the plaintiff's own evidence discloses such contributory negligence as bars recovery, a motion for nonsuit should be sustained. *Royster v. R. R.*, 147 N. C., 347; *Fulghum v. R. R.*, 158 N. C., 555.

If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, with knowledge of the danger, constitutes contributory negligence. *Fulghum v. R. R.*, 158 N. C., (234) 555; 29 Cyc., 520; *Whales v. Gas Light Co.*, 45 N. E., 363; *Johnson v. Wilcox*, 19 Atl., 939. And where a person *sui juris* knows of a dangerous condition and voluntarily goes into the place of danger, he is guilty of contributory negligence, which will bar his recovery. *Royster v. R. R., supra; Fulghum v. R. R., supra; Saunders v. Smith Realty Co.*, 86 Atl., bot. p. 405; *Columbus Ry. v. Asbell*, 66 S. E., 902; *Southern Ry. v. Rowe*, 59 S. E., 462; *Woodman v. Pitman*, 10 Atl., 321.

The plaintiff was in a place of absolute safety. He was sitting on the west end of the bench near the steps at the southwest corner of the platform. His lantern was sitting between the end of the bench and these steps. He had been to the station many times in the daytime and had full knowledge of the conditions around the station. He knew that the platform on the east side was several feet above the ground.

To use his language, "I knew there was no rail around the east platform. I could see that there was no light at all on the east platform. It was dark as pitch out there."

With full knowledge of the dangerous conditions, and with his own lantern that had lighted his way to the station sitting by his side, he voluntarily went to the east platform in the darkness, where he knew the conditions were dangerous.

He had an absolutely safe way at hand. He could have either gone down the steps at the southwest corner, which were nearest him, and which were only 4½ feet high, and across which, according to his own statement, his lantern was shining, or he could have adopted the course that the most ordinary prudence would have dictated, and carried his lantern with him to light his way.

In most respects this case is very much like the *Fulghum case*, above cited, except that the evidence of contributory negligence here, according to the plaintiff's own statement, is clearer and stronger than in that case.

The motion for nonsuit was properly sustained.

Affirmed.

*Cited: Horne v. R. R.*, 170 N.C. 660 (2j); *Battle v. Cleave*, 179 N.C. 114 (2d); *Nowell v. Basnight*, 185 N.C. 148 (2c); *Boswell v. Hosiery Mills*, 191 N.C. 557 (3d); *Groome v. Statesville*, 207 N.C. 540 (3c); *Hayes v. Telegraph Co.*, 211 N.C. 194 (2d); *Barnes v. Wilson*, 217 N.C. 199 (3j); *Pafford v. Construction Co.*, 217 N.C. 736 (3c); *Wall v. Asheville*, 219 N.C. 170 (3c); *Godwin v. R. R.*, 220 N.C. 285 (2c); *Deaton v. Elon College*, 226 N.C. 440 (3c); *Drumwright v. Theatres*, 228 N.C. 332 (3j); *Grodon v. Sprott*, 231 N.C. 476 (3c).

H. F. HEDRICK v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 11 November, 1914.)

**1. Telegraphs—Negligence—Mental Anguish—Issues—Causal Connection—Trials—Instructions.**

Where damages are sought for mental anguish and the negligent delay of a message by a telegraph company, and the first issue relates solely to the question of defendant's negligence, and the second as to whether the damages were caused by the negligence of the defendant, and where the jury has affirmatively answered the second issue under proper instructions, it includes the question of proximate cause. Hence, an instruction on the first issue, that the jury could answer it without finding that the negligence of the defendant was the cause of the injury, is not erroneous. In this case, it appearing that the name of the sendee of the message was changed in transmission, without explanation, and otherwise it would have been promptly delivered, there was no real controversy presented as to proximate cause arising under the second issue, and the judge would have been justified in instructing the jury that the defendant was negligent upon the admitted facts, upon the first one.

**2. Telegraphs—Mental Anguish—Presumptions—Relationship—Uncle and Nephew.**

Where a telegram to an uncle announces the death and time of burial of his 4-year-old nephew, there is a presumption arising from the relationship that the sendee of the message will suffer mental anguish in consequence of not being able to attend the burial of the deceased, caused by the negligence of the telegraph company in failing in its duty to transmit and deliver the message with reasonable promptness. *Sherrill v. Telegraph Co.*, 155 N. C., 250, cited and approved.

APPEAL by defendant from *Devin, J.*, at March Term, 1914, of (235) FORSYTH.

This is an action to recover damages for mental anguish because of the failure of the defendant to correctly transmit and with reasonable promptness deliver a telegram addressed to the plaintiff, announcing the death and burial of his nephew.

The record shows that the nephew of the plaintiff, a child not quite 4 years of age, died at Lexington, N. C., about 5 o'clock p. m., on Saturday, 8 February, 1913. At 9:42 a. m. on the following Sunday, one W. H. Seachrist went, at the request of the plaintiff's brother-in-law, father of the child, to the defendant's office at Lexington, and asked the defendant's agent to send a message to the plaintiff, at Winston-Salem. This message was, at the request of the sender, written by the defendant's agent, as follows:

H. F. HEDRICK, 14 Liberty Street, Winston-Salem, N. C.

Our baby is dead; bury at 4 this evening.

(Signed) S. E. MILLER.

The agent thereupon informed the sender that the office at Lexington closed at 10 a. m., and that he would rush the message through as soon as he could. The message was relayed by Charlotte and was received at Winston-Salem at 9:47 a. m., addressed to S. F. Hedrick, 14 Liberty Street. As soon as the message was received, it was turned over to a messenger, who tried to deliver it to S. F. Hedrick. The plaintiff lived in Winston-Salem, on Fourteenth Street, 300 or 400 yards from Liberty, and there was no such number as 14 Liberty Street. His name and
(236) address appeared in the city directory as "H. Frank Hedrick, Fourteenth Street, corner of Howard." The messenger boy failed to find the plaintiff, and when he returned to the office with the message at 10 minutes past 12, the office had closed. The Sunday hours at the Winston-Salem office at the time this message was received were from 8 to 10 a. m. and 4 to 6 p. m. The message was delivered at 5:20 p. m., and the plaintiff testified that he could and would have gone to Lexington to attend the funeral if he had received the message in time.

There was no material exception to the charge upon the first issue, except upon the ground that the judge, in effect, told the jury they could answer the issue in the affirmative without finding that the negligence of the defendant was the cause of injury to the plaintiff.

His Honor charged the jury upon the second issue as follows: "You will allow nothing for punishment against the defendant; but the rule, gentlemen, is compensation for his suffering. Compensatory damages are the only damages you could allow. It would be your duty to find under this issue, if you want to answer it, what amount in dollars and cents you find to be a fair, just, and reasonable compensation to the plaintiff on account of anguish sustained by reason of the negligence of the defendant.

"The word 'anguish' indicates a high degree of mental suffering, without which the plaintiff should not recover substantial damages. Mere disappointment would not amount to mental anguish or entitle the plaintiff to more than nominal damages. In all cases damages for mental anguish are purely compensatory, and should never exceed a just and reasonable compensation for the injury suffered. If the defendant has been negligent, it is the duty of the jury to give to the plaintiff fair recompense for the anguish suffered from such negligence, but from that alone; and in determining the amount they should render to each party exact and equal justice, without a shadow of generosity, which is not a virtue in dealing with the property of others.

"You will distinguish between mental anguish caused by the negligence of the defendant and grief on account of the death of a near relative, and you would not allow anything on account of the natural grief which the person would have—plaintiff in this case had, if you find that

he did have—on account of the death of one who was closely related by blood to him, but only grief and anguish which he sustained by reason of the failure of the defendant to transmit correctly and properly deliver a message notifying him of the time of the interment of one whose relationship by blood was that as close as shown in this case; and in order for him to recover damages for mental suffering caused by the negligence of the defendant it is necessary to show that the defendant could reasonably have foreseen from the face of the message that such damages would result from a breach of its contract or duty to transmit (237) correctly, or that it had extraneous information which should have caused it to anticipate just such a consequence from a neglect of its duty towards the plaintiff.

"The message in this case, announcing the death and interment at a particular hour, was of a character sufficient to inform the defendant of its great importance, and that mental anguish would probably result from its negligence in failing to transmit it with reasonable promptness. A message relative to the death of a person is sufficient to put the defendant company on notice that a failure to deliver will result in mental suffering for which damages may be recovered.

"(Mental suffering is presumed if there be close blood relationship, and you may also consider the testimony of the plaintiff himself on that, as to his feelings, and evidence which you will recall as to the existence of mental anguish caused by the negligence of the defendant.)"

The defendant excepted to the part of the charge in parentheses.

The jury returned the following verdict:

1. Did the defendant negligently fail to transmit and deliver the message, as alleged in the complaint? Answer: "Yes."

2. What damage, if any, has the plaintiff sustained on account of mental anguish caused by the negligence of the defendant? Answer: "$250."

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

*Louis M. Swink for plaintiff.*

*George H. Fearons, Manly, Hendren & Womble, and Alfred S. Barnard for defendant.*

ALLEN, J. The issues submitted to the jury in *Hunter v. Tel. Co.*, 135 N. C., 461, were:

1. Was the defendant guilty of negligence, as alleged in the complaint?

2. What damage, if any, has the plaintiff sustained on account of mental anguish?

The first of these issues was approved by the Court, and the following issue was suggested in place of the second, because necessary to present

the "causal relation between the negligence of the defendant and the damages sustained therefrom by the plaintiff": "What damage, if any, has the plaintiff thereby sustained on account of mental anguish?" Or, "What damage, if any, has the plaintiff sustained on account of mental anguish caused by such negligence?"

In *Alexander v. Tel. Co.,* 141 N. C., 76, the first issue in the *Hunter case* and the second issue suggested by the Court were approved, and it was held that it was not error to refuse to submit a third issue involving proximate cause, as the defendant could have the benefit of its contention under the issue of damages.

(238) The issues in the case before us cannot be distinguished from those in the *Hunter* and *Alexander cases,* and these decisions settle authoritatively that when issues are so framed, the first issue presents no question except negligence, considered separate from the result, and that the language in the second issue, "caused by the negligence of the defendant," is sufficient to sustain a finding of proximate cause.

It follows, therefore, as the question of proximate cause was not in the first issue, but in the second, that the exceptions to the charge on the first issue, permitting the jury to answer it in the affirmative without finding proximate cause, cannot be sustained.

It also appears that his Honor would have been justified in charging the jury that the defendant was negligent upon the admitted facts, as it is not denied that the message when delivered to the defendant at Lexington was addressed to H. F. Hedrick, and when received at the office of the defendant at Winston-Salem it was addressed to S. F. Hedrick, and there is no attempt to explain or excuse the change.

Nor does there appear to be any real controversy as to proximate cause, as the messenger of the defendant, who first received the message for delivery, testified that he was not looking for H. F. Hedrick; that there was a city directory in the office, and if he had turned to it he would have found the correct street address of H. F. Hedrick, and the plaintiff's uncontradicted evidence that he would have attended the funeral if he had received the message.

The charge as to the presumption of mental anguish arising from close relationship is sustained by *Cashion v. Tel. Co.,* 123 N. C., 274, which holds that the presumption extends to near relatives of kindred blood, and this has been approved in *Harrison v. Tel. Co.,* 136 N. C., 382, and in other cases.

The fourth headnote to *Sherrill v. Tel. Co.,* 155 N. C., 250, says that this presumption does not exist when the relationship is that of aunt and niece, and of course the same rule would prevail as between uncle and nephew; but the headnote is not supported by the opinion. The point decided was that proof of the relationship creating the presumption did

not prevent the introduction of other evidence of affection existing between the parties.

No error.

(239)

J. R. MEDLIN v. COUNTY BOARD OF EDUCATION ET ALS.

(Filed 18 November, 1914.)

1. **Schools, Separate—White and Colored Races—Statutes—Parent—Party in Interest—Evidence—Negro Blood—General Reputation—Hearsay.**

Children having any admixture of colored blood are by statute (Revisal, sec. 4086) forbidden entrance into the public schools for white children; and where a witness has testified as to the general reputation of the grandmother of the child, whose parent is seeking to enter him in a school for white children, that she was of mixed blood, but on cross-examination that she had heard such reputation had sprung up through jealousy of two or three white men in the neighborhood in the last few years, the latter is admissible as to the general reputation. Where the parentage of an ancestor of the child is relevant, testimony of general reputation of such parentage should be elicited, and a question, "Who was said to be her mother?" is held incompetent, in this case, as hearsay.

2. **Schools, Separate—White and Colored Races—Negro Blood—Statutes—Parent and Child—Party in Interest—Declarations of Parent—Impeaching Evidence.**

Where the entrance of a child into a white public school is denied on the ground that it had an admixture of colored blood in its veins (Revisal, sec. 4086), and the father of the child brings suit against the county board of education to compel its admission to such school, the father is but a nominal party, the party in interest being the child, and testimony of other witnesses of his declarations to them that he had married a negress can only be received as hearsay evidence in impeachment of his contradictory testimony, given by him as a witness, and not as substantive evidence. In this case, if it were erroneous on the trial for the judge to confine the admissibility of the evidence of this character to the purposes of impeachment, the distinction is too slight to be the ground for a new trial. Supreme Court Rule 27, 164 N. C., 548. The tendency of the court and of the times not to afford the appellant a new trial unless prejudicial error has been committed by the trial court, discussed by CLARK, C. J.

WALKER, J., dissenting.

APPEAL by defendants from *Allen, J.*, at June Term, 1914, of WAKE.

*W. B. Snow and Armistead Jones & Son for plaintiff.*
*Percy J. Olive and H. E. Norris for defendants.*

CLARK, C. J. This is an action against the county board of education of Wake and the school committee of District No. 2 (white) of House's

Creek Township. The plaintiff alleges that his children belong to the white race and are entitled to attend said school, but have been wrongfully and unlawfully debarred by defendants from attending the same on the false allegation that they are of mixed blood, and asks a *mandamus* to compel the defendants to admit his children to the said school
(240) for whites. The defendants answer, admitting that plaintiff's children have been debarred, and aver that they are of mixed blood and therefore not entitled to attend.

It is admitted in the answer that the plaintiff, who is the father of the children, is of the white race. It is also admitted that Nan Powers was the mother of Mrs. J. R. Medlin and the grandmother of plaintiff's children. It was contended by plaintiff that John Powers and Lucy Powers, who are admitted to be of the white race, were the parents of Nan Powers, but this was denied by the defendants.

Revisal, 4086, forbids the admission of children to the white schools if there is any admixture of colored blood. *Johnson v. Board of Education,* 166 N. C., 468. The jury found that the children of the plaintiff were of unmixed white blood and entitled to attend the white school.

Exceptions 1 and 2 not being brought forward in defendants' brief, are abandoned. Rule 34.

Elma Maynard testified, on cross-examination in respect to Annie Powers, that the general reputation was that she was of mixed blood. The witness was then asked "If that general reputation has not sprung up through envy and jealousy of two or three men in that neighborhood in the last few years?" To which she replied: "I have heard so. I went to school with some of Mr. Medlin's children. It is generally reputed that two or three men started the rumor that Medlin's children were mixed blooded." This was a matter in the discretion of the court. It showed by the witness's testimony that there was no general reputation as to Nan Powers being of mixed blood; that what the witness meant was that there was a widely spread report which was not believed, because it was of general repute that it was a trumped-up charge.

Exceptions 4, 5, 7, 8, 18, 20, 23, and 26 seem to present substantially the same question, which is exemplified by the question, "Who was said to be her mother?" Here it is not the general reputation that is asked for, but merely hearsay. To make such questions competent, the witness should have been asked, first, if she knew the general reputation. This defect applies to all these questions. The defendant did not offer to show general reputation in the family.

Exceptions 9 and 10 are those most strenuously contested. Thad Ivey, who was a witness for the defendants, testified that plaintiff Medlin had said to him: "I married a nigger"; and Hardie Bagwell, also witness for

defendants, testified that Medlin said in his presence that he "knew his wife was one-fourth nigger."

J. R. Medlin denied having made such statements, and testified that his wife was the daughter of Annie Powers, who was white, and that he had never known that she was reported to be of mixed blood; that Annie Powers was the daughter of John Powers and Lucy Powers, who are admitted on this trial to be of the white race.

There was much conflicting evidence, but the jury found that the (241) evidence showed that the children were of purely white blood.

Exceptions 9 and 10 are because the judge stated that the evidence of Bagwell and Ivey as to Medlin's statement was "impeaching evidence. The parties involved here are the children. It is only what we call impeaching evidence. It only affects Mr. Medlin's testimony as a witness, but it is not what we call substantive evidence as to the real color of the children. He denies having said that, and it is only a question affecting his testimony, that does not go to the jury in respect to the color of the children." Had this evidence of contradictory statements been as to any other witness than Medlin, unquestionably such contradictory statements would have been impeaching and not substantive evidence. As the judge stated, it could not affect the color of the children. It was not evidence as to their color, but hearsay impeaching the truth of his statement on the trial. Evidence of contradictory statements are not substantive evidence, but merely impeaching testimony, unless it is an admission by a party in interest. The contradictory statement is hearsay, and therefore incompetent except to impeach the credibility of the testimony of the witness, except when the statement is a declaration against interest. Here, while Medlin was the nominal plaintiff, he was not possessed of such interest as would have made his admission against the interest of the children receivable as such. 1 Greenleaf Ev., sec. 176. If he had signed a statement that the children were not white, it would not have been competent in an action brought directly by them, unless he had gone on the stand and testified to the contrary, and then it would have been competent only to impeach his credibility. The judge ruled correctly. Besides, if it had been otherwise the jury could not have been prejudicially affected by the distinction, which they could not be expected to comprehend, between impeaching evidence by reason of a contradictory statement which lessens the weight of witness's testimony and calling such contradictory statement substantive evidence. The distinction between the two is not easily appreciated by a jury. Formerly new trials were given by reason of the distinction. But the Court, appreciating the fact that new trials should not be given on such slight distinction, in Rule 27, 164 N. C., 548, prescribed: "When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that

fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury especially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks at the time of admission that its purpose shall be restricted."

(242) The tendency of the courts and of the times is that new trials shall not be granted unless it can be seen that the error, if one is committed, materially contributed to the result of the trial. This is hardly possible, when the error alleged is that evidence was substantive and not impeaching only, when the contradictory statement is made by a nominal plaintiff who is suing in behalf of the beneficial plaintiffs, whose rights he could not prejudice by any admission out of court, though such statement by him might well be calculated, if believed by the jury, to disparage the weight of his testimony at the trial.

The other exceptions do not require discussion. They were evidently taken out of abundant caution in a hotly contested case. The question at issue is almost entirely one of fact. It is one in which a jury would be naturally deeply interested and in which the jurors have the great advantage over any other mode of trial in that, knowing the witnesses, they can weigh the credit to be given to their testimony.

The burden was upon the plaintiff to make out his case by the preponderance of the testimony, and when a jury of twelve white men have determined the issue, as they have done in this case, in a matter of this kind, there can be little doubt of the correctness of their conclusion.

No error.

WALKER, J., dissenting: It is always with regret that I have to differ with my brethren of the majority, and I never do so unless I am convinced otherwise by reasons which my own logic does not enable me to overcome, and never express that difference in the form of a separate opinion unless the case is of the greatest importance or the principles involved are of the gravest moment in the administration of justice. I so regard this case, and the doctrines of law which govern it. The Legislature had positively and unmistakably forbidden that a child having any negro blood in its veins should be admitted to a public school for white children, adequate and equal facilities being provided by law for the education of both races in separate schools (*Johnson v. Board of Education,* 166 N. C., 468), and this being so, and such having been ordained as the public policy of the State by the highest lawmaking body, for reasons which are obvious, it is our bounden duty to see that the law is not violated, either directly or indirectly. It follows that where the

right of any child to be admitted to a school for white children is brought into controversy, the right being disputed upon the ground that he has inherited negro blood in however small a degree or quantity, the question should be tried and decided strictly according to established rules of law. My fixed opinion that this case has not been so tried is my reason, and an all-sufficient one, for this dissent. Whatever may be said of the others, this exception of the defendant is certainly well taken. The action was brought by J. R. Medlin against the defendants. He is the (243) only plaintiff, and brings the suit in his own name, alleging his individual and personal interest therein as the natural guardian of his children. They are not parties. He is attempting solely to enforce his alleged paternal right to have his children admitted to the school. He is, therefore, not only a party in interest, but the only party in interest on the side of the plaintiff.

The defendants introduced as a witness Thad Ivey, who testified that plaintiff J. R. Medlin said to him, in a conversation had while he was riding with witness in his buggy, he being a mail carrier: "'Well, Ivey, what are we going to do about the school matter?' And I asked what was the matter with the school business, and he said: 'They won't let us send to school'; and he said to me, 'I married a negro,' and it so shocked me there was very little else said, if anything at all. I drove on and he went his way." The court ruled, without even any objection by plaintiff to the testimony, so far as the record shows, that it could be used only as evidence tending to impeach Mr. Medlin as a witness, and not as substantive proof of the children's color, and he would not allow it to be considered by the jury to prove that fact. The defendant offered the evidence generally, both as impeaching and as substantive evidence. His Honor fell into this error doubtless because, from his remark while ruling upon the question, he evidently thought the children were the plaintiffs, and their father was not the plaintiff; but he was mistaken in this assumption.

It is hardly necessary to cite authority for the position that a declaration against the interest of a party is always competent as both impeaching and substantive evidence, and is evidence of the strongest and weightiest kind. A man is not apt to swear to his own hurt. Plaintiff, at the time of his remark to the witness Ivey, had a controversy with the school board, it seems, and spoke advisedly and with knowledge that his statement might affect his interests. That such declarations are competent would seem to be beyond any doubt. *McDonald v. Carson,* 95 N. C., 377; *Locklayer v. Locklayer,* 139 Ala., 354, where the declarant had said he was of negro blood; and even in proceeding to caveat a will, where there are strictly no parties, such declarations by any of those who have been brought in have been held admissible by this Court. *Enloe v. Sherrill,*

28 N. C., 212, where, at p. 215, *Judge Nash* says: "And when the declarations of any party to the issue are admitted as evidence, it is because of the rule that the declarations of any one against his interest is legal testimony as against him. It has therefore been ruled in this State that in an issue of *devisavit vel non,* when the parties are regularly constituted, their declarations are evidence against them," citing *McCrainey v. Clark,* 6 N. C., 317. In *McDonald v. Carson, supra, Chief Justice Smith* dismisses a similar point with scant consideration, in view of the well
(244) settled rule of evidence. He says, briefly: "The last imputed oversight is in regard to a conversation had between the plaintiff and the defendant Wadsworth, of which it is enough to say that any and all declarations, pertinent to the subject-matter and bearing upon the issue, coming from the defendants, or any of them, are competent, at least against the persons making them, and may be against all, when their interests are joint and they are engaged in a common enterprise. This objection has not been pressed in the argument, and we dismiss it without further comment."

Nan Powers was the grandmother of the children, the mother of Medlin's wife. Elma Maynard had testified that the general reputation was that Nan Powers was of mixed blood, meaning that there was an admixture of negro blood, and on redirect examination was allowed to state, over defendant's objection, that she had heard that the reputation to which she had referred had "sprung up from envy and jealousy of two or three men in the neighborhood." This was clearly incompetent, as what she had last heard came from an entirely different source, and it was not the subject of proof by reputation. If she had said, that at the same times she heard of the reputation as to Nan Powers being of mixed blood, she also heard, as a qualifying part thereof, that it was based on envy and jealousy, the case would have been different; but she did not say so.

His Honor also disparaged the defendant's testimony, of course unconsciously, when he said that he thought "the law ought to be very carefully administered as to the mixed blood of a person born sixty-eight years ago," for that remark greatly impaired its force, and there was no real reason why the law should be more carefully administered in such a case than in any other. It was giving the court's view upon the weight of such testimony, and although not in so many words, the clear implication was that it was not entitled to much credit. The evidence in this case to show the presence of negro blood in the veins of these people was very strong, and almost convincing; but such an observation coming from the court might, and no doubt did, turn the scales against the defendants, and was within the prohibition of Revisal, sec. 535. *S. v. Dick,* 60 N. C., 440; *Withers v. Lane,* 144 N. C., 184; *Park v. Exum,* 156 N. C., 228; *S. v.*

*Cook*, 162 N. C., 588; *Ray v. Patterson*, 165 N. C., 512, and *Speed v. Perry, ante*, 122.

Reputation and tradition are the methods of proof by which pedigree and kindred matters are established. They are considered by the law as reliable and trustworthy, and therefore have long been admitted as evidence. This kind of testimony is not weakened, but rather strengthened by age and the long continuance of the reputation. Any tradition which can survive the lapse of sixty-eight years is not to be discredited on account of that fact, but our confidence in its truthful- (245) ness should be increased thereby, as it improves by age, and the long period of its existence and the continuity of the tradition but show its persistence. The length of time, therefore, was not the proper subject of unfavorable comment. No rule of law, that I am aware of, warranted the criticism.

The learned and impartial judge who presided at this trial was inadvertent to the effect of this remark at the time, as he would be the last one to sway a jury, in the least, by any personal expression of opinion upon the weight of the evidence. He is too just and exemplary for that, and that the comment was unguardedly made, I have not the least doubt. But we must look at its effect, and the motive is not to be considered. *Starr v. Oil Co.*, 165 N. C., 587; *S. v. Dick, supra; Withers v. Lane, supra.*

The exclusion of the evidence of Thomas Finch was error, as it was not necessary to prove, as a fact, that Nan Powers had any grandparents. In the course of nature, she must have been the grandchild of someone, and the court takes judicial notice of all such matters.

There are other assignments of error, but I need not consider them, as those I have mentioned are sufficient to overturn the verdict and judgment. Some of the defendant's most important evidence was either improperly excluded or the probative force to which it was naturally and legally entitled was greatly weakened; and, thus embarrassed, there was left to the defendant little chance to succeed. We are not inerrable, and these slips will sometimes accidentally occur, where we strive to do our best; but the harm is not neutralized by the noble purpose to do the right, however earnest it may be, and for this reason the law steps in and corrects the error, and it is but just that it should do so. It takes no chances on the probable harmlessness of the mistake, but acts upon the theory that such a handicap must needs be prejudicial.

The public schools of our State should be administered in strict accordance with the mandate of the law requiring separate schools for the two races. It is no injustice to either, but, in my judgment, a great help, and a necessary provision for both. If this verdict has gone wrong, the harm may be incalculable, and especially so if it has resulted from

an erroneous application of the law. It is better, even if it be a true deliverance, that it should come after a trial which is clear of any departure from long established principles. My conviction, after much reflection upon and study of the questions raised, has led me irresistibly to the conclusion which I have stated, and my desire to see this important law, so necessary to the peace and happiness of both races, correctly and strictly enforced, compels me to this dissent.

The record shows, as I have stated, that J. R. Medlin is suing in his own behalf and not as next friend or in behalf of his children. He (246) alleges, and it is the only theory upon which he bases his claim to relief, that his own personal right has been violated, and he is, in no sense, a nominal plaintiff, either in fact or in law. His children are not parties to this record, and if they were and could assert any individual right therein, they would have to appear by their next friend. I cannot agree to the doctrine that because a jury has decided a case one way, it must be the correct one. That depends very much upon whether the law has been properly administered, and the defendant is entitled under the Constitution, and as of right, to a legal trial, and a verdict in accordance therewith. Nor do I agree that the testimony as to the declaration of Medlin "that his wife was a negro" is not competent substantively on other grounds than that he is the real plaintiff in this suit. It would be dangerous practice to found our decisions upon the possible correctness of a verdict. We do not decide the facts, but what is the law of the case. We stated in *Starr v. Oil Co., supra,* that the Court should be careful to see that neither party is placed at any undue advantage before the jury by anything occurring during the trial, whether it proceeds from counsel, the court, or otherwise, and further said: "Courts should be very careful to safeguard the rights of litigants and to be as nearly sure as possible that each party shall stand before the jury on equal terms with his adversary, and not be hampered in the prosecution or defense of his cause by extraneous considerations, which militate against a fair hearing. . . . While frequently in the exercise of the authority conferred upon this Court we disregard technical errors, when we see that they do not affect the merits of the controversy, the error committed in this case is of too grave a nature to be put aside as merely technical," citing *Hensley v. Furniture Co.,* 164 N. C., 148, which is to the same general effect. I am of opinion that there should be a new trial.

HOKE, J., concurs in this dissenting opinion.

*Cited: Miller v. Melton,* 179 N.C. 469 (2c); *Smith v. Hosiery Mill,* 212 N.C. 662 (2p); *S. v. Miller,* 224 N.C. 230 (1c); *S. v. Isaac,* 225 N.C. 313 (2p).

PAUL PRUITT v. SOUTHERN RAILWAY COMPANY.

(Filed 11 November, 1914.)

**1. Trials—Verdicts—Motion to Set Aside—Courts — Discretion — Appeal and Error.**

Motions to set aside a verdict on the ground that it is against the weight of the evidence should be addressed to the conscience and sound discretion of the trial judge, and will not be considered on appeal, in the absence of the abuse of this discretionary power.

**2. Railroads—Inspection of Trains—Unusual Conditions—Projections from Trains—Injury to Pedestrians—Trials—Questions for Jury.**

A railroad company is fixed with knowledge of whatever a careful inspection of its trains will disclose, and the burden is upon it to show that a proper inspection had been made, which failed to discover an unusual condition causing an injury, the subject of an action; and the evidence in this case tending to show that while the plaintiff was standing alongside the defendant's track at a crossing, and where he had a right to be, waiting the passage of its train, some unusual projection 4 or 5 feet from the side of the train struck his knee and hurled him beneath the train, to his injury, the question of defendant's actionable negligence is one for the jury under a proper instruction from the court. The charge in this case is approved.

APPEAL by defendant from *Devin, J.*, at June Term, 1914, of (247) ROCKINGHAM.

This is a civil action to recover damages for a personal injury. The issues of negligence and damage only were submitted. From the verdict and judgment for plaintiff, defendant appealed.

*P. W. Glidewell and C. O. McMichael for plaintiff.*

*Manly, Hendren & Womble for defendant.*

BROWN, J. The testimony of the plaintiff tends to prove that on the night of 18 October, 1912, while standing at a public crossing in the town of Reidsville, some 3 or 4 feet from the track, waiting for a freight train to pass, he was struck about the knee by some projecting object that protruded from the side of the train, and was hurled from his feet; thrown under the train, and his arm was cut off by the wheels; that this object was at the end of a car and projected some 4 feet from side of the car.

The plaintiff further testifies that he heard this projection rattling, and that he stepped one foot out of the way, and before he could get the other out of the way, it caught him about the knee and pulled him under a car and his left arm was cut off at the shoulder.

It is argued that the projecting object was a loose end of the rubber piping of an automatic brake with an iron catch on the end.

There are two assignments of error, viz.:

1. The court charged the jury as follows: "If you shall find by the evidence and its greater weight that the railway company operated a freight train south through Reidsville with a rod or other unusual projection extending out from said car for a distance of 3 or 4 feet, near the ground; that the defendant knew or by reasonable diligence could have known of such projection, and if you further find from the evidence and its greater weight that such projection caught plaintiff and drew him under the train, that his injuries were sustained thereby, it would be your duty to answer the first issue 'Yes.'"

(248) 2. The court refused to give defendant's prayer for instruction as follows: "There is no sufficient evidence that the defendant either knew or should have known of the projection which the plaintiff says caught his leg, and you will answer the first issue 'No.'"

There was much evidence offered by the defendant tending to contradict the plaintiff, and the dispatcher's train sheets were offered to prove that no freight train passed the crossing as stated by plaintiff.

The discussion in the briefs as well as the argument seems to be based upon the idea that this Court will set aside a verdict if it is against the weight of the evidence. Our previous declarations should leave no doubt that we exercise no such power. It is a matter for the conscience and sound discretion of the Superior Court judge.

There is no suggestion here of an abuse of that discretion. That the evidence of the plaintiff, if taken to be true, makes out a case of negligence, the proximate cause of plaintiff's injury, is too plain for argument. The plaintiff was where he had a right to be, at a public crossing, waiting for the freight train to pass. He was standing at a safe distance to avoid injury. He was not required to be on the lookout for a projecting object, such as is described. This projection fastened itself into his knee and pulled him under the train.

The plaintiff was not required to prove that the defendant knew of such projection and failed to remove it. The defendant is fixed with a knowledge of whatever a careful inspection of its trains will disclose. The burden of proof is on the defendant to prove that it made proper inspection and failed to discover this unusual and extraordinary projection, whatever it may have been. Failure to make proper inspection is negligence. Wharton on Negligence, secs. 3, 29. "The duty of inspection is said to be affirmative, and must be continuously fulfilled and positively performed." *Brann v. Chicago, R. I. and Pac. Ry.*, 53 Iowa, 597; Bailey's Pers. Inj., sec. 2638; *Cotton v. R. R.*, 149 N. C., 231.

The assignments of error cannot be sustained.

No error.

ANNIE E. SMITH v. POSTAL TELEGRAPH-CABLE COMPANY.

(Filed 18 November, 1914.)

**1. Telegraphs—Mental Anguish—Funeral Postponed—Addressee's Duty—Negligence—Trials—Evidence.**

In an action to recover damages against a telegraph company for the negligent delay in delivering a telegram from A. S. Adams to Annie E. Smith, reading, "Baby died this evening. Come," delivered to the husband of the plaintiff, the addressee, the evidence tended to show that the husband wired back to the sender to ascertain the name of the deceased baby, and was informed in reply that it was the 1-year-old baby of the sender, the plaintiff's brother. The plaintiff acknowledged receiving the two messages, and there was evidence tending to show that other telegraphic correspondence had passed between the parties, wherein the sender stated that the funeral of the child would be postponed on plaintiff's request, of which the plaintiff denied knowledge; and with further evidence that the plaintiff had ample time after receiving the messages to have had the funeral postponed and attended the burial. *Held*, it was the duty of the plaintiff to have had the funeral postponed and attended it, had she received the message to that effect and could reasonably have done so, which presented an issue of fact for the jury under the conflicting evidence; and upon an affirmative finding thereon, the plaintiff's recovery of damages occasioned by not attending the funeral will be denied.

**2. Same—Measure of Damages—Nominal Damages—Trials—Instructions.**

Where damages for mental anguish are sought in an action against a telegraph company for negligent delay in the delivery of a death message, in an action brought by the addressee, and there is evidence tending to show negligence on the defendant's part in failing to deliver the message with reasonable promptness, and that the addressee could have had the funeral of the deceased postponed and attended it, it is *Held*, that the negligence of the defendant, if established, would be a tort arising from its failure to perform a public duty, and that nominal damages, at least, would be recoverable, and such additional damages as the plaintiff may have suffered up to the time she first had the opportunity to attend the funeral; and a charge is held erroneous that fails to instruct the jury upon the plaintiff's duty to have had the funeral postponed and attend it, under the circumstances of this case.

**3. Same—Proximate Cause—Special Instructions—Appeal and Error.**

Where in an action against a telegraph company to recover damages for its failure to promptly deliver a death message, there is evidence tending to show that at the time it was received for transmission the sender was asked for a better address, which he could not give, and a service message was delivered to him thereafter stating that the party addressed could not be found and asking for a better address, which the sender promised to obtain; and that he obtained and gave the correct address several hours thereafter, but too late for the addressee to come, and which was promptly forwarded by the defendant, resulting in the prompt delivery of the first message; and there is further evidence that the messenger boy of the defendant at the terminal point was negligent in not

promptly finding the addressee and delivering the first message, it is held to be erroneous for the trial judge to refuse to give a prayer for special instructions on this phase of the case, presenting the question of proximate cause, which was not cured by the general charge given in the case.

BROWN, J., concurs in result.

(249) APPEAL by defendant from *Lane, J.*, at June Term, 1914, of GUILFORD.

This action was brought to recover damages for an alleged delay in the delivery of a telegram filed with the defendant at 2:30 o'clock (250) p. m., on 23 June, 1913, addressed by A. S. Adams, at Angier, N. C., to Annie E. Smith, *feme* plaintiff, High Point, N. C., which read as follows: "Baby died this evening. Come." At the time of its delivery to the operator at Angier, he asked for a better address—the correct street and number—and was told that it was not remembered at the time, and to "Send it anyway," which he did. At 3:38 o'clock p. m., the operator at Angier was notified by a service message that the telegram to Mrs. Smith had not been delivered, "as unable to locate sendee," and was handed to A. S. Adams at 4 o'clock p. m., as stated by the operator, but, as stated by A. S. Adams, at 6 o'clock p. m. Adams was not positive about it, and testified according to his best recollection. Adams was then asked for the correct address—the street and number—but told the operator he did not know it, but would get it and give it to him, which, he testified, was done by him that night, but too late, as he admitted, to send the reply message that night, as it was after 9 o'clock or after office hours. The operator told him that he could not get it through that night, but would do so the next morning, and after the office opened the next morning, about 9 o'clock, he sent the message with the correct street address. After this and some time that morning, he notified Adams that the first message had been delivered. There was no delay in sending the message on the morning of 24 June, 1913. The message was: "Angier, N. C., 24 June, 1913. Better address mine 23d, Adams to Smith, is 403 Grimes Street." There was evidence that the first message reached Annie E. Smith between 10:25 and 11 o'clock on the 24th. The following messages passed between the parties afterwards:

1. High Point, N. C., 24 June, 1913, W. A. Smith to Arthur Adams, Angier, N. C., sent at 8:25 a. m.: "Give full name of person died by wire at once."

2. Angier, N. C., 24 June, 1913, A. S. Adams to W. A. Smith, sent at 9:50 a. m.: "My baby about a year old."

3. High Point, N. C., 24 June, 1913, Annie E. Smith to Wiley Young, care of Young Drug Store, Angier, N. C., sent at 10:25 a. m.: "Be there tomorrow morning. Hold Cyrus's remains out."

4. High Point, N. C., 24 June, 1913, sent at 10:27 a. m. to Angier, N. C., service message: "Yours signed Adams delivered this a. m., after holding it over."

5. Angier, N. C., 24 June, 1913, A. S. Adams to Annie E. Smith, 403 Grimes Street, High Point, N. C., sent at 10:54 a. m.: "My baby dead, not Cyrus. Wire at once if you want to come."

6. High Point, N. C., 24 June, 1913, Annie E. Smith to A. S. Adams, Angier, N. C., sent at 12:15 p. m.: "Sorry, but cannot come on account of delay of first telegram."

Mrs. Annie E. Smith, one of the plaintiffs, testified: "I have a (251) brother named Cyrus, 13 years old. He is my baby brother. When I got the first telegram I did not know what to think, because the name was not on it, only Adams. I didn't know which one of my brother's babies it was. My husband wired back before he ever delivered the telegram to me—before he came back to deliver the first telegram he wired back for the full name, and then I got that telegram after my husband wired back, 'Give full name of person dead by wire at once.'"

There was evidence of negligence in the delivery of the first telegram to Mrs. Smith, as her name was in the High Point directory and the messenger, while trying to deliver the message, was told where she lived, and there was evidence which tended to exculpate defendant. The evidence also tended to show that there were three trains, at that time, which left High Point, N. C., connecting at Durham, N. C., for Angier, N. C. The first left High Point at 6:27 a. m., and reached Durham at 9:25 a. m.; the second left at 9 a. m. and reached Durham at 3:25 p. m., and the third left High Point at 9:20 p. m. and Greensboro at 12:50 a. m. and arrived at Durham at 3:25 a. m. The through train from Asheville passed High Point at 3:40 in the afternoon and arrived at Durham at 6:25 p. m. Angier is 41 miles from Durham, and there were two trains from Durham; one left the latter place for Angier at 7:30 a. m., arriving at Angier at 9:30 a. m., and the other at 3:30 p. m., arriving at Angier at 5:38 p. m. All these were passenger trains, and the most direct route from High Point to Angier is by way of Durham.

There was evidence that the *feme* plaintiff had a brother named Cyrus, about 12 years old, and that the child who died was her nephew, and that the time for the funeral of the deceased child had been fixed at 4 p. m. of 24 June, 1913.

The defendant requested the court to charge, substantially, that if the jury found by the greater weight of the evidence that the delivery of the first message was delayed, and that defendant, after it found that it was unable to deliver the message to the sendee, asked for a better address, which plaintiff unduly delayed to give, and that the delay in delivering the message was caused proximately by the failure of plaintiff to give a

better address, they would answer the first issue "No." This the court declined to do.

The jury returned the following verdict:

1. Did the defendant carelessly and negligently fail to deliver the telegraphic message, as alleged in the complaint? Answer: Yes.

2. If the message had been delivered in a reasonable time, would the plaintiff have attended the funeral of her nephew, as alleged in the complaint? Answer: Yes.

(252) 3. What damage, if any, has the plaintiff sustained on account of mental anguish caused by the negligence of the defendant? Answer: $200.

Judgment thereon and appeal by defendant, after reserving all exceptions taken during the trial.

*J. A. Barringer for plaintiff.*

*Brooks, Sapp & Williams for defendant.*

WALKER, J., after stating the case: The telegraphic correspondence between the parties shows that the first message in the series, in the transmission and delivery of which negligence is charged against the defendant, was handed by the messenger to the husband of the plaintiff some time before 8:25 o'clock a. m. on 24 June, 1913, as the husband, W. A. Smith, wired back to A. S. Adams, at Angier, for the full name of the person who had died, which was received at Angier at 8:25 a. m. He would not have sent such a message had he not known that some one had died, and he could only have received this information from the telegram of Mr. Adams, announcing that "baby died this evening." Mrs. Adams testified that her husband received the first message and afterwards delivered it to her, but before doing so he had inquired for the full name of the child.

We do not understand why either the husband, W. A. Smith, or his wife, Annie E. Smith, who sues in this case, should have understood that the first message, from A. S. Adams to Mrs. Smith, referred to her young brother Cyrus, as he was 13 years old, and she knew that her brother, A. S. Adams, had an infant child. She further said: "When I got the first telegram, I did not know what to think, because the name was not on it, only Adams. I did not know which one of my brother's babies it was." And still further: "On 24 June, 1913, we got several telegrams from Mr. Adams. The baby that died was my nephew; a boy, and my brother's son, and was 1 year old. It was between 11 and 12 o'clock on 24 June, 1913, when I got this telegram. About 11 o'clock on 24 June I got another telegram. That was the second one I remember. I got the one announcing the baby's death just a few minutes before I got any

other. The other telegram stated the full name. I just do not remember what the other telegram said. My husband received it." She also stated that the reason that they wired for the full name was that the first message was signed merely "Adams," and "we sent back for the name on the other telegram." She did not remember whether she received a telegram reading, "My baby about a year old." She was much "torn up and broken down" by the fact that she could not be at the funeral, was the reason for her forgetfulness. She said: "I knew it was one of my brother's babies. When I got the first telegram I did not think it was my brother that was dead." She denied sending the telegram (253) in care of Young's Drug Store, stating that she would be there at 11 o'clock the next day, and "to hold remains of Cyrus out," and never heard of it before, and did not remember the telegram stating that she could not come. She did not "remember anything about any telegram except the first one, and never sent any telegram, but just found out it was her brother's baby." She afterwards said that she did not remember whether she authorized any one to send the message to Wiley Young. There was much other evidence of the same nature. It appears, though, that she was informed of the identity of the child as early at 12 o'clock on 24 June, 1914, and could have taken the Asheville train passing High Point at 3:40 p. m., arriving at Durham at 6:25 p. m., leaving there at 7:30 a. m. the next day and arriving at Angier at 9:30 the same morning. There was also a train leaving High Point at 9:20 p. m., arriving at Greensboro about 30 minutes later, connecting with the train which leaves Greensboro at 12:50 a. m., and which arrives at Durham at 3:25 the same morning. A train then leaves Durham for Angier at 7:30 a. m., arriving there at 9:30, as above stated. These were the train schedules when the telegrams were exchanged between the parties, and plaintiff admits that she could have taken the Asheville train at 3:40 p. m. on 24 June, or the midnight train and stayed in Durham that night, reaching Angier the next morning at 10 o'clock, as she said, or 9:30, as defendant's witness testified.

If plaintiff had admitted sending and receiving all the telegrams, or even that she authorized them to be sent, and that she received the answers, or if the jury had found that she did, we think she could not, in law, have recovered for any mental anguish caused by her inability to attend the funeral, because she had an opportunity to do so, as she had received the telegram from Mr. Adams, giving her full information and asking her to wire at once if she wished to come, and this was notice to her, especially when considered in connection with his telegram that he would postpone the funeral for her arrival the next day, as she could not have reached Angier on the 24th, and he must have known it. She should, therefore, have taken the train at 3:40 p. m., or at midnight, for Angier.

But she denies sending any of these, and admits that she received only the first two of the series, and then too late to attend the funeral, which was to take place the afternoon of the same day at 4 p. m. She testified, as stated, that she "did not remember anything about any telegram except the first one." We would, therefore, have to resort to defendant's testimony for any proof in regard to these matters, and we are forbidden to use it, unless to the extent that it tends to support the plaintiff's case.

(254) But even if plaintiff sent and received all the telegrams, the defendant would be liable to her, in tort, for some damages on account of the negligent delay in delivering the first message on 23 June, as there is evidence that the messenger, Joe Ridge, went to the house of William Smith, brother-in-law of plaintiff, as early as 4 p. m. on 23 June, and there received from him information as to the correct street address of the plaintiff, but for some reason failed to deliver it until the next morning. It is true that there is evidence tending to show that no such information was given, but this conflict in the testimony was for the jury to settle. If they find that there was negligence, she is entitled, at least, to nominal damages for the breach of duty (*Hocutt v. Telegraph Co.*, 147 N. C., 186), and to such additional damages as she may have suffered up to the time she first had the opportunity to attend the funeral, and time to avail herself of it. If she had it at 12 o'clock on 24 June, she could not increase the damages by her negligent failure to go when she could do so. *Edwards v. Telegraph Co.*, 147 N. C., 127. We said in *Hocutt v. Telegraph Co., supra,* referring to 2 Joyce on Electric Laws, secs. 941, 942, and 943: " 'Nominal damages are a small or trivial sum awarded for a technical injury due to a violation or invasion of some legal right and as a consequence of which some damages must be awarded to determine the right. Thus, though no actual damage may result from a breach of the contract by a telegraph company in negligently failing to promptly deliver a message, yet nominal damages may be awarded. And as a general rule in such cases only nominal damages can be recovered, unless some substantial damage be shown, and the negligence of the company is the proximate cause of the damages suffered. Actual damages are those which are given as a compensation to a person injured by the wrongful act of another, commensurate with the actual loss or injury sustained.' Joyce Electric Law, secs. 941, 942, 943. When the plaintiff discovered that the agent had made a mistake, and that by his negligence she was about to suffer damage, the law imposed the duty upon her to use such care and diligence as a person of ordinary prudence under the circumstances would have used to prevent the threatened damage or to minimize it. The rule has been thus stated and applied to cases of delayed telegrams: The duty rests upon all persons, for whose losses others may be

liable to respond, to take all reasonable measures to diminish the damages that may occur. This principle applies to all who may claim indemnity from others for losses, either upon express contracts or for torts. So, in cases where a person has been injured by the failure to deliver a telegraphic message or by an error in transmission thereof, and he stands in a position to suffer further loss, in addition to that already incurred, he should exercise reasonable efforts to make the loss as light as possible, and there can be no recovery of damages for any loss which (255) might have been averted by the exercise of such effort," citing also, for the last proposition, 2 Joyce on Elec. Law, sec. 972, who adds that if the injured party has exercised reasonable care to prevent the damage which would otherwise result, the mere fact that his efforts might have been more judicious will not enable the company to escape the consequences of its negligence. Another author says: "Compensation for a wrong is limited to such consequences as the injured party could not have avoided by reasonable diligence. All other consequences are regarded as remote. The rule is the same in cases of contract and cases of tort. . . . He who has it in his power to prevent an injury to his neighbor and does not exercise it, is often, in a moral if not a legal point of view, accountable for it. The law will not permit him to throw a loss resulting from a damage to himself upon another, arising from causes for which the latter may be responsible, and which the party sustaining the damage might by common prudence have prevented. The party who is not chargeable with a violation of his contract should do the best he can in such cases, and for any unavoidable loss occasioned by the failure of the other he is justly entitled to a liberal and complete indemnity." Hale on Damages, p. 64. And Sutherland on Damages, sec. 88, says: "The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or willfulness he allows the damages to be unnecessarily enhanced, the increased loss—that which was avoidable by the performance of his duty—falls upon him. This is a practical obligation under a great variety of circumstances, and as the damages which are suffered by a failure to perform it are not recoverable, it is of much importance." If the plaintiff had the opportunity to leave on the afternoon or midnight train, after Mr. Adams had offered to postpone the funeral, it was her duty to do so and lessen the damages.

We find, though, by an examination of the record, that these views were not explained to the jury at all, and the right to recover full damages was made to turn altogether upon the negligence in regard to the delivery of the first telegram only, whereas the charge should have covered both aspects of the case. The damages awarded embraced those flowing from the mental anguish caused by her not attending the funeral,

when the jury may have found, had they been properly instructed, that she could have attended the funeral after she received the last message, if she had desired to do so, and therefore suffered no mental anguish on that account. The court made the barest and briefest reference to this feature of the case, and then only in stating the contention of the defendant, and even then confined the case entirely to the conduct of the defendant (256) in respect to the first telegram. There was positive error in allowing the jury to assess damages based upon the negligent delay in delivering the first telegram, and for mental anguish caused by her inability to attend the funeral, without reference to the opportunity she had of doing so after she received the telegram offering to postpone the funeral for her arrival, if the jury found that such was the case. It laid down too broad a rule.

We think, also, that the court should have given the instruction as to proximate cause requested by the defendant, or one substantially similar. *Hargrave v. Telegraph Co.*, 60 S. W., 689, which is much like this case. The instruction requested by defendant was substantially correct, and should have been so given, as decided in *Baker v. R. R.*, 144 N. C., at p. 42, where a similar prayer was submitted and where we said: "The general charge of the court in respect to the degree of care required of the defendant's servant in approaching the crossing with the train would perhaps have been fully sufficient in the absence of any request for more specific instructions. *Boon v. Murphy*, 108 N. C., 187; *S. v. Jackson*, 13 N. C., 563; *Patterson v. Mills*, 121 N. C., 258; *Cowles v. Lovin*, 135 N. C., 488; *Yow v. Hamilton*, 136 N. C., 357. It is also true that the court is not obliged to adopt the very words of an instruction asked to be given, provided in responding to the prayer it does not change the sense or so qualify the instruction as to weaken its force. *Brink v. Black*, 77 N. C., 59; *Chaffin v. Mfg. Co.*, 135 N. C., 95. These are rules which are observed in all appellate courts. But it is an equally well established rule that if a request is made for a specific instruction, which is correct in itself and supported by evidence, the court, while not required to adopt the precise language of the prayer, must give the instruction, at least in substance, and a mere general and abstract charge as to the law of the case will not be considered a sufficient compliance with this rule of law," citing *Knight v. R. R.*, 110 N. C., 58; *Chesson v. Lumber Co.*, 118 N. C., 59; *S. v. Dunlop*, 65 N. C., 288; *Young v. Construction Co.*, 109 N. C., 618.

The defendant would not be liable in damages if its negligence did not proximately cause the injury, and it is practically the same to say that liability would not arise if the delay in delivering the telegram was not caused proximately by its negligence, for the delay was the injury or breach of duty, which it is alleged caused the damages.

The learned judge defined proximate cause and made some general reference to it, but no real application of it, and we do not think the charge shows any sufficient or substantial response to the specific prayer of the defendant, which was expressly refused, as requested by it, and at the time it was submitted.

Mental anguish which is caused by the failure to deliver, or (257) delay in delivering a telegram is a legitimate ground upon which to base a recovery of damages, as we have so often held, beginning with *Young v. Telegraph Co.*, 107 N. C., 370 (decided by a unanimous Court composed of *Chief Justice Merrimon* and *Justices Davis, Shepherd, Avery,* and *Clark*), down to *Betts v. Telegraph Co., ante, 75.* We believe there has been no formal dissent from the doctrine first declared by this Court in 1890 to the present time, a period of nearly a quarter of a century. But while the principle has been firmly established by this Court, and, we may add, by many others, and, where not so established by judicial decision, has been made the law by legislative enactment, the courts should be careful to see that it is justly administered and is not made the pretense for the redress of fictitious or fanciful wrongs, as mental anguish may be so easily simulated and its existence is so difficult for the defendant to disprove. The defendants are entitled, therefore, to be protected against false claims and excessive damages by a firm and intelligent exercise of the supervisory power of the trial judge. As was said by the Court in *McAllen v. Telegraph Co.*, 70 Texas, at p. 246: "In this case it seems that the plaintiff's mental anguish was not the result of any real or adequate cause. It does not appear that the father was dead, or in such condition as demanded the personal presence or attention of the son. On the contrary, the sorrows of the plaintiff were imaginary, and were caused by the failure on the part of the father to send the carriage to Pena, which the affectionate son attributed to the fact that the father was dead or too dangerously ill to attend to ordinary business, when in truth the failure was due solely to the fact that no request to send forward the carriage had been received. The deduction of the son was not logical, or, at all events, the occurrence might have been well accounted for on some other hypothesis than the disability of the father. If grief or sorrow produced by things unreal, mere figments of the brain, are held to give a cause of action for a breach of contract or tort, an individual of a somber or glowing imagination would often be entitled to large damages on account of mental suffering, while others of a buoyant fancy for the same breach of duty would not be entitled to anything; and damages, instead of being measured by the rules of law as applied to the real facts, would largely depend upon the fertility of the imagination of the suitor." We are not suggesting that there is anything of the sort in this case, but merely sounding a warning, as a precautionary measure

against any abuse of a just principle. The plaintiff may have a good cause, and is free to establish it before the jury. The doctrine of mental anguish is perfectly safe and sound, and can be successfully defended against attack by the simple application of common-law princi-
(258) ples; but our own long line of decisions, and the steadily growing opinion of the other courts in favor of it, is sufficient evidence of its wisdom and permanence, and there is no danger of its working any wrong or injustice if verdicts are supervised as in other cases, when compensatory damages for mental anguish, and also those which are purely exemplary, are allowed by the law.

We conclude, for the reasons given, that the case should be tried again.

New trial.

BROWN, J., concurs in result.

*Cited: Wilson v. Scarboro,* 169 N.C. 657 (2c); *Weeks v. Telegraph Co.,* 169 N.C. 705 (2c); *Hulin v. Telegraph Co.,* 182 N.C. 543 (2d); *Waters v. Telegraph Co.,* 194 N.C. 193 (2c).

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G. W. MONTCASTLE ET AL. V. R. A. WHEELER.

(Filed 18 November, 1914.)

1. **Reference—Evidence—Approval of Trial Judge—Appeal and Error.**

Exceptions to a report of a referee, supported by competent evidence and approved by the trial judge, are not reviewable on appeal.

2. **Corporations—Distribution of Assets—Act of Treasurer—Award and Satisfaction—Estoppel—Credits.**

In an action by a corporation and some of its stockholders for dissolution, and against its treasurer for an accounting and distribution of its assets among the stockholders, it is held that the treasurer cannot successfully plead accord and satisfaction by showing that he, of his own authority, had sent statements and checks to the stockholders for their distributive shares in the assets, which had been cashed by them, for the treasurer's accounting should have been made to the corporation, which cannot be estopped by his action; when the corporation is not indebted, and not otherwise, he is entitled to a credit in the settlement for the sum he has thus distributed.

APPEAL by defendant from *Lane, J.,* at February Term, 1914, of DAVIDSON.

*S. E. Williams and Emery E. Raper for plaintiffs.*

*Jerome & Price and T. J. Gold for defendant.*

CLARK, C. J. This is an action by some of the stockholders, and the corporation, against the defendant as treasurer of the corporation, for an accounting and recovery of the assets of the company and a distribution of the same among the stockholders and the dissolution of the company.

The company had a paid-up capital of $1,850 and sold an option on some real estate in Moore County for $4,000, making $5,850 which went into the hands of the treasurer, as he admitted. He claimed (259) to have paid out, or accounted for, all he received, and that he had paid the stockholders $1,866.95, and claims to be entitled, after paying expenses, to retain a salary of $2,400 to balance the assets. The matter was referred and the report of the referee was confirmed by the court.

The referee finds as a fact (No. 6), to which no exception is made: "R. A. Wheeler was employed at first meeting of the directors as general manager and was to be paid for his services $150 per month and railroad fare for the time actually engaged in the work of the company, and in carrying out said contract went to Moore County and had land surveyed, cleaned up, and laid off into streets and lots, which work was completed about 16 April, 1908; and he made a trip to Boston for the company during the year, and at its end rendered a statement to the company in which he charged as paid to himself, salary account $417.34, leaving in his hands a cash surplus, and said nothing in his statement about any further claim for salary." The defendant excepted, however, to the further finding, that "$417.34 was the salary due R. A. Wheeler for the time actually employed during the first year, and that he was not entitled to any further salary for said year."

As there is no exception to the finding above, that he was to be paid $150 per month and railroad fare "for the time actually engaged in the work of the company," and the work was completed in Moore County about 16 April, 1908, his work was less than two months. He was allowed for the trip to Boston $96.50, to which there was no exception. There was evidence to support the finding of the referee, and his findings being approved by the court, we cannot review them. *Usry v. Suit,* 91 N. C., 406; *Wadesboro v. Atkinson,* 107 N. C., 317; *Harris v. Smith,* 144 N. C., 439.

The other four exceptions are all to findings of fact by the referee, approved by the judge, and there was evidence tending to support the findings, and we cannot review them.

This action is by the corporation and part of the stockholders to compel an accounting by the treasurer and the winding up of its affairs. The treasurer, after paying expenses, undertook to settle the business without a meeting of the directors, and without consultation sent each stockholder $300. They demanded a statement, and he inclosed checks

to each stockholder for $73.39 more. The defendant claims that this was an accord and satisfaction, because the stockholders cashed above checks, though they protested that they would not accept the statement, but that they objected to it and would not agree to it.

The corporation is a plaintiff here in winding up its affairs, and upon this accounting with the treasurer the corporation is entitled to have the true amount due it by its treasurer determined. It recovered (260) $1,632.89 as the balance which it was found that the treasurer owed the company. Out of this it should pay each of its stockholders their *pro rata,* on dissolution, and it was so adjudged. The treasurer was not authorized to settle with the stockholders individually, but his account should have been rendered to the corporation and approved by it. His unauthorized sending of these checks to the stockholders and their cashing the same does not estop the corporation. The treasurer is only entitled to a credit on settlement with the said company to the amount distributed by him to the stockholders, and would not be entitled to that if the company had been indebted.

Affirmed.

*Cited: Mfg. Co. v. Lumber Co.,* 177 N.C. 407 (1c).

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STANDARD TRUST COMPANY ET AL. v. COMMERCIAL NATIONAL BANK.

(Filed 18 November, 1914.)

**Bills and Notes—Holder—Due Course—Presumptions—Trials—Erroneous Instructions—Appeal and Error.**

The possession of a negotiable instrument by the indorsee, or by a transferee where indorsement is not necessary, imports *prima facie* that he is the lawful owner of the paper, and that he acquired it before maturity, for value, in the usual course of business, without notice of any circumstance impeaching its validity; and where fraud is not alleged or suggested, it is error for the trial judge to instruct the jury that such holder is *prima facie* one in due course, and then add, "that is, if he takes it in good faith, for value, without notice of infirmity, and is the owner thereof and entitled to sue thereon."

APPEAL by plaintiff from *Devin, J.,* at August Term, 1914, of GUILFORD.

Civil action tried upon this issue:

1. Is the plaintiff the owner and purchaser for value of the check sued on? Answer: No.

Eight issues in all were submitted to the jury, but under instructions of the court the jury answered only the first. The court rendered judgment dismissing the action, and the plaintiff appealed.

*Thomas S. Beall, Manly, Hendren & Womble for plaintiff.*
*Brooks, Sapp & Williams for defendant.*

BROWN, J. This case was before this Court at the last term, and is reported in 166 N. C., p. 113. The facts are fully set out in that report, and are referred to in explanation of this opinion.

The action is brought to recover on a check for $5,000, 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. The check was received (261) by the payee, indorsed by them to the plaintiff, the Standard Trust Company, who forwarded it through the Girard Trust Company for collection and credit of the plaintiff.

In this trial his Honor instructed the jury as follows: "Is the plaintiff the owner and purchaser, for value, of the check sued on? ( The holder of a check—that is, the payee or indorsee who is in possession, or the bearer thereof—is *prima facie* deemed to be the holder in due course; that is, if he takes it in good faith, for value, without notice of infirmity, and is the owner thereof and entitled to sue thereon.")

It is contended that his Honor erred in adding these words, towit: "that is, if he takes it in good faith, for value, without notice of infirmity, and is the owner thereof and entitled to sue thereon." This assignment of error, in our opinion, is well taken.

Our negotiable instruments law is simply the codification of the common law, and under both the statute and the common law the possession of a negotiable instrument by the indorsee, or by a transferee where indorsement is not necessary, imports *prima facie* that he is the lawful owner and that he acquired it before maturity, for value, in the usual course of business and without notice of any circumstances impeaching its validity.

Nothing else appearing, this entitles the holder of a negotiable instrument to maintain an action upon it. By presenting the paper, in case duly indorsed, the plaintiff made out a *prima facie* case; that is, a case sufficient to justify a verdict for him on the first issue. Third Ruling Case Law, p. 1037, and cases cited in the notes.

In *Triplett v. Foster,* 115 N. C., 335, it is held that when, in an action to foreclose a mortgage given to secure notes, assigned to plaintiff, the answer did not state facts sufficient to amount to a plea of illegality or fraud in the inception or transfer of the note, and there was no evidence tending to support such a defense, the production of the notes by the

plaintiff was *prima facie* evidence of ownership, and it devolved on the defendant to rebut the presumption.

The principle is well settled that when the maker of a note alleges fraud on the part of the payee in obtaining its execution and offers proof tending to support that fact, the *prima facie* case of an indorsee before maturity, that he took without notice, is so far rebutted as to shift the burden on him to show that he purchased for value and in good faith. *Bank v. Burgwyn,* 110 N. C., 267; *Evans v. Freeman,* 142 N. C., 62.

This *prima facie* case, upon which the holder can rely, continues good until, under proper allegations in the pleadings, there is evidence offered tending to show that the instrument was procured by fraud or is
(262) tainted by some other infirmity. When that evidence is offered, the burden of proof shifts, and it then becomes the duty of the holder to show that he acquired the instrument in the usual course of business before maturity and without notice of any vice in it. *Bank v. Fountain,* 148 N. C., 590.

By adding the words to his instruction which are excepted to, his Honor deprived the plaintiff entirely of the benefit of the presumption which the law accords to a holder of a negotiable instrument, duly indorsed.

There are other assignments of error relating to the evidence and the charge of the court which it is unnecessary to notice, as the case is to be retried *de novo.*

New trial.

*Cited: Moon v. Simpson,* 170 N.C. 336 (c); *Bank v. Wester,* 188 N.C. 375 (c); *Bank v. Rochamora,* 193 N.C. 5 (c); *Clark v. Laurel Park Estates,* 196 N.C. 637 (c); *Pickett v. Fulford,* 211 N.C. 165 (c); *Lister v. Lister,* 222 N.C. 560 (p).

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## LEONARD S. MORGAN v. ROYAL BENEFIT SOCIETY AND ROYAL FRATERNAL ASSOCIATION.

(Filed 18 November, 1914.)

**1. Corporations—Officers—Principal and Agent—Insurance—Reinsurance—Declarations—Evidence.**

The rule as to the competency of declarations of an agent to bind his principal applies to corporations and their officers or agents, and the declarations, to be competent, must be with regard to matters within the scope of the agent's authority to act and made during the course of his duties as such agent; and in this action against two insurance companies on a policy issued by one of them, which, being a foreign corporation, has

withdrawn from soliciting new business here, on the ground that the other defendant was organized here for the purpose of assuming, and did assume the policies of the former, a letter written by a local agent of the domestic corporation, who had been the agent of the foreign corporation, and after the policy sued on had matured, stating that the general manager said he would endeavor to secure payment from the home office of the foreign corporation, and if not, it would be paid by the domestic corporation, is incompetent as evidence of the alleged arrangement, not only as concerning matters beyond the scope of his authority to bind his company, but as hearsay and *res inter alios acta.*

**2. Appeal and Error—Nonsuit—Incompetent Evidence.**

Where the only evidence to sustain the cause of action alleged by the plaintiff is incompetent, but erroneously admitted, and an appeal has been taken by the defendant for the refusal of judgment of nonsuit thereon, the Supreme Court will not overrule the trial court and grant the nonsuit, for the plaintiff would then have been deprived of the opportunity of substituting other and competent evidence which might have been available; and therefore a new trial will be ordered.

**3. Justice of the Peace—Judgment Against One Defendant—Appeal—Parties—Appeal and Error.**

Where in an action cognizable in the court of a justice of the peace two insurance companies are sued for the payment of a matured policy, alleging joint responsibility thereon, and judgment is rendered against both of them, with appeal to the Superior Court by only one, it is error for the trial judge, on motion of the plaintiff, to order that the other defendant be made a party in the court, as its presence is unnecessary.

APPEAL by defendant fraternal association from *Devin, J., at* (263) February Term, 1914, of FORSYTH.

This action was brought to charge the defendant Royal Fraternal Association with the payment of a policy of insurance issued by its codefendant, Royal Benefit Society, on the life of Sarah C. Morgan for the benefit, at her death, of her son, Leonard Morgan. The Royal Benefit Society is a corporation of the District of Columbia, and in 1910 was doing an insurance business in North Carolina, issuing policies to its members. The Royal Benefit Society issued a policy of insurance, No. 58343, on the life of Sarah C. Morgan, payable at her death to her son, Leonard Morgan. The license of the Royal Benefit Society was revoked by the Insurance Commissioner of North Carolina on 14 May, 1910, which prevented said company from writing any new insurance after that date. Lucy F. Ragsdale was the local agent of the Royal Benefit Society in the city of Winston-Salem, N. C. On 2 June, 1910, the Royal Fraternal Association was organized and chartered as an insurance company by the Secretary of State for North Carolina, with its principal place of business at Charlotte, N. C. It began business 1 August, 1910, issuing its first policy of insurance on said date. The Royal Fraternal Association was an insurance company conducted under the lodge plan. Its members were re-

quired to make application to said company for insurance, submit to a medical examination, and if said examination was satisfactory, the said company then issued a policy of insurance, which was different from that issued by the Royal Benefit Society to the applicant. Lucy F. Ragsdale was licensed as the local agent of the Royal Fraternal Association to solicit business for said company in the city of Winston on 16 June, 1910. She sent all moneys collected for the Royal Benefit Society direct to Washington, D. C., and none of it went to the Royal Fraternal Association in Charlotte, N. C., as defendant contends; but plaintiff says that $1.25 found its way into the coffers of the association at Charlotte, N. C., of which C. B. Bailey was the general manager. The Fraternal Association was organized in June, 1910, and issued its first policy 1 August, 1910. Sarah C. Morgan was sick in April, 1910, and continued sick until her death, 2 July, 1910, which occurred one month before the Royal Fraternal Association began business. The plaintiff brought suit before a justice of the peace against both defendants on the policy issued
(264) by the Royal Benefit Society. It is not contended by the plaintiff that the Royal Fraternal Association ever issued any policy to Sarah C. Morgan, or that she ever made application for an insurance policy to said company.

*Judgment was rendered by the justice of the peace in favor of the* plaintiff against the Royal Benefit Society, and dismissed as to the Royal Fraternal Association. The plaintiff appealed from the judgment of the justice of the peace as to the Royal Fraternal Association. There was no appeal as to the Royal Benefit Society.

In the Superior Court an order was made permitting a summons to issue to the Royal Benefit Society to make it a party defendant to said action. The defendant Royal Fraternal Association objected to this order, for the reason that the suit was on contract and the amount less than $200, and that the Superior Court had no jurisdiction, and excepted when the objection was overruled. Verdict and judgment for plaintiff, and defendant appealed.

*Alexander, Parrish & Korner for plaintiff.*
*Hastings & Whicker and E. R. Preston for defendant.*

WALKER, J., after stating the case: The ground of this action is that the license of the Royal Benefit Society to do business in this State, it being a foreign corporation with place of business in Washington, D. C., had been revoked by the Insurance Commissioner of this State, and thereafter the other company or association had been chartered and organized for the purpose of taking over and carrying the outstanding policies of the banished society. The plaintiff offered testimony which, if competent,

had some tendency, perhaps, to show the above relation between the two associations, and, as a part of such testimony, he introduced the following letter from Lucy F. Ragsdale, who had been a local agent at Winston-Salem, N. C., of the Royal Benefit Society, to Leonard Morgan, the beneficiary of the policy issued by it to his mother:

WINSTON-SALEM, N. C., 26 September, 1910.

MR. MORGAN.

DEAR SIR:—Yours of today received. In regard to the death of your mother, will say that I have just returned from home office and investigated the matter, and I find that your mother was perfectly square on books and did not owe one penny. Nolas told me that you said the company wrote you that she had not paid; but that is a mistake. The general manager told me to say to you that you should get every penny of that money if he could possibly make the home office in Washington pay it, and if they did not pay it he would pay it out of that office; said rest assured that you would get it. I have been working very hard for that claim, and I am going to see that you get it.

Hope you and Susie are well.

Respectfully, MRS. L. F. RAGSDALE.

That letter was dated after the death of Sarah C. Morgan, which (265) occurred on 2 July, 1910, more than two months before. Defendant objected to the admission of this letter as evidence, and duly excepted when its objection was overruled and the letter was admitted by the court and read in evidence.

The court erred in admitting the letter of Lucy F. Ragsdale. It was incompetent on several grounds: (1) As the declaration of an agent offered to bind her principal, when she had no authority, by virtue of her position as local agent or otherwise, to make it in behalf of her principal. (2) It was rank hearsay, or the unsworn statement of a third person as to a material fact in the case, that is, as to what she had heard another person say. (3) It was *res inter alios acta;* and (4) It was the declaration of an agent after the fact, towit, the death of the policy-holder, which is not admissible against the principal, and is, therefore, forbidden by the rule of evidence upon which the following cases were decided: *Southerland v. R. R.,* 106 N. C., 100; *Rumbough v. Improvement Co.,* 112 N. C., 751; *Edgerton v. R. R.,* 115 N. C., 645; *Williams v. Telephone Co.,* 116 N. C., 558; *Darlington v. Telegraph Co.,* 127 N. C., 448; *Summerrow v. Baruch,* 128 N. C., 202; *Lyman v. R. R.,* 132 N. C., 721, and *Younce v. Lumber Co.,* 155 N. C., 239. In the *Rumbough case* the Court thus stated the rule: "Officers of corporations, from the highest to the lowest, are only the agents of such corporations. What acts they perform and what contracts they make for their principals are bind-

ing if within the scope of their particular authority, express or implied. But the scope of the authority of one officer or agent, as to a past transaction at least, cannot be proved by the unsworn declaration of another officer or agent. The objection to the admissibility of such testimony is obvious." And it was said in the oft-cited case of *Smith v. R. R.*, 68 N. C., 107: "The power to make declarations or admissions in behalf of a company as to events or defaults that have occurred and are past cannot be inferred as incidental to the duties of a general agent to superintend the current dealings and business of the company. No such power is expressly given by the by-laws of defendant company, and a general power so unusual and so unnecessary in the ordinary business of a company must require a clear and distinct grant." This Court said in *Styles v. Mfg. Co.*, 164 N. C., 376, by a *per curiam* opinion, which indicates that the principle was too well settled and familiar to be misunderstood or misapplied: "The rule as to the admissibility of such evidence is stated in *Gazzam v. Ins. Co.*, 155 N. C., 340, to be that 'The competency of the declarations of an agent of a corporation rests upon the same principle as the declarations of an agent of an individual. If they are narrative of a past occurrence, as in *Smith v. R. R., supra,* and *Rumbough v. Improvement Co., supra,* they are incompetent; but if
(266) made within the scope of the agency and while engaged in the very business about which the declaration is made, they are competent. *McComb v. R. R.*, 70 N. C., 180; *Southerland v. R. R.*, 106 N. C., 105; *Darlington v. Telegraph Co., supra.*'" In *Barnes v. R. R.*, 161 N. C., at p. 582, *Justice Brown says:* "The plaintiff offered the declarations of Fulton Carter concerning this matter, and proposed to prove them by William Lowrie. They were properly excluded. Carter was a station hand, and the alleged declarations were not within the scope of his authority. They are hearsay in every sense," citing *Lytton v. Mfg. Co.*, 157 N. C., 331; *Younce v. Lumber Co.*, 155 N. C., 241, and *Rumbough v. Improvement Co., supra.* So we take it as thoroughly well settled that evidence of this kind is incompetent as being hearsay and beyond the authority of the declarant to bind the principal thereby.

Defendant also objected to two letters alleged to have been sent out from Washington, D. C., and purporting to have been signed, with a rubber stamp and typewriter, by M. B. Garber, as National secretary of the Royal Benefit Society, and authorizing collectors of the society in this State to collect dues from policy-holders in the name of and remit to the Royal Fraternal Association, instead of the Royal Benefit Society, and give receipts accordingly. The objection was put upon the grounds that the handwriting of Garber had not been proved, nor had it been shown that they were written by him or under his authority, nor that they were sent out with the knowledge or consent of the other associa-

tion, nor that they were received by the collectors or seen by any of the policy-holders; and for this objection they cited and relied on *S. v. Shields*, 90 N. C., 687; *Simmons v. Mann*, 92 N. C., 12; *Daniel v. R. R.*, 136 N. C., 517; *Lyman v. R. R., supra.* There are other exceptions strenuously urged upon our attention by the learned counsel for appellant, but we need not now discuss them, as it is barely possible, if not probable, that the questions to which they refer may never arise again, though, if they do, they will be worthy of serious consideration.

We grant a new trial for the sole reason that the court improperly admitted the letter of Lucy F. Ragsdale, which was material and prejudicial. The judge, in his charge, stated to the jury that this letter was a sufficient memorandum, under the statute of frauds, to charge the Royal Fraternal Association upon the promise therein made to answer for the liability of the other insurance association. We have carefully examined the testimony of Lucy F. Ragsdale, and find that the letter is not corroborative; but the judge, as we have shown, treated it as substantive evidence, and in this he erred, as there is nothing to show any authority from the Royal Benefit Society to make any such promise, except the mere declarations and unsworn statements of its agent, made after the fact, and not while actually engaged in the very transaction about which they speak (*dum fervit opus*).

We cannot grant the motion to nonsuit, as the court acted upon (267) this incompetent evidence in refusing the motion of defendant to dismiss the action, and if it had been ruled out, as it should have been, the plaintiff may have substituted other competent evidence in its place, and improved, if not matured, his case.

There is one point made by defendant which requires notice. This action originated in the court of a justice of the peace, where a judgment was entered, as above stated. The Royal Fraternal Association appealed, but its codefendant, the Royal Benefit Society, did not, so that it was not a party when the case was first constituted in the Superior Court. The court, on motion of plaintiff, ordered it to be made a party, which was done, and, we think, erroneously. Judgment had already been taken against said company, and its presence in the case was not further required for the purpose of charging it with liability for the debt. It had no further interest in the case, as this is a straight action of debt and not an equitable suit by the Royal Benefit Society to compel the Royal Fraternal Association to comply with its alleged contract of indemnity with it. The Superior Court had no original jurisdiction of an action against the Royal Benefit Society as the claim was less than $200, and it was not a necessary or even proper party, in order that the plaintiff might recover against the Royal Fraternal Association. We can see how the latter defendant could be prejudiced by its presence in the case, and

it might affect the course of the trial and the questions of evidence. We can see no good reason for making the Royal Benefit Society a party, and it will be dismissed from the case and its name stricken from the record, at plaintiff's cost.

Because of the error pointed out by us, the defendant is entitled to another jury.

New trial.

*Cited: Johnson v. Ins. Co.*, 172 N.C. 148 (1c); *R. R. v. Smitherman*, 178 N.C. 599 (1c); *Hunsucker v. Corbitt*, 187 N.C. 503 (1c); *Hubbard v. R. R.*, 203 N.C. 678 (1c); *Midgett v. Nelson*, 212 N.C. 43 (2cc); *Gorham v. Ins. Co.*, 214 N.C. 531 (2c); *Brown v. Montgomery Ward & Co.*, 217 N.C. 371 (1c); *Caulder v. Motor Sales*, 221 N.C. 439 (2c); *Webster v. Charlotte*, 222 N.C. 323 (2p); *Gibbs v. Russ*, 223 N.C. 351 (2d); *S. v. Pritchard*, 227 N.C. 169 (2p); *Supply Co. v. Ice Cream Co.*, 232 N.C. 686 (2c).

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LEFLER BROTHERS v. C. W. LANE & CO. ET AL.

(Filed 18 November, 1914.)

**Contracts, Written—Interpretation—Admeasurements by Engineer—Prima Facie Correct—Fraud or Mistake.**

Written contracts should be construed so as to effectuate the intent of the parties as embodied in the entire instrument, giving effect to each and every part when it can be done by fair and reasonable intendment. Hence, in construing the contract sued on in this case, that the plaintiffs were to cut and remove all timber from the defendant's 100-foot right of way, between certain stations, for a certain price per acre, etc., according to admeasurement made by the defendant's engineer in charge, it is *Held*, that the plaintiffs are not entitled to receive the price per acre inclusive of spaces upon the right of way already open and clear of trees, etc., for such is not only a reasonable interpretation of the language employed bearing directly upon the question, but any other interpretation would ignore entirely the stipulation that the work was to be paid for according to the admeasurements of the defendant's engineer; and while the engineer's estimates are not made conclusive under the terms of the contract, his determination of the question should be taken as *prima facie* correct and controlling unless impeached for fraud or mistake.

(268) APPEAL by defendant from *Lane, J.*, at May Term, 1914, of DAVIDSON.

Civil action to recover the price of certain work done by plaintiffs for defendant under the following written contract:

"Be it known as an agreement between C. W. Lane & Co., Inc., parties of the first part, and Lefler Brothers, parties of the second part, that we, parties of the second part, for the sum of $30 per acre, agree to cut and move all timber from a 100-foot right of way, between stations 90 and .....on the N. C. and Y. Railway; and in consideration of the said sum of $30 per acre we, the parties of the second part, further agree to clear all brush and rubbish off the right of way herein mentioned, and cut all stumps so that the tops will not exceed 4 inches above surface.

"This agreement is accepted and signed before witnesses on this 6 August, 1912."

There was evidence on the part of plaintiff tending to show that, pursuant to the agreement, they had removed timber, etc., for a certain distance along right of way, and the amount cleared up was 66 acres, arrived at by estimating the entire acreage on the right of way of 100 feet for the distance they had worked over, and allowing no deduction for land in cultivation or otherwise cleared and opened; that the amount in question had been ascertained by multiplying the length by the width of right of way, etc., and the sum due on that basis, of 66 acres, after crediting sums already paid, was $680.

There was evidence on part of defendant to the effect that the amount actually cleared by plaintiffs, according to specifications of the contract, was only 45.05 acres, arrived at by survey and admeasurement of H. B. Bayley, the engineer in charge. That officer testified that if there was any clearing at all done for the distance and within the 100 feet right of way, it was allowed for in the estimate. That defendant was ready and willing to pay on this basis, and had offered to do so.

The court charged the jury if they believed the evidence they would render verdict for amount claimed, $680, with interest.

Verdict for such amount. Judgment, and defendant excepted and appealed.

*E. E. Raper for plaintiff.*
*Phillips & Bower for defendant.*

HOKE, J. In construing written contracts it is a well recog- (269) nized rule, approved in repeated decisions of our Court, that the intent of the parties as embodied in the entire instrument shall prevail, and that each and every part shall be given effect, if this can be done by fair and reasonable intendment. *Gilbert v. Shingle Co., post,* 286, citing, among other cases, *Hendricks v. Furniture Co.,* 156 N. C., 569; *Davis v. Frazier,* 150 N. C., 449. The position referred to is very well stated in *Hendricks' case,* as follows: "The court, in construing a contract, will examine the whole instrument with reference to its separate parts, to

ascertain the intention of the parties, and will not construe as meaningless any part or phrase thereof when a meaning may thus be found by any reasonable construction."

Applying the principle, we think it clear, from a perusal of this contract, that plaintiffs were not to be paid in any event for the entire amount covered by the boundary worked over, but only for such portions as were cleared by them according to the specifications of the contract. This is not only the more reasonable interpretation of the language employed bearing directly on the question, but to hold otherwise would be to ignore entirely the stipulation that the work was to be paid for "according to admeasurements made by the engineer in charge." This was no doubt inserted for the reason that some parts of the land would be open and that the amount to be paid should be ascertained by survey and intelligent estimate, and, while the contract does not contain the provision that this estimate of the engineer shall be conclusive, giving his decision, as in some instances, the force and effect of an arbitration of the question, as in *Webb v. Trustees,* 143 N. C., 304; *Perry v. Ins. Co.,* 137 N. C., 402; *Wytheville v. R. R.,* 91 Va., 613; *Brooke v. Milling Co.,* 78 S. C., 200, and that class of cases, at the same time, the engineer being the person selected by the parties to perform this service, his determination of the question should be considered as *prima facie* correct and controlling unless impeached for fraud or mistake. *R. R. v. Scholes,* 14 Ind. App., 534; Page on Contracts, sec. 1469; Elliott on Contracts, sec. 728; 9 Cyc., p. 617.

The clause then has, and was intended to have, some significance, and the construction which ignores it and which holds that the plaintiff is entitled to recover for the entire boundary and not for the amount actually cleared off, according to the specified terms of the contract, can not be sustained. For the error indicated, defendant is entitled to a new trial, and it is so ordered.

New trial.

*Cited: Lefler v. Lane,* 170 N.C. 182 *S. c.; Electric Supply Co. v. Burgess,* 223 N.C. 100 (c).

HORNER MILITARY SCHOOL ET AL. v. J. F. ROGERS.

(Filed 11 November, 1914.)

**Schools — Contracts — Board and Lodging — Presumptions — Reasonably Clean and Wholesome—Trials—Evidence—Questions for Jury—Courts —Verdict, Directing.**

Where the plaintiff sues upon a contract for the price agreed to be paid by the defendant for the tuition, board and lodging of his sons, the law implies that the board and lodging to be furnished by plaintiff must be clean, decent, and reasonably wholesome, and when the evidence is conflicting as to whether the plaintiff has performed these requirements, the question should be submitted to the jury, and it is reversible error for the judge to direct a verdict in the plaintiff's favor because the terms of the contract are admitted or established.

APPEAL by defendant from *Lyon, J.*, at May Term, 1914, of (270) GRANVILLE.

This was a civil action. There was a verdict and judgment for plaintiff, and defendant appealed.

*A. W. Graham for plaintiff.*

*B. S. Royster for defendant.*

BROWN, J. This action is brought to recover the tuition charges for defendant's two sons. The correspondence in evidence establishes a contract between the plaintiff and defendant in pursuance of which the defendant sent his sons to plaintiff's school and agreed to pay a certain sum for their tuition, board and lodging, the defendant to furnish, as stated in the catalogue, bedclothing and towels.

The court instructed the jury that in this case there is no evidence of violation of contract on part of plaintiff, and jury should answer first issue "Yes." The defendant excepted.

Upon all the evidence, we agree with his Honor that the plaintiff is entitled to recover $250, in case the plaintiff performed the contract on its part, and his Honor did not err in giving the plaintiff's first three instructions. But there was error in giving the fourth.

The law implies that the board and lodging to be furnished by plaintiff must be clean, decent, and reasonably wholesome. The defendant offered evidence tending to prove that when his sons arrived at the school they were assigned to a room furnished solely with "two old home-made bedsteads, two old dirty and filthy mattresses, a piece of a mirror, a goods box for bureau, and an old washstand." The boys testify that they could not sleep on such mattresses, and went to a hotel. The defendant came and made examination. He testifies: "I found conditions there I would not

like to describe; there was filth and dirt all over it, and the mattresses were so filthy they were not fit for decent people to sleep on."

(271) It is true that the plaintiff introduced much evidence tending to contradict this, and to prove that the accommodations furnished were reasonably wholesome, clean, and suitable for the pupils of the school.

His Honor's instruction did not permit the defendant's evidence to be passed upon by the jury. It is patent that if the conditions were such as described by the defendant and his sons, the plaintiff did not perform the contract on its part, and could not recover. His Honor should have submitted the matter to the jury with appropriate instructions.

New trial.

*Cited: Fairmont School v. Bevis,* 210 N.C. 52 (c).

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W. B. SIMMONS v. W. L. GROOM.

(Filed 18 November, 1914.)

**1. Reference—Findings of Fact—Evidence—Confirmation of Court—Appeal and Error.**

The findings of fact by the referee made upon adequate and responsive evidence, and concurred in by the trial judge, are not open to review on appeal.

**2. Contracts, Written—Interpretation—Intent.**

The intent of the parties to a written contract, as gathered from the wording of the entire instrument, should govern in its interpretation, giving to the words employed their ordinary meaning except where the context or admissible evidence shows that another meaning was intended; and in proper instances resort may be had to the subject-matter when the ordinary meaning of the written words would lead to an absurd result, and also to the condition of the parties to the contract, so that the courts may avail themselves of the same light in its construction as the parties were in when they made it.

**3. Same—Timber Deeds—Ultimate Payment—Time for Cutting—Reasonable Time—Appeal and Error—Premature Appeal.**

Where a written contract for the sale of standing timber definitely provides for the payment of a stated sum as a balance due thereon, with further provision that the purchaser may pay for the timber by removing it from the lands at a certain rate per thousand, rendering a monthly account at certain times, and that he shall "cut the timber as a whole within the time mentioned in the timber deeds (purchased by him), and as much sooner as he reasonably can, by correct interpretation the method of payment by cutting and removing the timber was given for the benefit

of the purchaser, requiring that he be reasonably diligent in order to avail himself thereof; and where he has been neglectful of his opportunity by failing for long periods of time to cut and remove the timber, permitting, in some instances, the time to expire within which his vendor was given to cut in his timber deeds; and the ultimate obligation of the purchaser to pay the balance of the purchase price being absolute, it is not open to him, in the vendor's action to recover the balance of the purchase price, to successfully maintain the position that the contract permitted him the full time specified in the timber deeds in which to cut the timber and make the required payment, and that the action, having been brought within that time, was premature and should be dismissed. *Hardison v. Lumber Co.*, 136 N. C., 173, cited and distinguished.

**4. Same—Liens—Counterclaim.**

The defendant in this action to recover against him a balance due on the purchase price of timber growing on the plaintiff's lands, having failed to make payment thereon, or to avail himself of a provision of payment allowed to him whereby he was permitted to remove the timber and make partial payments thereon from time to time, etc., is permitted to recover, as a counterclaim, certain sums of money he has paid to judgment creditors of the plaintiff, which constituted an encumbrance on the timber rights conveyed to him.

APPEAL by defendant from *O. H. Allen, J.*, at February Term, (272) 1914, of NEW HANOVER.

Civil action to recover on a contract, heard on exceptions to report of referee.

The plaintiff complained and offered evidence tending to show that in 1908 plaintiff was the owner of certain lands, timber contracts, sawmill, dry-kiln, planing mill, and other property, and defendant offered to buy the same at the price of $19,500, which offer plaintiff accepted. Defendant having paid off as part of the contract price, towit, the sum of $8,714.65, the same being certain charges existent on the property and debts due from plaintiff, the parties subsequently met together at Rocky Mount, on 17 December, 1908, and entered into a written contract as embodying the executed and executory features of the agreement in terms as follows:

NORTH CAROLINA—Nash County.

Know all men by these presents, That I, W. L. Groom, for and in consideration of certain timber and land deeds and two bills of sale, do agree to pay W. B. Simmons, his heirs or assigns, $10,785.35, same to be paid as follows: It being understood that what I have paid heretofore is payment in full for mills, land, etc., and 4,500,000 feet of timber, by scale Doyle's rule, and for all logs cut after said amount above is cut I am to pay at the rate of $3 per thousand feet for from the 1st to the 10th day of each month for such Doyle's log scale as cut during the preceding month, until the above amount is settled for, or, in other words, until I have cut

enough logs, after having cut the 4,500,000 feet, to amount to $10,785.35 at a rate of $3 per thousand feet, it being understood that I am to cut said timber as a whole within the time mentioned in said timber deeds, as much sooner as I reasonably can; it being further understood that all logs are to be scaled by the mill operator or such man as he may designate, and the amount of same rendered to W. B. Simmons. Now,
(273) in the event said W. B. Simmons is not satisfied with scale, another scaler can be secured by mill operator and said W. B. Simmons, jointly, each paying one-half of cost of said scaler, and said scaler is to certify to his account once each month. It is further understood and agreed that all timber is to be cut reasonably saving. This agreement is to bind my heirs and assigns.

In witness whereof I do, this 17th day of December, 1908, fix my hand and seal. W. L. GROOM. [SEAL]

That the timber interest disposed of in this agreement consisted of contract rights to cut timber on specified tracts of land held at that time by the vendor and expiring at different times, towit, in 1912, 1913, 1916, 1918. That in reference to peformance or failure to perform the stipulations of the contract, the referee, Mr. E. S. Martin, finds, and there is testimony in the record to support the finding:

"Fifth. That the defendant promised plaintiff that he would enter upon the cutting of the timber at once, and he did so for some time and sent his men for that purpose a little before Christmas, 1908, or first of year 1909.

"Sixth. That the defendant ran the mill for four or five months, and shut down in May, 1909, and stopped cutting timber, and the mill remained idle for about six months and no timber cut, when plaintiff wrote him to continue cutting, to which defendant made no reply. Defendants started up again in January, 1910; ran about six months, stopped again, and shut down the mill and stopped cutting timber for some twelve months; started up in March, 1911, and ran until the mill was burnt in May, 1911, and defendant from that time ceased operating and cutting timber and the mill has never been rebuilt, but he has operated other mills at other places which he owned. That the frequent stops were occasioned by lack of funds, labor troubles, and attachments for debts.

"Seventh. That at the time said timber contracts and property were sold and said contract was made, towit, 17 December, 1908, there were at least 10,000,000 feet of standing timber upon said land conveyed by the plaintiff to the defendant.

"Eighth. That no guarantee or representation was made by the plaintiff as to the quantity of timber standing upon said tracts of land sold by him to defendant, but defendant relied entirely upon his own examination and judgment as an expert, and I so find him to be, as to the quantity of

timber thereon. That the contract made by the defendant with the plaintiff, hereinbefore set forth, was not based upon any condition as to the quantity of timber on said land bought as aforesaid.

"Ninth. That on or about 15 November, 1909, the defendant (274) sold and conveyed all of the lands, timber contracts, mill and other property conveyed to him by the plaintiff to the Duck Lumber Company, a corporation which he had formed and incorporated about that time and in which he held considerably a majority of the stock; that he became the president of said company and managed and controlled the same.

"Tenth. That the capacity of the mill sold to defendant was about 3,500,000 feet per year, and the mill could easily cut that amount per year, and between the date of the contract and 17 March, 1912, the mill, if run with reasonable regularity, could easily have manufactured all the timber standing on said lands, 10,000,000 feet or more, into lumber, and, in fact, it was calculated by defendant that it could be done in three years from the date of the contract; whereas, during the whole period existing from the beginning of the contract to the present time, there has been cut and manufactured only 2,982,076 feet.

"Eleventh. That the mill was not run constantly or with any degree of regularity, or timber cut as reasonably as could have been done to execute the contract. There was a great waste in the cutting, and much timber was left in the woods which could have been and should have been sawed up, and some of it stayed out so long that there was nothing left, as timber is damaged in less than thirty days after being cut, by exposure to the weather.

"Twelfth. That the timber contract, Exhibit J-2, expired 24 December, 1910, before this action was brought, and Exhibits D and E expired 20 and 21 November, 1912, Exhibit J, 5 February, 1913, and the contracts, Exhibits F, H, K, and L, will expire in 1916 and 1918, and Exhibits E-1, G, and N are deeds for said lands—all of which was known to the defendant.

"Thirteenth. That the defendant has not paid any part whatever of the $10,785.35 mentioned in said contract, though demanded, but the whole of said amount, with interest thereon from 25 September, 1910, remains due and unpaid, if certain amounts found due to defendant as fixed in the counterclaim hereinafter mentioned are excepted which should be credited thereon.

"Fourteenth. That the defendant did not at any time render to the plaintiff a statement of the logs scaled, as provided in said contract, or in any manner inform him of the same."

The referee further finds on a counterclaim entered by defendant that, in addition to the first payments made by him, the defendant had paid off judgments constituting a lien on the realty to the amount of $336.05, and,

upon these findings, held as a conclusion of law that the balance of the purchase price, less the counterclaim, was due and owing from defendant, and that plaintiff was entitled to judgment for such sum.

(275) On the hearing, all of defendant's exceptions were overruled and the report confirmed as to findings of fact and conclusions of law, and, judgment having been so entered, defendant excepted and appealed.

*L. Clayton Grant and John D. Bellamy for plaintiff.*
*Iredell Meares for defendant.*

HOKE, J. There is evidence in the record tending to support the findings of fact by the referee, and this being true, and these findings having been concurred in by the judge, they are not open to further review by this Court, and being adequate and fully responsive, must be considered as representing the facts on which the rights of these parties must be determined. *McCullers v. Chambers,* 163 N. C., 61; *Henderson v. McLain,* 146 N. C., 329.

As to the conclusions of law embodied in the report of the referee, it is contended by the defendant, and his exceptions are framed and designed chiefly to present the position, that in the contract declared on the defendant is only required to pay for logs cut as he cuts them, and that he is allowed the entire time contained in the timber contracts bought by him in which to cut the amount necessary to meet the sum stipulated for in the contract, and that not having cut this amount when the suit was commenced, the action was begun prematurely, and that on the facts as found defendant now owes plaintiff nothing, and the action should be dismissed.

In *R. R. v. R. R.,* 147 N. C., 382, in speaking to certain rules of interpretation applicable to these written contracts which are sufficiently ambiguous to permit of construction, the Court said: "It is well recognized that the object of all rules of interpretation is to arrive at the intention of the parties as expressed in the contract, and that in written contracts which permit of construction this intent is to be gathered from a perusal of the entire instrument. In Paige on Contracts, sec. 1112, we find it stated: 'Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole.' And while in arriving at this intent words are *prima facie* to be given their ordinary meaning, this rule does not obtain when the 'context or admissible evidence shows that another meaning was intended.' Paige, sec. 1105. And further, in section 1106, it is said that the context and subject-matter may affect the meaning of the words of a contract, especially if in connection with the subject-

matter the ordinary meaning of the term would give an absurd result. Again, as said by *Woods, J.,* in *Merriam v. United States,* 107 U. S., 441, 'In such contracts it is a fundamental rule of construction that the courts may look to not only the language employed, but to the subject-matter and surrounding circumstances, and may avail themselves (276) of the same light which the parties possessed when the contract was made.' And in Beach on Modern Law Contracts, sec. 702, the author says: 'To ascertain the intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects they had in view. The words employed, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have.' "

Applying the principles contained in these citations, it appears from the findings of fact in the referee's report that this was a sale of property by plaintiff to defendant at the contract price of $19,500, entered into in 1908, and that there remains due the sum of $10,785.35, which is to be in any event ultimately paid by defendant, save and except a small counterclaim of $336.05, being the amount paid to relieve some of the property from a judgment lien; that the written contract, after stipulating for the payment of this sum of $10,785.35, provided that the defendant might pay for same by removing timber from the land at the rate of $3 per thousand, rendering an account from the 1st to the 10th of each month, and "it being understood that I am to cut the timber as a whole within the time mentioned in the timber deeds, and as much sooner as I reasonably can"; that notwithstanding this stipulation for reasonable diligence, and the fact that there was ample timber on the ground and that sufficient time had elapsed to enable the defendant to have cut the timber and paid off the entire debt, the methods of defendant have been so lax and dilatory that, in the three years and over from the signing of the contract to the institution of the suit the defendant has only cut 2,982,076 feet of the 4,500,000 he himself was to have before commencing payment; that the mill having burned, he has made no effort to procure another, and has transferred his holdings to a corporation organized by him, known as the Duck Lumber Company; that he has permitted at least three of the timber contracts to become forfeited by lapse of time and has made no payment on the amount except the small counterclaim of $336.05, paid in satisfying a judgment lien, as stated.

From these, the facts and attendant circumstances, having due regard to the nature and history of the transaction and the design and controlling purpose of the agreement as well as its language, we concur in the view of the referee, that this contract did not contemplate that the defendant should in any event have the entire time stipulated for in these timber deeds to cut and pay off this obligation, but that he was to proceed

and cut the timber with reasonable diligence; that the ultimate obligation to pay being absolute, this was a method of payment provided by the contract for defendant's benefit, and, it appearing that he has (277) utterly failed to comply with the stipulation, its terms may no longer avail him, and, by correct interpretation of the contract, his obligation to pay has become absolute.

We were referred by counsel to the case of *Hardison v. Lumber Co.*, 136 N. C., 173, for the proposition that one having a contract conferring the right to cut timber on another's land for a stated period is not required to cut continuously, and the case so holds; but this was construing an ordinary timber contract as between the parties thereto, and does not apply where, as here, one holding such a deed has conveyed the same under a contract binding the grantee to proceed with diligence and has absolutely failed to comply with the stipulation.

On careful perusal of the record, we find no error which gives defendant any just ground of complaint, and the judgment in plaintiff's favor is Affirmed.

*Cited: McMahan v. R. R.*, 170 N.C. 459 (2c); *Hales v. R. R.*, 172 N.C. 107 (2c); *Worley v. Comrs.*, 172 N.C. 818 (2p); *Lewis v. May*, 173 N.C. 103 (2c); *Mfg. Co. v. Lumber Co.*, 177 N.C. 407 (1c); *Miller v. Green*, 183 N.C. 654 (2c); *Perry v. Surety Co.*, 190 N.C. 291 (2c); *King v. Davis*, 190 N.C. 741 (2c); *Jones v. Casstevens*, 222 N.C. 413 (2c); *McAden v. Craig*, 222 N.C. 501 (2c); *Farmers Federation v. Morris*, 223 N.C. 468 (2c); *Jones v. Realty Co.*, 226 N.C. 305 (2c).

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FRANK HANFORD v. SOUTHERN RAILWAY COMPANY.

(Filed 18 November, 1914.)

**1. Railroads — Injury to Live Stock — Negligence — Opinion Evidence — Trials—Questions for Jury.**

Where the evidence is conflicting as to whether or not the engineer on defendant's train could have stopped his train in time to have prevented an injury to plaintiff's horse, which had become frightened and had run some distance down and near the defendant's track in the same direction the train was going, before attempting to cross the track, where the engine struck him, it is competent for an engineer who had been long in the defendant's service and knew the condition existing as to grade, etc., at the place of the injury, to testify that from his knowledge of the locality, experience and observation, the train could have been stopped in time to have avoided it; and the evidence presenting questions of fact, a judgment of nonsuit was properly denied.

**2. Railroads—Injury to Live Stock—Statutory Presumptions.**

The statutory presumption of negligence of a railroad company in killing live stock, when the action is brought within six months, applies whether a horse, the subject of the action, was hitched to a buggy at the time or running at large. Revisal, sec. 2645.

**3. Railroads—Injury to Live Stock—Ordinary Noises—Frightening Horses—Trials—Negligence.**

The principle that railroad companies are not liable in damages occurring to travelers along the road in consequence of their teams taking fright at the noises ordinarily made by the operating of its trains does not apply to cases wherein the company, by the exercise of reasonable diligence, could have prevented the injury after the horse had become frightened and, running along the track for some distance, had attempted to cross in front of the train. *Barnes v. Public-service Corporation*, 163 N. C., 365, cited and distinguished.

**4. Railroads—Injury to Live Stock—Issues—Last Clear Chance.**

The evidence in this case being conflicting as to whether or not by the exercise of reasonable care the engineer on the defendant's train could have avoided killing the plaintiff's horse which attempted to cross the track in front of the train, it was proper to submit a third issue, as to whether the defendant could have avoided the injury by the exercise of ordinary care, in addition to the issues of negligence and contributory negligence.

APPEAL by defendant from *Lyon, J.*, May Term, 1914, of (278) ALAMANCE.

*W. H. Carroll for plaintiff.*

*E. S. Parker, Jr., for defendant.*

CLARK, C. J. This is an action to recover damages for the alleged negligent killing of a horse and destruction of buggy and harness belonging to plaintiff.

Exceptions 1, 2, and 4 were for permitting the witness Capt. J. C. Walton, who testified that he had been long in the service of the defendant company and for many years conductor and knew the grade at the point where the accident occurred, to express his opinion that the train could have been stopped or slackened up at that point, it being an up grade, in a very short distance.

The uncontradicted evidence was that the horse was hitched in front of the house, when, becoming frightened, he broke loose and ran with the buggy attached down the road nearly parallel to the railroad track and tried to cross just in front of the engine. There was evidence tending to show that he was struck just before he cleared the track, and evidence of the defendant tending to show that he ran into the engine. There was

evidence on the part of the plaintiff that there was no attempt made to slacken speed, though the engineer could have thereby prevented the injury. There was evidence for the defendant that there was an attempt to slacken speed, and that the collision was unavoidable. This presented a question of fact for the jury, and the nonsuit was properly denied. Nor was there any error in admitting the testimony of Captain Walton. Indeed, we have many cases that any one is competent to give his opinion as to the distance in which a train can be stopped. *Blue v. R. R.*, 117 N. C., 644; *Davis v. R. R.*, 136 N. C., 117. The jury can form their own opinion as a matter of common knowledge. *Davis v. R. R., supra; Wright v. R. R.*, 127 N. C., 227; *Lloyd v. R. R.* 118 N. C., 1013; *Deans v. R. R.*, 107 N. C., 693; *Draper v. R. R.*, 161 N. C., 314. In fact, Captain Walton spoke from his own knowledge of the grade, and from his experience as a railroad employee.

(279) The defendant contends that the presumption of negligence in killing live stock, when the action is brought within six months, does not apply where the facts were known. But such is not the case. Nor is the presumption rebutted from the fact that the horse was attached to the buggy. The statute (Rev., 2645) contains no such exception. This matter was fully discussed and decided in *Randall v. R. R.*, 104 N. C., 410, and was again fully discussed and reaffirmed on the rehearing of the same case, 107 N. C., 748, in which it was held that "The presumption arises from the fact of killing, whether the animal was hitched to a wagon or cart as well as where it is running at large."

The defendant also relied upon *Barnes v. Public-service Corp.*, 163 N. C., 365, which held that the railroad company is not responsible for damages occurring to travelers along the road in consequence of their teams taking fright at the noises ordinarily made by the operation of such trains. That case would be in point if this action was for frightening the animal whereby he ran away and was injured by running into danger. But it has no application here, where the charge is not that the noise of the train frightened the animal and caused him to run, but because, as the jury have found, he was injured by collision with the train, which could have been prevented by the train slackening its speed.

In *Hines v. R. R.*, 156 N. C., 226, *Allen, J.*, citing the opinion of *Hoke, J.*, in *Snipes v. Mfg. Co.*, 152 N. C., 46, says: "The right of the plaintiff to maintain his action must be determined by the conduct of the parties after the time the horse began to kick, and if the evidence presents a phase upon which the jury could find that the engineer, by keeping a lookout, could by the exercise of ordinary care have seen that a collision was imminent in time to stop his train and avoid it, the plaintiff could recover, notwithstanding the failure of the driver to look and listen at the crossing." This is almost in the exact language of

*Brinkley v. R. R.*, 126 N. C., 91, which has been repeatedly cited since. See citations in Anno. Ed.

The defendant also excepted to the submission of the third issue: "Notwithstanding plaintiff's negligence, could the defendant company, by the exercise of ordinary care, have prevented the injury sustained by the plaintiff?" This third issue was recommended, *Denmark v. R. R.*, 107 N. C., 189, and in many cases since. See Anno. Ed. The two other exceptions were addressed to the charge upon this issue. There was in this, as in other respects,

No error.

*Cited: Hopkins v. R. R.*, 170 N.C. 486 (1c); *Borden v. R. R.*, 175 N.C. 179 (2j); *Blevins v. R. R.*, 184 N.C. 325 (1p).

F. L. PEYTON v. HAMILTON-BROWN SHOE COMPANY.

(Filed 18 November, 1914.)

**1. Reference, Compulsory—Waiver.**

A motion for a compulsory reference should be made in an action before the jury has been impaneled, or the rights of a party thereto will be considered as waived. Whether or not it was within the discretion of the trial judge to order a compulsory reference in this case is not presented, as it does not fall within the class of cases wherein such a reference is allowed. Revisal, sec. 519.

**2. Contracts—Goods Sold on Commission—Compromise—Consideration.**

The plaintiff was salesman for the defendant, and was to receive a commission of a certain per cent upon the sales made by him, and also upon goods shipped by the defendant into his territory during the time of his employment, which was terminated, before its expiration, with the defendant's consent; and a difference of opinion arising as to the amount due him as commissions earned under the contract, it was agreed by them that the defendant should pay the agreed commission on all sales of goods then to be shipped, when the goods were shipped. This action was brought by the plaintiff to recover the amount alleged to be due him under this arrangement; and it is held that the compromise agreement as to the terms of settlement was supported by a sufficient consideration.

**3. Contracts—Goods Sold on Commission — Amount Due — Trials — Evidence.**

Where the matter at issue between the parties to an action is as to the amount due the plaintiff in commissions upon the accepted sales of goods he has made for the defendant, it is competent for the plaintiff to testify as to the full amount of his sales, for the purpose of subsequently showing how many of them the defendant had shipped out under his contract; and

he may be permitted to refer to corresponding sections of complaint and answer to make his testimony more intelligible, without necessarily making such sections evidence in the case. The plaintiff may also state the amount he claims as owing to him by the defendant, and explain its items, including those he contends were wrongfully charged against him on the defendant's books; and it is further held that the defendant will not be permitted unfairly to hold back shipments merely for the purpose of depriving the plaintiff of his commissions.

**4. Appeal and Error — Unanswered Questions — Prejudicial Evidence — Harmless Error.**

Where the plaintiff sues to recover of the defendant his commissions of a certain per cent on the sales of goods he has made for defendant under contract, an immaterial answer to a question as to his commissions on a larger amount of sales than he claims cannot be prejudicial to the defendant or held as error on appeal.

**5. Trials—Instructions—Verdict, Directing—Questions for Jury.**

A request by appellant for instructions directing a verdict, based on only a part of the evidence, which was in favor of the requesting party, and excluding that favorable to appellee, was properly refused, and the dispute in this case being over the amount due plaintiff from the defendant as commissions on sales of merchandise made under a contract between them, and the evidence being conflicting, the question thus raised was properly left to the determination of the jury.

(281) APPEAL by defendant from *Shaw, J.*, at Fall Term, 1914, of RICHMOND.

This action was brought to recover the amount alleged to be due under a contract between the parties, by which defendant employed plaintiff as its traveling salesman in parts of North Carolina and South Carolina, the territory being designated by reference to a map described therein. Plaintiff was to receive 2¾ per cent commissions on all goods sold by him and shipped into his territory; to have a drawing account or guaranteed monthly salary of $150, payable at the end of each month, and to be paid all his necessary traveling expenses, the salary to be paid during the time he was at work in his territory and the contract to continue in force for the period of one year. The contract was dated 18 August, 1911, and was, by mutual consent, terminated 27 July, 1912, plaintiff having resigned his position on the latter date. Plaintiff received his commissions, salary, and expenses from time to time during the performance of the services required of him under the contract, and now claims that on 27 July, 1912, when he resigned, that he had sold goods for the defendant to responsible purchasers, which were thereafter shipped to them by defendant, amounting in value, according to ruling prices of defendant, to $46,528, the commission on which, at the stipulated rate, is $1,285.51, for which he demands judgment. The parties disputed with each other as to the true amount due the plaintiff on account of the transactions be-

tween them, and on 27 July, 1912, they came to a settlement, in which defendant promised to pay the agreed commission on all sales of goods which had been made by plaintiff in his territory, and which had not then been shipped by defendants, but which were shipped afterwards, the same to be paid when the goods were so shipped, and it is on the sale of these goods, as stated, that he claims his commission. The court submitted one issue to the jury, as to the amount of defendant's indebtedness to plaintiff, and they returned a verdict for $375.50. Judgment was thereupon rendered, and the defendant appealed.

*M. W. Nash for plaintiff.*
*J. P. Cameron for defendant.*

WALKER, J., after making the foregoing statement of the case: It appears that, after the pleadings had been read and the jury impaneled, refendant requested the court to order a reference of the case, which was refused, and to this the first exception was taken. The motion for a compulsory reference should have been made before the im- (282) paneling of the jury. It was due then, in the regular order of procedure, and by passing that stage in the trial without acting, the defendant waived his right; he having impliedly accepted the method of trial by jury, instead, by his silence. Such motions must, of course, be submitted in apt time. A like motion was held to have been properly refused, for this reason, in *Hughes v. Boone,* 102 N. C., 137. See *Kerr v. Hicks,* 131 N. C., 90. The statute provides that "When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference," in the cases enumerated therein. Revisal, sec. 519. Whether this is a discretionary power of the judge we need not decide, as we are of the opinion that this case does not fall within any of the classes where such a reference is allowed. No long or complicated account was necessary to decide the issue between the parties or for the information of the court, and the case, it seems, was tried very easily and fairly without it.

It was competent for the plaintiff, while testifying in his own behalf, to state the quantity of goods sold by him, in order that it might be subsequently shown how many of them had been shipped under his contract and settlement of 27 July, 1911; and for a like reason it was not improper that he should be permitted to refer to section 4 of the complaint and answer to make his testimony intelligible. They were preliminary matters, and the ruling of the court did not make the sections, so referred to, evidence in the case. We see no objection to the same witness stating what he claimed was owing by the defendant, and his explaining the items. Nor was there any valid objection to his stating the items which defendants had wrongfully charged to him or debited him with on

their books, as something had to be deducted from the amount they had promised to pay him. It was necessary that this should appear, in order to ascertain the correct balance. All this covers the second, third, fourth, fifth, and sixth exceptions. As to his being allowed to state the amount of commissions on $103,000 at 2¾ per cent, if he had answered it, we cannot see what harm would have resulted to defendant; but his answer was not responsive to the question, and there is no exception to the answer, and therefore, on this ground, the seventh exception must fail. *Caton v. Toler,* 160 N. C., 104; *Shaw v. Telegraph Co.,* 151 N. C., 638. But no harm was actually done by the question and answer, as in the cross-examination he stated, in answer to defendant's question, that he only claimed commissions on the sales amounting to $69,624.95 at 2¾ per cent, which would be $1,914.67, and this amount, with a premium due him of $49, was all that he demanded, the total being $1,963.67; he then stated the amount of the entire shipments, both before and after 27 July, 1912, to be $69,624.95; so that the defendant was not prejudiced by the
(283) question as to the amount of the commission on $103,000 at 2¾ per cent, if it had been answered, as he did not seek to recover them.

This brings us to the consideration of the question, and the pivotal one in the case, whether the settlement of 27 July, 1912, is binding upon defendant. We cannot see why it is not. The parties had disagreed as to the balance, if any, due the plaintiff under the contract, and for this reason they came to an accounting, for the purpose of settling the differences between them. This is a sufficient consideration to support the settlement and the agreements or covenants entered into as a part thereof.

In the recent case of *Burriss v. Starr,* 165 N. C., 657, defendant's appeal at p. 662, we said in regard to a similar question: "In *Mayo v. Gardner,* 49 N. C., 359, this Court said, by *Chief Justice Nash: 'In re Lucy,* 21 Eng. Law and Eq., 199, it was decided that, to sustain a compromise, it was sufficient if the parties thought, at the time of entering into it, that there was a *bona fide* (or real question between them), though in fact there was no such question.' The law favors the settlement of disputes, as was said in that case. It is stated in 9 Cyc., 345, that 'the compromise of a disputed claim may uphold a promise, although the demand was unfounded,' citing numerous cases to sustain the text."

*Chief Justice Nash* said further, in *Mayo v. Gardner, supra:* "The prevention of litigation is a valid and sufficient consideration; for the law favors the settlement of disputes. Thus, a submission of claims and demands to arbitration is binding, so far as this, that the mutual promises are a consideration, each for the other. 1 Parsons Contract, 364; Com. Dig., 'Action on the case on Assumpsit,' A 1, B 2. In *Keson v. Barclay,* 2 Pa., 531, an action of slander for words was compromised by the de-

fendants agreeing to pay the plaintiff a sum certain; the Court held there was a sufficient consideration, though the words used were not slanderous." And in Parsons on Contracts (5 Ed.), p. 438, book 2, ch. 1, sec. 4, it is said: "On the same ground a mutual compromise is sustained. With the courts of this country the prevention of litigation is not only a sufficient, but a highly favored consideration, and no investigation into the character or value of the different claims submitted will be entered into for the purpose of setting aside a compromise, it being sufficient if the parties entering into the compromise thought at the time that there was a question between them. And in these cases inequality of consideration does not constitute a valid objection; it is enough if there be an actual controversy, of which the issue may fairly be considered by both parties as doubtful." It may be added that the defendant could not hold back the shipment of goods already sold by plaintiff for the purpose, merely, of defeating his recovery of his legitimate commis- (284) sions. He had performed his part of the contract and was a faithful agent, so far as appears, and he was entitled to fair treatment in return therefor. The jury might have so found upon the evidence.

The eighth and last exception is equally untenable. The judge could not direct a verdict upon the evidence, as requested to do. It was for the jury to say what was the balance due the plaintiff. There was evidence, we think, upon which they could have found a larger balance than the one indicated in defendant's prayer. Anyhow, there was no ground for such a peremptory instruction, and, besides, defendant could not select a part of the evidence, and base a request for a charge upon that alone. It must be considered as a whole. It appears that all of the testimony was not stated in the record. But, in any view, the instruction would have been improper as invading the province of the jury.

After a careful examination of the entire case, we find no reason for complaint on the part of the defendant. The verdict seems to have been a very moderate one, as we construe the evidence.

No error.

*Cited: Ferebee v. Berry,* 168 N.C. 283 (4c); *Lee v. Thornton,* 176 N.C. 211 (1c); *Armstrong v. Polakavetz,* 191 N.C. 735 (2c); *Bohannon v. Trotman,* 214 N.C. 721 (2c).

H. GLENN HALL v. PIEDMOND RAILWAY AND ELECTRIC COMPANY.

(Filed 11 November, 1914.)

**Street Railways—Trials—Negligence—Evidence—Questions for Jury.**

When a judgment of nonsuit is granted upon the evidence, the evidence is viewed on appeal in the light most favorable to the plaintiff; and in this action to recover damages for the death of plaintiff's horse, wherein there was evidence in plaintiff's behalf that he was sitting on his horse in a narrow street of a town, when the horse, becoming frightened on the approach of the defendant's car, ran backward in the direction the car was going, which the motorman must have seen, but failed to stop the car or slacken the speed, which he could have done in time, resulting in the injury, while the plaintiff was doing all he could to control the horse and avoid it. *Held*, it was sufficient to be submitted to the jury upon the question of defendant's actionable negligence. *Barnes v. Public-service Corporation*, 163 N. C., 363; *Doster v. Street Ry.*, 117 N. C., 661, cited and distinguished.

APPEAL by plaintiff from *Lyon, J.*, at March Term, 1914, of ALAMANCE.

*W. H. Carroll for plaintiff.*

*E. S. Parker, Jr., for defendant.*

CLARK, C. J. This was an action to recover damages for the negligent killing of plaintiff's horse in October, 1912. On said date the
(285) plaintiff was sitting sideways on his horse on Front Street in Burlington at 11 o'clock a. m., when the defendant's car, going west, frightened the horse, which ran backward, on a narrow street in the same direction the car was going. The owner slipped off, but held the reins. The motorman must have seen the horse backing in the direction of his car, but failed to stop the car or to slacken his speed so as to prevent a collision.

This being a nonsuit, the evidence must be taken in the light most favorable to the plaintiff. *Cotton v. R. R.*, 149 N. C., 227; *Shepherd v. R. R.*, 163 N. C., 521.

The defendant relies upon *Barnes v. Public-service Corp.*, 163 N. C., 363, and *Doster v. Street Railway*, 117 N. C., 661; but those cases differ very much from this. In the *Barnes case* the plaintiff, in a buggy, was driving his horse through the street and a boy in the buggy was leading a young unbroken colt by a halter. The motorman and the plaintiff saw each other when about 150 yards apart, but the plaintiff continued to drive some 75 yards further, coming towards the car, the horse and colt becoming more frightened. The owner of the horses could have turned

out, after he saw the condition of his animals, into the cross-streets, but says he did not do so because he thought he had as much right on the street as the car. The motorman proceeded until the car was abreast of the buggy, when the colt jumped upon the rear wheels of the buggy and upset it, throwing the plaintiff to the ground and injuring him. There was no collision with the car, which was running at its usual speed and making no unusual noise. In that case the Court held that the plaintiff was negligent, in that he continued to drive towards the car when he saw that his team was frightened and when he could have turned out into one of the cross-streets.

In *Doster v. R. R.*, cited in the last named case, the horse was being driven along the highway parallel to the railway, and, becoming frightened, rushed upon the track ahead of the street car and was injured. The Court held that in such case the street railway company would be responsible for the consequences of the collision only when "by proper watchfulness on the part of the motorman the danger might have been foreseen and the injury prevented by using the appliances at his command." This was put upon the ground that the public service should not be interrupted by requiring the cars to stop because the driver "ventures to test the nerve of his horse or mule by driving it along the street" when he sees that it is frightened by the moving cars, and can turn out or stop his horse and hold it till the car passes.

In the present case the horse ran backwards towards the car, and though the motorman saw that its owner was holding the bridle and attempting to prevent the horse backing on the line, and that unless the car stopped there would likely be a collision, he made no effort to do so, and the horse was injured by the car striking him. The motor- (286) man, who could have seen the horse for 300 feet, did not "use the appliances at his command" and stop the car, so as to prevent the injury. The plaintiff was doing all he could to prevent the collision, but could not. The motorman saw this, and could have prevented it, but did nothing. It may be that if the defendant had put on evidence he might have satisfied the jury of a different state of facts. But upon the evidence the case should have been submitted to the jury. *Hines v. R. R.*, 156 N. C., 222.

In *Bullock v. R. R.*, 105 N. C., 180, it was held that where the engineer with proper watchfulness should have seen that a wagon was stalled upon the track, it was his duty to use "every means and appliance in his power" to stop the train, and if he does not, the company is liable for his negligence. In *Brinkley v. R. R.*, 126 N. C., 88, the same was held where the horse was running loose on the track and would not get off and there was a cattle-guard or trestle ahead of it which it could not cross.

The subject is interestingly discussed with full citation of authorities by *Hoke, J.*, in *Snipes v. Mfg. Co.*, 152 N. C., 42, in which it was held that if the engineer with proper diligence could have seen a person in front of his engine in such a position that ordinary effort on his part would not likely avail to save him from injury, and that a collision was not improbable, it is negligence if he fails to use all means at his command, consistent with the safety of the passengers or property in his charge, to prevent the collision or injury. That principle applies with greater force here, where the frightened horse did not have intelligence to attempt to avoid the injury and the motorman saw this and that the horse's owner was vainly endeavoring, with all his power, to prevent the collision.

The verdict of nonsuit must be

Reversed.

*Cited: Hall v. Railway Co.*, 172 N.C. 347 *S.c.*

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W. T. GILBERT v. WACCAMAW SHINGLE COMPANY.

(Filed 11 November, 1914.)

**1. Contracts, Written—Interpretation—Intent.**

In construing a written contract the intent of the parties as embodied in the entire instrument should prevail, giving effect to each and every part if it can be done by fair and reasonable intendment; and in ascertaining this intent resort should be had primarily to the language of the agreement to which, if it expresses plainly, clearly, and distinctly the meaning of the parties, effect must be given by the courts, and other means of interpretation are not permissible.

**2. Same—Timber Deeds—Time of Cutting—Statute of Frauds—Parol Evidence.**

A conveyance of standing or fallen timber "of the dimensions of 10 inches or more in diameter at a distance of 12 inches from the ground, or which may attain that size ten years from date thereof," etc., and the description of the land, "together with the perpetual right of way, in, to, and through and over the above-mentioned tract or parcel of land at any and all times during the period of twenty years, for the purpose of removing the timber," is construed that the ten-year limitation first mentioned is descriptive of size of the timber conveyed and specifying the time within which the measurement must be had; and the twenty-year limitation in the latter portion is intended to fix, with reference to the date of the deed, the time in which the timber sold must be cut and removed; and parol evidence to show that a different period was agreed upon, or that the ten-year period was that fixed for cutting and removing the timber sold, is inadmissible as tending to vary or contradict the writing.

**3. Appeal and Error—Fragmentary Appeal.**

An appeal from the construction of a deed to standing timber, reserving the question of alleged trespass by reason of wrongful cutting of timber below the sizes specified and conveyed, is fragmentary and will be dismissed.

WALKER, J., concurring.

APPEAL by plaintiff from *Allen, J.*, at August Term, 1914, of (287) BRUNSWICK.

Civil action. Plaintiff, the owner of certain land, sued the defendant company for wrongfully cutting timber on his property.

Defendant showed a line of deeds purporting to convey to him the timber of certain dimensions on the land and claimed the right to cut and remove the timber at any time within twenty years from the date of the deeds.

It was agreed that the matters in controversy, in so far as determined, were properly made to depend on the correct interpretation of the first deed conveying the timber, same being a deed from W. T. and Anna A. Gilbert to R. W. Gibson, bearing date March, 1903, the rights therein disposed of having passed by *mesne* conveyances to defendant and being in terms as follows: "This deed, made on this ..... day of March, 1903, by W. T. Gilbert and Anna A. Gilbert, his wife, of the State and county aforesaid, of the first part, and R. W. Gibson, of the State aforesaid and the county of New Hanover, of the second part, witnesseth: That said parties of the first part, and for the consideration of $600 to them paid by R. W. Gibson, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents bargain, sell, and convey to the said R. W. Gibson and his heirs, all oak, poplar, maple, spruce pine, and other timber, both standing and falling, of the dimensions of 10 inches or more in diameter at a distance of 12 inches from the ground, or which shall attain such size any time within the period of ten years (288) from the date of this instrument, except, however, all longleaf boxed timber, upon the following described lot or tract of land situate, lying, and being in the county and State aforesaid and described as follows: [Here follows description of land by metes and bounds, which is not in dispute.] Together with the perpetual right of way in, to, through, and over the above mentioned tract or parcel of land at any and all times during the term of twenty years, for men, teams, and vehicles, and the right to built, erect, construct, maintain, and operate railroads, tramways, and cartways upon and across the said land for the purpose of removing the above mentioned timber or any other timber now or to be hereafter purchased by the said parties of the second part upon any land or lands other than the above mentioned, with the full right to use

such small brush and timber as might be necessary to build, maintain, and operate the said railroads, tramways, and cartways, free of all charge."

It was admitted that defendant had cut and removed some of the timber after ten years and within twenty years from the date of the instrument.

The court being of opinion that under the deed in question, and as a matter of law, the defendant had twenty years from the date of the instrument within which to cut and remove the timber, excluded evidence offered by plaintiff tending to show what was a reasonable time to cut and remove the timber, and also evidence offered by way of aiding in the interpretation of this deed; that the understanding and agreement of the parties was that the timber should be cut and removed in the ten years, and, thereupon, plaintiffs submitted to a nonsuit and appealed.

In reference to this order of nonsuit, it appeared that there were two other actions pending on the docket involving the construction of this deed, and the course indicated was adopted with consent of all parties in the interest of time and in order to obtain the opinion of the Supreme Court, that the causes might be correctly tried, the question of alleged trespass, by reason of wrongful cutting of timber below the sizes specified and conveyed in the instrument, being reserved.

*E. K. Bryan and Cranmer & Davis for plaintiff.*

*C. Ed. Taylor for defendant.*

HOKE, J. It is the accepted rule of construction in this and other written contracts that the intent of the parties as embodied in the entire instrument should prevail and that each and every part shall be given effect if it can be done by fair and reasonable intendment, and that (289) in ascertaining this intent resort should be had, primarily, to the language they have employed, and where this language expresses plainly, clearly, and distinctly the meaning of the parties, it must be given effect by the courts, and other means of interpretation are not permissible. *McCallum v. McCallum, post,* 310; *Kearney v. Vann,* 154 N. C., 311; *Hendricks v. Furniture Co.,* 156 N. C., 569; *Bridgers v. Ormond,* 153 N. C., 114; *Davis v. Frazier,* 150 N. C., 447; *Walker v. Venters,* 148 N. C., 388.

Applying the principle, we think it clear that the ten-year limitation, stated in the first portion of the contract, is descriptive as to the size of the timber conveyed and specifying the time within which the measurement must be had: "of the dimensions of 10 inches or more in diameter at a distance of 12 inches from the ground, or which shall attain such size within the period of ten years from the date of the instrument." And the twenty-year limitation, in the latter portion, by correct interpretation, is as clearly designed and intended to fix the time within which the

timber sold must be cut and removed. True, the instrument here only uses the word "remove," but, considering the extent and purposes of the contract, the term, by clear intendment, includes the right to cut during said period by the usual and ordinary methods of lumbermen in that vicinity. It is the only interpretation which would allow to the term as used any reasonable significance, and is the construction approved with us in well considered cases on the subject. *Lumber Co. v. Smith,* 150 N. C., 253, followed in *Bateman v. Lumber Co.,* 154 N. C., 248, and other cases. This being the correct and clearly expressed import of the contract, his Honor was right in declining to hear testimony as to what would be a reasonable time within which to cut the timber. This question of reasonable time only arises when, as in *Hawkins' case,* the time to commence is left indefinite, "fifteen years from the time he commenced cutting," and it was held that the grantee was thereby required to commence within a reasonable time. But in the contract before us the term refers to the date of the instrument (*Hornthal v. Howcott,* 154 N. C., 228; *Warren v. Short,* 119 N. C., 39), and this being definite and certain, the evidence tending to establish a reasonable time was incompetent and properly excluded. And the court also made correct ruling as to the evidence offered to show that the parties to the agreement only intended to allow ten years in which to cut and remove the timber. This would be to contradict the written agreement of the parties by parol evidence, and is clearly contrary to authority. Speaking to such evidence, in *Walker v. Venters,* the *Chief Justice* said: "Such evidence is never admitted if the wording of the written contract is clear or if the evidence offered is in direct contradiction of the intrinsic meaning of the language of the contract."

While we approve his Honor's construction of the deed and (290) uphold his rulings excluding evidence tending to alter or contradict the same by parol, we must hold that, as we understand the record, the appeal has been prematurely taken. Unless otherwise provided by statute, an appeal only lies from a final judgment or one in its nature final, and, under our decisions, a nonsuit may not be taken to test an adverse ruling of a judge, leaving issuable matter presented and undetermined in the court below. In deference to the suggestion of his Honor that an authoritative construction of this deed is desirable, we have passed upon the questions presented, a course that is pursued in rare instances (*Milling Co. v. Finley,* 110 N. C., 411, and 110 N. C., 503), but, under our decisions we must hold, as stated, that the appeal is premature and adjudge that the same be dismissed. *Merrick v. Bedford,* 141 N. C., 505; *Hoss v. Palmer,* 150 N. C., 18.

Appeal dismissed.

WALKER, J., concurring: I concur in the result, as I do not think that the cases of *Lumber Co. v. Smith,* 150 N. C., 253, and *Bateman v. Lumber Co.,* 154 N. C., 248, as to the right to cut during the extended period, which is given for removal of the timber only, apply to this case. If I thought so, my concurrence would be turned into a dissent, for my opinion is that those cases were not correctly decided on that point, my reasons for so saying appearing from my dissenting opinion in the *Smith case.* I think the proper construction has been given to the deed in question here upon other grounds, which are not affected by those decisions, and that the final conclusion is sound.

*Cited: Finger v. Goode,* 169 N.C. 73 (1c); *Gard v. Mason,* 169 N.C. 508 (1c); *Makuen v. Elder,* 170 N.C. 511 (1c); *Powell v. Watkins,* 172 N.C. 247 (c); *Chemical Co. v. O'Brien,* 173 N.C. 621 (1c); *McKinney v. Patterson,* 174 N.C. 490 (3p); *Pugh v. Allen,* 179 N.C. 309 (1c); *In re Sermon's Land,* 182 N.C. 129 (c); *Grocery Co. v. Newman,* 184 N.C. 375 (c); *Corp. Com. v. Mfg. Co.,* 185 N.C. 23 (3c); *Corp. Com. v. Mfg. Co.,* 185 N.C. 24 (c); *Shields v. Harris,* 190 N.C. 525 (2d); *Newton v. Highway Com.,* 194 N.C. 305 (c); *Electric Supply Co. v. Burgess,* 223 N.C. 100 (1c).

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WALTER G. FEREBEE v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 11 November, 1914.)

**1. Evidence—Expert Witnesses—Cause and Effect of Injury.**

It is competent for a medical expert, during the examination of the plaintiff in his action to recover damages of the defendant for a personal injury alleged to have negligently been inflicted by it, to indicate the wound on the plaintiff's person, and testify from its character that it had apparently been produced "by some force coming from above, carrying the head and upper part of the spine forward," and state his reasons, when relevant to the inquiry, and other competent witnesses have testified as to the manner, place, and time the injury had been received.

**2. Evidence—Medical Experts—Qualification—Osteopaths.**

Where the trial court has found as a fact that one testifying as a medical expert has qualified himself to give the testimony sought of him, it is immaterial to what school of medical thought and practice the witness belongs, and an exception that the witness was an osteopath cannot be sustained.

**3. Measure of Damages—Personal Injury—Evidence—Wages—Prospective.**

The plaintiff in his action to recover damages for a personal injury against a railroad company testified to the amount of wages he had received as brakeman, as flagman, and at the time he was injured, and that

then he "had been in line for extra baggage for two or three months." *Held*, competent upon the measure of damages.

**4. Railroads—Master and Servant—Personal Injury—Actual Occupation.**

The plaintiff, while baggage-master of the defendant, was injured, and in his action to recover damages therefor it is held that it was immaterial to the inquiry whether he was in the baggage car at the time or not.

**5. Railroads—Printed Rules—Parol Evidence.**

A railroad company may not prove its printed rules by oral evidence of plaintiff on cross-examination.

**6. Court's Discretion—Examination of Witnesses.**

The manner of cross-examination of a witness is very largely a matter which must be left to the sound discretion of the trial judge, which will not be held for reversible error except when palpably abused.

**7. Evidence—Measure of Damages—Nervous Conditions.**

It is competent for witnesses who have qualified as medical experts and who had attended the plaintiff, to testify, when relevant to the measure of damages in an action for a personal injury, as to the effect on plaintiff's nervous system in amputating his arm; that they found the plaintiff "run-down and weak, with rather a troubled expression, indicating sorrow and suffering."

**8. Court's Discretion—Evidence—Witness—Repetition.**

In this case it is held that the refusal of the court to permit defendant's medical expert witness to further testify as to the incorrect methods employed by a medical expert witness who had testified in plaintiff's behalf, is not erroneous, it appearing it was a repetition by the witness of his testimony already given upon the trial.

**9. Evidence—Irrelevant Matter—Appeal and Error.**

The admission of irrelevant evidence, not prejudicial to the appellant, will not be held for error.

**10. Trials—Material Witnesses—Present at Trial—Matters in Excuse.**

It is competent to show that material witnesses had been subpœnaed by the other side, and were present at the trial, for the purpose of showing why the party had not himself subpœnaed them.

**11. Appeal and Error—Error as to One Issue—Trial—Damages—Evidence.**

Where on appeal of an action to recover damages for a personal injury no error is found as to the issues of negligence and contributory negligence, and the case is sent back for trial solely on the issue of damages, instructions bearing upon the first two issues, as, in this case, the conduct of the plaintiff on the witness stand, are properly refused.

**12. Trials—Instructions—"Large Damages"—Ability to Pay—Appeal and Error.**

In this case the modification of defendant's requested instructions, so as to make them read that the jury should not consider the ability of the defendant to pay "large damages," instead of "damages," if erroneous, is held as harmless error.

**13. Trials—Instructions—Interested Witnesses.**

A prayer for special instructions, that the expert witnesses testifying in plaintiff's behalf were inclined to view the circumstances in a favorable light for plaintiff, is objectionable as an expression of opinion by the court forbidden by statute.

**14. Same—Appeal and Error — Former Appeal — Courts — Improper Remarks.**

Upon the consideration to be given by the jury to the testimony of interested witnesses, *Herndon v. R. R.*, 162 N. C., is approved and the charge of the judge is recommended as the correct form; and in this case, sent back for a new trial by the Supreme Court, it is not held for error that the trial court correctly charged upon this phase of the controversy by following the directions laid down in the former appeal, and added that he did so because the Supreme Court had held that it must be done; "but after you have done so, and you shall conclude that the witness had told the truth, you will give the same weight to his evidence that you would to that of any other credible witness."

**15. Appeal and Error—New Trial on One Issue—Damages—Trials—Evidence.**

Where a new trial is awarded on appeal only on the issue of damages, the plaintiff is not confined on the second trial to the evidence on this issue he has introduced on the first one, but may show other matters tending to increase the amount.

**16. Appeal and Error—Objections and Exceptions—Trials—Contentions—Instructions.**

Appellant should call to the attention of the trial judge, at the time, an alleged erroneous statement to the jury of his contentions, to afford him an opportunity to correct it; for otherwise it will not be considered on appeal.

**17. Trials—Evidence Withdrawn—Instructions—Appeal and Error.**

When the trial judge instructs the jury that certain evidence introduced is withdrawn, and they shall not consider it in their deliberations, the admission of the evidence will not be held for error, and in this action for damages for a personal injury the plaintiff's expenses for nursing were properly allowed as an element of damages.

WALKER, J., concurs in result.

(292) APPEAL by defendant from *Cooke, J.*, at March Term, 1914, of WAKE, in an action for the recovery of damages for personal injuries.

*Douglass & Douglass for plaintiff.*
*R. N. Simms for defendant.*

(293) CLARK, C. J. This case was before us, 163 N. C., 351, when we directed a partial new trial, restricted to the single issue of

damages. The first and second exceptions, because the trial judge submitted no other issue, need not be considered.

The third and fourth exceptions are that Dr. Richardson, who had qualified as an expert, was permitted to testify, while the plaintiff was being examined and exhibited to the jury: "This place up here, (indicating) on the neck is the most serious injury of the two, and apparently has been produced by some force coming from a point above this place of injury, carrying the head and upper part of the spine forward. I state that for the reason that the neck here. . . ." The witness then proceeded to testify without objection: "My reason for stating that the conditions of this kind may be brought about for two causes: one of them is accidents or injuries in which force produces them, and the other is diseased conditions. Diseased conditions of the spine will frequently, and often do, produce deformities which resemble these in some particulars." (Page 23 of the record.)

It has always been held competent for experts to testify as to the character and extent, and to give their opinion as to the producing causes, of wounds, whether or not they were gunshot wounds or produced by sharp or blunt instruments, and to give their opinions generally as to the causes and effects of injuries. The doctor was not giving his opinion as to the manner in which the plaintiff received the injury or as to when or where it was received. Other witnesses testified as to those facts. The objection of the defendant that the doctor was an osteopath cannot be sustained. The court having found he was an expert, to what school of medical thought and practice the expert belonged is as irrelevant as to what church or political party he was affiliated with.

Exception 5, that the plaintiff testified as to his prospects of promotion, cannot be sustained. The witness said that when he was a brakeman he got from $40 to $48; when he was a flagman that he got $55 and $60, and when he was injured he was getting from $84 to $87 per month. In response to the question, "How long did you get as much as $80?" he replied: "I had been in line for the extra baggage two or three months." This meant, of course, that he had been extra baggage-master for that length of time. Besides, upon objection, the plaintiff withdrew the question, and to the inquiry, how long he had been drawing $80 per month, the witness replied, "Two or three months."

The sixth and seventh exceptions do not require discussion. The plaintiff was a baggage-master, but it has no bearing upon this injury to show that he was not in that car at the moment of the injury.

The eighth exception is based upon the ground that the court (294) did not permit the defendant to prove its printed rules by oral testimony of the plaintiff on cross-examination and is untenable.

The ninth exception is that the court permitted the plaintiff to ask the defendant's witness, Dr. Moore, "Do you want to leave the jury under the impression that the plaintiff is 'faking'?" The manner of the cross-examination is very largely a matter which must be left to the sound judgment and discretion of the learned and impartial trial judges, and this Court will not interfere except in case of palpable abuse or of injury done appellant, which does not appear to be the case in this instance. The witness was not treated with indignity, nor do we see that the defendant could be prejudiced by asking the witness if he intended to disparage the plaintiff.

Exception 10: Dr. Spillman, who had treated the plaintiff and testified as to the amputation of his arm, was permitted to state that, "in his opinion, the effect of the pain upon the general nervous system was that the patient gets nervous, can't sleep, and begins to go to pieces all over."

Exception 11: Dr. Graves was permitted to testify: "Upon examination, I found Mr. Ferebee rundown and weak, with a rather troubled expression, indicating both sorrow and suffering." These witnesses were medical practitioners, found to be experts by the court, and we cannot see that this evidence was in any way prejudicial to defendant.

Exception 12: Dr. R. L. Payne, who was admitted as an expert, testified that there were "improved methods in general use in the medical profession for the purpose of examining and demonstrating the sensations or lack of sensations in the patients," and he added that the method used by Dr. Glascock (also an expert witness) was not according to the improved method. The court refused to permit this witness to state whether or not a person could pass through such an examination as Dr. Glascock had exhibited and yet have sensation. We suppose that this exclusion was upon the ground that the witness had already testified fully and had virtually told the jury that the test made by Dr. Glascock had amounted to nothing, and a further pursuit of this subject was simply repetition calculated to give the jury no additional light upon the issue before them.

The statement of the witness, that he believed the defendant's witness, Sawyer, had feeling towards him, is the thirteenth exception. We cannot see that it was in any way prejudicial. At most, it was irrelevant.

The fourteenth exception was that the plaintiff testified that two nurses in the Norfolk hospital, who attended him after his injuries, were then in court under subpœna by the defendant. This was to show why
(295) the plaintiff had not subpœnaed them, and that the defendant, having had an opportunity, did not put them on the stand.

The fifteenth and sixteenth exceptions, for refusal to instruct the jury, as prayed, "to consider the conduct of the plaintiff at the time of his

injury," was properly refused, because on the former trial the jury had responded "No" to the third issue, "Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer?" To permit that injury to be again considered in this trial, in reduction of damages, would be to try again that question, when the sole issue submitted in the new trial granted by the Court was as to "the damages sustained by the plaintiff by reason of the negligence of the defendant." The jury having already found on the former trial that there had been no contributory negligence, and this having been affirmed by this Court on appeal, the jury could not consider again the matter of contributory negligence in reduction of the damages. The former verdict had established that the plaintiff had been injured by the negligence of the defendant, and that he had not contributed to that injury, and the sole issue submitted to the jury under the direction of this Court was, therefore, as to the amount of the damages.

The court modified the prayer, "The ability of the defendant to pay damages is a matter which cannot properly be considered by you in answering the issue," by inserting the word "large" before the word "damages." We do not think that this, if error, was substantial enough to warrant a new trial, which is the sole object of taking an exception. That was the seventeenth exception. Neither can we sustain the eighteenth, which was to the refusal of the court to instruct the jury that "The medical experts who testified for the plaintiffs were naturally inclined to view the circumstances that make for the plaintiff's side in a favorable light and contrary circumstances in an unfavorable light." This would have been to express an opinion upon the weight of the evidence.

The nineteenth cannot avail, for the instructions asked were substantially given.

The defendant requested the court to charge that the plaintiff, "as a party to this action, has an interest in the outcome of such a character that it is your duty to scrutinize his evidence with care and to give due consideration to the fact that he is interested." The court gave this, but added the following: "That is the extent of your consideration, and I do this because the Supreme Court has held that it must be done. But after you have done so, and you shall conclude that he told the truth, you will give the same weight to the evidence that you would to that of any other credible witness."

We cannot, in view of the previous decisions of this Court, say (296) that it was error in his Honor to make such addition to the prayer.

In *Herndon v. R. R.*, 162 N. C., 317, the matter is fully discussed and many of the previous rulings of this Court cited in the opinion of the Court and in the dissenting opinion in that case.

In that case *Judge Justice* charged the jury, upon the weight to be given to the testimony of parties and witnesses, as follows:

"Weigh all this evidence, gentlemen, in every way; and in weighing it you have a right to take into consideration the interest that the parties have in the result of your verdict, the conduct of the witnesses upon the stand and their demeanor; the interest that they may have shown, or bias, upon the stand, if any; the means they have of knowing that to which they testify; their character and reputation, in weighing this testimony, so as to arrive at the truth of what this matter is."

In order to settle this matter for the future, we commend to the judges of the Superior Court this charge as a full and clear statement of duty of jurors in passing upon the evidence of parties when they are witnesses. We think that nothing more need be added to it. It is all that is necessary.

As to the twenty-first exception, the court properly told the jury, "At a former term of this court the issues as to negligence and contributory negligence were settled entirely. This issue was also settled at that trial; but this question we have up now has been sent back by the Supreme Court for a new trial, and that is the issue as to the quantity of the damages."

Exceptions 22 and 23 are to paragraphs of the charge which we do not find objectionable.

Exception 24 is because the court charged the jury, "While the first two issues settled the question of negligence and contributory negligence, and entitled the plainitff to recover, when they come to introduce evidence as to the damages, they are not confined to the same damages, specific evidence of damages, as they were before." That is, that on a new trial as to damages the plaintiff is not restricted to the same evidence which he used on the former trial. This is correct. Nor was there any error in exception 25, because the court told the jury that "The plaintiff alleged and offered evidence that he is damaged in several respects besides his disability to labor," nor in exception 26, because the jury were instructed that they could not give any consideration to the issues of negligence and contributory negligence, because those two issues had been settled in the former trial.

Exception 27 is to a statement of a contention of the plaintiff, and no exception was made to it during the progress of the trial. If the statement that the plaintiff so contended was erroneous, the defendant
(297) should have called it to the attention of the court for correction at the time (*Jeffress v. R. R.*, 158 N. C., 215), for it was not as to a matter of law, but as to a statement of fact, which the judge should have been given opportunity to correct at the time.

Exception 28 presents exactly the same proposition, of an alleged error in stating a contention of the plaintiff.

Exception 29 is because the judge included in his charge as elements of damages "nursing" and "loss of mental powers." As to the nursing, the judge restricted the allowance for cash paid out for medical and nursing bills to $250, when the plaintiff testified that he had actually paid out between $250 and $275 for medical assistance and medicines. As to the "loss of mental powers," the judge was requested to withdraw that from the consideration of the jury as an element of damages, and the court told the jury, "That is withdrawn. You will not consider it in your deliberations."

The other exceptions were to the refusal to set aside the verdict; refusal to grant a new trial; refusal to set aside the verdict as being excessive; to the refusal of a judgment *non obstante veredicto,* and to the judgment as entered. All of these are merely formal, and are based upon the exceptions already discussed.

No error.

WALKER, J., concurring in result: The judge should have given the instruction requested by the defendant in regard to the interest of the plaintiff as a witness, without adding the qualifying clause, and without any reference to the correctness of the proposition as decided by this Court. The prayer was this: "As a party to this action, he has an interest in the outcome of such a character that it is your duty to scrutinize his evidence with care and to give due consideration to the fact that he is interested." The court gave this instruction, but added the following: "That is the extent of your consideration, and I do this because the Supreme Court has held that it must be done. But after you have done so, and you shall conclude that he told the truth, you will give the same weight to the evidence that you would to that of any other credible witness." The qualification of the instruction, as prayed for by the plaintiff, was the subject of defendant's twentieth exception. This question was considered in *Herndon v. R. R.,* 162 N. C., 317; *S. v. Vann,* 162 N. C., 534, cited and approved in *Herndon's case,* and in the case of *In re Smith's Will,* 163 N. C., 464. The Court decided in the *Herndon case* (by *Justice Brown*), quoting from and approving what is said in 30 A. and E. Enc. of Law, at p. 1094, that while the testimony of a party in interest, as that of any other witness, must be submitted to the jury, the interest is a matter to be considered by the jury in weighing the testimony and determining what force it shall have. It is very (298) generally held proper to instruct the jury that they may take into consideration the interest of a party or other witness in determining the credibility of his testimony, and according to the weight of authority the court may instruct the jury that they should consider such interest. Instructions of this character are not objectionable as charging the jury

with respect to matters of evidence, and the refusal of such instruction is error, and the error is not cured by a general instruction that the jury are the judges of the credibility of the witnesses and the weight to be given to the testimony of each, nor by an instruction that the jury are to use their common sense and experience in regard to the credibility of witnesses, citing also, for the same proposition, 38 Cyc., 1729. There was a dissenting opinion in *Herndon's case,* based upon the distinct ground that the judge should not charge the jury "that because of interest they should carefully scrutinize the evidence of the defendant," without adding that, "if the jury believe the evidence, it should have the same weight as if the witness was not interested." This was the point of plaintiff's exception in this case, that without this addition or qualification, the bare instruction that they should consider the interest of the witness in the event of the action, and give it such weight as they may think it should have, in passing upon his credibility, was indirectly an expression of opinion prejudicial to the witness, and therefore error. But the majority of the Court did not take this view, and, on the contrary, held that no such modification was necessary, or should be made, and no expression of opinion could be fairly inferred by the jury from the language used. The *Chief Justice,* dissenting from this decision, relied upon *S. v. Holloway,* 117 N. C., 732; *S. v. McDowell,* 129 N. C., 532, and other cases of a like kind. It may be admitted that there is some authority for the present contention of the appellee, that such a qualification of the general instruction is proper, but it has so recently been rejected, in explicit terms, as misleading, even if in itself sensible, that we prefer to stand by the ancient rule, which was adopted and enforced by this Court for so many years, even down to a very recent date. In *S. v. Vann,* 162 N. C., at p. 541, we expressly approved what was said in *S. v. Byers,* 100 N. C., 512, for a unanimous Court, by *Justice Ashe,* who always stated a legal principle with great accuracy and proper limitation, as follows, in regard to such testimony: "It was their duty to scrutinize the testimony (of certain witnesses) carefully, because of their interest in the result; but, notwithstanding such interest, they might believe all they had said or only a part of it, or none of it, according to the conviction produced upon their minds of its truthfulness." And there he stopped, as did the judge below in giving the charge to the jury in that case. He cited with
(299) approval the following cases: *S. v. Nash,* 30 N. C., 35; *S. v. Nat,* 51 N. C., 114; *Flynt v. Bodenhamer,* 80 N. C., 205; *S. v. Hardee,* 83 N. C., 619; *Ferrall v. Broadway,* 95 N. C., 551, and these are not all that he might have cited to sustain the ruling as to what is the proper instruction in the circumstances.

In *S. v. Nash, supra,* this Court sustained this as a correct instruction: "The law regards with suspicion the testimony of near relations when

testifying for each other, and it is the province of the jury to consider and decide on the weight due the testimony." And so, in *S. v. Nat, supra,* this one: "When near relations depose for near relations, their testimony is to be received, and ought to be received, with many grains of allowance." In *Hardee's case, supra,* it was held that the nature of the particular caution to be given by the judge to prevent an improper use of testimony, likely to be biased, and an excessive confidence in it, must be left largely to the sound discretion of the court, no special form being required, but only such general guidance as will enable the jury to understand clearly how they may consider it, the matter being at last one upon which they must exercise their good judgment and their common sense, as to the weight that should be given to the circumstance of interest or to any other fact calculated to produce bias, and they should be freed from any arbitrary rule which would require the witness to be put upon a perfect equality with other witnesses, who, apart from any consideration of bias at all, may have more intelligence, knowledge, and character than the witness in question, and who, in other respects, have had better opportunity for information as to the matter under investigation. If the jury conclude that a party or an interested person, who testifies in the cause, has divested himself of all prejudice or leaning toward his own side, and has honestly endeavored to tell the truth, they should not stop there, but find whether he is entitled, in other respects, to their favorable consideration, by himself or in comparison with other witnesses; and yet the court instructed the jury in this case, "After you (they) have done so" (that is, found that he is honest and truthful and had no bias), "you (they) *will* give the same weight to the evidence that you (they) would to that of any other credible witness"—which means, because it so says, that he should stand upon the same base with them, when there may be many other considerations which tend to impeach his character or to weaken his testimony. If the court meant that, if in giving his testimony the witness was not influenced by his interest in the cause he is entitled to be classed as a disinterested person in weighing his testimony, the charge would have been unobjectionable, as that is a self-evident proposition, and the jury would be likely to understand it and act accordingly, without any special advice from the court; but that is not what was said, and by the qualification to the requested instruction, the witness was presented in a better attitude than he should, perhaps, (300) have occupied before the jury. The credit due to a witness is not determined alone by his interest, or lack of personal interest, in the cause, as a party or otherwise, but his intelligence, demeanor on the stand, character, and so forth, must be placed in the balance when weighing his testimony. This idea is well expressed by *Judge Pearson* in *S. v. Williams,* 47 N. C., 257. The learned judge in that case was referring to the

rule, *falsum in uno, falsum in omnibus,* and repudiating it as an unsafe one, because no fixed rule can be formulated for gauging the jury's belief in the credibility of a witness. They may consider even one false statement he may have made during the trial as bearing upon it, but not as necessarily controlling and requiring them to disregard all of his testimony. *S. v. Hardee,* 83 N. C., at 622. The remarks of *Judge Pearson* in the *Williams case* are very pertinent here. He said: "The charge of the judge directs the attention of the jury to the question to be decided; his control over the *admissibility of evidence* excludes all that is incompetent, and the jury are relied on to find the truth. It is the exclusive province of the jury to decide issues of fact, and to pass upon the credit of witnesses; when the credit of a witness is to be passed on, each juror is called on to say whether he believes him or not; this belief is personal, individual, and depends upon an infinite variety of circumstances; any attempt to regulate or control it, by a fixed rule, is impracticable, worse than useless, inconsistent and repugnant to the nature of a trial by jury, and calculated to take from it its chief excellence, on account of which it is preferred by the common law to any other mode of trial, and to adopt in its place the chief objection to a fixed tribunal. 'Do I believe what that witness has sworn to?' is a question for each juror. The statement may be more or less probable, and in accordance with the way in which men act and things occur. It may be more or less corroborated by the testimony of other witnesses and the attendant circumstances. The manner of the witness, even his looks, may impress my mind more or less favorably, and this is the reason every witness is required, by the common law, to be examined in the presence of the jury. Is it practicable to frame a general rule by which my belief must be regulated?" And I ask the same question in this case. Commenting upon this passage, taken from the opinion of *Judge Pearson* in the *Williams case, Chief Justice Smith* said, in *Farrall v. Broadway,* 95 N. C., at p. 559: "The charge is not corrected, and its objectionable features removed, by the reference to the second instruction to which it is subjected; for while the latter is appropriate and proper, its efficacy is neutralized by the part of the instruction, to which we have adverted, preceding it. If cautionary words had been used in calling the attention of the jury to the
(301) possible consequence of a verdict declaring the illegitimacy of the plaintiffs, to induce a careful scrutiny of the evidence, it might not have overstepped the limits of judicial right, as in regard to the testimony of an accomplice (*S. v. Hardin,* 19 N. C., 407); or the discredit attaching to the testimony of near relations (*S. v. Nash,* 30 N. C., 35); or to that of fellow-servants (*S. v. Nat,* 53 N. C., 114); or the detection of a witness in a false statement upon his sworn examination (*S. v. Smith,* 53 N. C., 132); but these matters of discredit are for the jury

to weigh and consider, and are not rules of law to control the jury. *S. v. Noblett,* 47 N. C., 418; *Wiseman v. Cornish,* 53 N. C., 218; *Flynt v. Bodenhamer,* 80 N. C., 205." Numerous other authorities could be cited to the same effect, which strongly support the view herein taken.

This question has undergone discussion very recently in the case of *In re Smith,* 163 N. C., 464. It is true, counsel there insisted that, in directing the jury how to pass upon the testimony of interested witnesses, it was not sufficient for the judge, as was done in that case, to charge merely that the jury might consider any bias they may have had (if any at all) by reason of their relation to the parties in the cause, but that he should have added that if the jury found that they were not influenced thereby they should have the same credit as any other witness, as was said in *S. v. Holloway,* 117 N. C., 732; and that with reference to this suggestion as to the addition, we stated that no such special instruction was asked, and therefore the point was not directly raised. But the Court, after stating preliminarily that the instruction should not have been so qualified if the special request had been made, observed substantially that if the jury had decided that the witnesses were not biased by their interest or relationship, they should not necessarily have received the credit due to other witnesses, and put upon an equality with them, as the credit to which they were entitled depended, not upon their bias or indifference alone, but upon other circumstances as well—as, for example, their intelligence and their appearance and deportment while on the stand; their character, whether good or bad; their means of knowledge; the probability of their story—these and other matters entered into the estimate of the value to be attached to the testimony of the witnesses, and the jury had the right to put them in the scales, in weighing the testimony, for the purpose of separating the true from the false and finally ascertaining where was the preponderance of the evidence. It may be proper for a judge to tell the jury "that if the witness is not biased by his interests, his testimony should have the same weight as if he was not interested," as said in some of the cases, for this is a truism, and a sensible jury would not overlook it. It is a proposition that proves itself; but it does not mean that the witness shall occupy a position of equality with another who has a better character, more sense (302) and knowledge of the facts, a stronger memory, superior judgment, and whose other qualities and advantages inspire the jury with greater confidence in his credibility. Speaking of the rule of the common law, whereby parties to and persons interested in the event of an action were disqualified, this Court said in *Hill v. Sprinkle,* 76 N. C., 353: "For generations past, and up to the last few years, interest in the event of the action, however small, excluded a party altogether as a witness, and that upon the ground, not that he may not sometimes speak the truth,

but because it would not ordinarily be safe to rely on his testimony. This rule is still applauded by great judges as a rule founded in good sense and sound policy. The parties to the action are now competent witnesses, but the reasons which once excluded them still exist, to go only to their credibility." We think that this change in the law of evidence was a wise and salutary one; but it did not abolish the other rules of evidence, and the jury should not be handicapped by an imperative instruction that, in the absence of bias of some who are interested, they should give credit to all the witnesses equally, as those who have had no interest may, in other respects and apart from any consideration of bias or impartiality, be more reliable. It is undoubtedly true that interest naturally produces bias, for we have been told that, "If self the wavering balance shake, it's rarely right adjusted"; but notwithstanding this tendency of his nature, and his frailty, the witness may resist the temptation which thus besets him and prove himself to be worthy of credit. *Smith v. Moore,* 142 N. C., 277. If he is not in fact prejudiced by his relation to the cause or the parties, the jury may then consider whether there are other circumstances which impair the strength of his testimony, such as want of intelligence, character, knowledge of the facts, and so forth. The subject has so recently been fully discussed in this Court that further comment is unnecessary. *Herndon v. R. R.,* 162 N. C., 317. See, also, *S. v. Vann,* 162 N. C., 534, which, while not so authoritative as it would have been had the question been directly presented for decision, is nevertheless worthy of serious consideration, as in itself correct, and especially as being fully in line with the cases which have been decided here and elsewhere for nearly a century.

Referring again to Judge Pearson's clear and vigorous statement of the law, as applicable to such cases, we cannot safely or wisely bind the jury by any "hard and fast rule," but should leave them at full liberty to judge of a witness's credibility in view of all the surrounding circumstances, his interest and probable bias being among them.

Let the jury consider the interest of the witness—as they are very apt to do, whether they are so instructed or not—and give it such weight, or no weight, as in their judgment it should have. This is the safest (303) and best rule, to leave the matter as much at large as possible, trusting to the intelligence and honesty of the jury to so balance the facts as to give to the witness, whose interest is involved, his due proportion of credit or discredit. This view was entertained by the Court also in *Herndon v. R. R., supra,* where, through *Justice Brown,* who wrote the opinion, it approved this charge given below: "His Honor, after charging fully, fairly, and correctly on each issue, concluded his charge with these words, to which plaintiff excepts, towit: 'Weigh all of this evidence, gentlemen, in every way, and in weighing it you have a right

to take into consideration the interest that the parties have in the result of your verdict, the conduct of the witnesses upon the stand and their demeanor, the interest that they may have shown, or bias, upon the stand, the means they have of knowing that to which they testify, their character and reputation, in weighing this testimony, so as to arrive at the truth of what this matter is. Take the case, gentlemen.' " In this connection it may be said that the rule to be found in 30 A. and E. Enc. of Law, 1094, and 38 Cyc., 1729, and stated above, was adopted in that case as the true one and as sustaining the charge, without any addition or qualification whatsoever. Though there was a dissent in *Herndon v. R. R., supra,* there was none in the case of *In re Smith's will, supra,* where the question was more sharply and formally stated, and discussed with full reference to the authorities.

For these reasons I would dissent from the judgment of this Court and the opinion, as I think the judge came dangerously near to the expression of his personal opinion upon the weight of testimony in his reference to what had been decided by this Court, and also that he laid down an erroneous rule in regard to interested witnesses, refusing the simple and correct instruction, as requested by defendant's counsel. As said in 38 Cyc., p. 1772: "It is improper for a judge to weaken the force of a proper instruction by sarcastic comment (or any expression of his opposition to the settled principle), so as to leave the jury in doubt whether the instruction was given or refused, or by intimating that, although the instructions given in behalf of a party are correct, they present a loose and inadequate presentation of the law applicable to the case, or to intimate that his personal opinion is otherwise than the law he charges." But after a most careful review of the entire record, I am convinced that the error worked no substantial disadvantage to the defendant, and that, all things considered, the case has been fairly and correctly decided upon its real merits, and the error, therefore, is not sufficient for a reversal. The Court, at a former term, had passed upon the questions of negligence which are involved, unfavorably to the defendant (163 N. C., 351), and another trial may be still worse for it, as the damages have been increased, so far, in "arithmetical progression," and practical wisdom dictates that it is better to halt here than to risk a steady and (304) "harmonic progression" hereafter. I therefore concur in the result.

As the opinion of the Court is *now* worded, I hardly know what the law has been declared to be. Is is very certain that *Herndon v. R. R.,* 162 N. C., 317, decides, by the clearest implication, that the addition to the prayer in this case was error. The entire instruction, as given, falls under the condemnation of *Hill v. Sprinkle,* 76 N. C., 353, cited and quoted from at length in *Herndon v. R. R., supra,* which says: "At all events, the charge is not such a clear and distinct enunciation of an

important principle or fact as could leave any reasonable doubt of its meaning in the minds of the jury. The prayer was distinct, and the response should have been equally so." This is an important question, and should be decided finally, one way or the other, for the charge is either erroneous in law or not so, and the question should not be left open in the way of a mere suggestion to the judges. The addendum is clearly harmful, if it is not correct, as it gives the interested witness a credit to which he is not entitled, by ranking him with those who are disinterested and are better qualified, in every way, to testify as to the facts.

*Cited: McManus v. R. R.*, 174 N.C. 737 (1c); *S. v. Love*, 187 N.C. 39 (16j); *Shaw v. Handle Co.*, 188 N.C. 233 (1c); *Godfrey v. Power Co.*, 190 N.C. 32 (1c); *S. v. Steele*, 190 N.C. 510 (16c); *Butler v. Fertilizer Works*, 195 N.C. 412 (1c); *S. v. Fox*, 197 N.C. 486 (1c); *Keith v. Gregg*, 210 N.C. 807 (1c); *Munden v. Ins. Co.*, 213 N.C. 507 (17c); *George v. R. R.*, 215 N.C. 774 (1c); *Hester v. Motor Lines*, 219 N.C. 746 (1c); *Patrick v. Treadwell*, 222 N.C. 5 (1c); *S. v. Mullis*, 233 N.C. 544 (11p).

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E. E. BAIN v. ALIDA LAMB.

(Filed 18 November, 1914.)

**1. Liens—Contracts—Material Men—Trials—Materials Used in Buildings—Evidence—Specific Notice—Waiver—Statutes.**

Where a material man brings suit against the owner of a dwelling for the price of material furnished during its construction to the contractor, and has given notice to the owner by letter of the amount claimed to be due him by the contractor, an acknowledgment by the owner, in reply, that he will reserve the bill for settlement, affords evidence in an action to collect the amount claimed to be due under the provisions of the Revisal, sec. 2020, that the materials had entered into the construction of the defendant's house; and also of a waiver in the nature of an admission of the defendant's right, if it existed, to demand greater particularity in the statement of the plaintiff's claim.

**2. Liens—Contracts—Material Men—Trials—Amount Due—Instructions—Appeal and Error—Harmless Error.**

In an action by the material man against the owner of a dwelling to recover the amount due him by the contractor for materials furnished and used in the construction of the building under Revisal, sec. 2020, and there is conflicting evidence as to the amount due by the owner to the contractor on his contract at the time of receiving the statutory notice, it is erroneous for the trial judge to charge the jury upon the question of plaintiff's recovery, without laying down any rule for ascertaining the

amount due on the contract, or furnishing a guide for them in reaching their conclusion upon the alternative propositions contained in the instruction; but when, taking the charge as a whole, it may be seen that instructions on this point were correctly given, and the jury understood them, an incorrect instruction appearing in a part of the charge will not be held for reversible error.

**3. Liens—Contracts—Material Men—Amount Due Contractor—Trials—Instructions—Measure of Damages.**

In an action by the material man against the owner of a dwelling to recover the price of material furnished by him to the contractor and used in the building (Revisal, sec. 2020), and the evidence discloses that the contractor has abandoned his contract and it is conflicting as to the amount the owner is due the contractor under the contract, the rule for the ascertainment of what amount, if any, is due to the contractor is the contract price, less the amount paid to him, and the reasonable cost of completing the building; and if the amount thus due exceeds the claim of the plaintiff, and the materials furnished were used in the house, he should recover the amount of his claim; and if less, he can only recover the amount due the contractor.

APPEAL by defendant from *Devin, J.*, at September Term, 1914, (305) of GUILFORD.

This is an action to recover of the defendant the sum of $770.31, the plaintiff alleging that he furnished material that went into her building; that he had given her notice thereof and it was her duty to retain this amount from the amount owing to the contractor at the time. The prayer in the complaint asked for a lien, but this was abandoned on trial.

The defendant entered into a contract with one R. B. Waddell in which the said Waddell agreed to erect and complete a nine-room dwelling-house at Whitsett, N. C., for the defendant, and the defendant agreed to pay therefor the sum of $2,100, Waddell agreeing to furnish the material and labor necessary for the erection and completion of said building. The plaintiff during July, 1909, contracted with Waddell to furnish the material for the house of the defendant, and the same was furnished by the plaintiff, beginning 28 July, 1909, and ending 9 August, 1909. The contract price and the value of the lumber furnished by the plaintiff as aforesaid was $770.31. The plaintiff notified the defendant in writing on 1 November, 1909, that he had furnished certain lumber and material for a dwelling-house in consequence of a contract with her contractor, Waddell. The notification was through the mail in the form of a letter addressed at Whitsett. The letter appears in the record. Shortly after the date of the letter, some time in December or January threafter, the plaintiff went to see the defendant and had a conversation with her in regard to the lumber and materials furnished for her house. The plaintiff testified that the defendant promised (306)

to pay him for such material. On 9 November, 1909, the defendant wrote the plaintiff the following letter, towit:

WHITSETT, N. C., November 9, 1909.

MR. BAIN:

You will please excuse me. I do not know all or much about law, and will reserve your bill for settlement, all right.

Yours truly, A. I. LAMB.

The defendant has paid the contractor, Waddell, $1,100 on the contract price, leaving a balance due in her hands of $1,000, less reasonable allowance for finishing up the house, which was left unfinished by the contractor, Waddell. Waddell failed to complete the building, and abandoned the contract in September, 1909, before the plaintiff notified the defendant of his claim.

The plaintiff offered evidence tending to prove that the house was near completion at the time of the abandonment of the contract by Waddell, and that the reasonable cost of completing it according to the contract would not have exceeded $200.

The defendant offered evidence tending to prove that the house was not worth more than $1,100 at the time the contract was abandoned, and that the reasonable cost of completing it would exceed $200.

The defendant denied promising to pay the amount due the plaintiff.

There was no evidence contradicting the evidence of the plaintiff that the lumber furnished by him was reasonably worth $770.31.

The correspondence in reference to the claim of the plaintiff was as follows:

GREENSBORO, N. C., November 1, 1909.

MRS. ALIDA LAMB, *Whitsett, N. C.*

DEAR MADAM:—We have furnished Mr. R. B. Waddell lumber and material to the amount of $770.31 for your house, of which amount nothing has been paid. Please retain this amount before settlement with Mr. Waddell and advise me by return mail if you are due Mr. Waddell the amount above stated, as our account has been standing some time and must insist on an early settlement. Your early reply will oblige.

Very truly, E. E. BAIN.

WHITSETT, N. C., November 2, 1909.

MR. BAIN:

DEAR SIR:—I think there is about the amount of your bill still due, if the house is ever finished. I have several bills ahead of yours, but think about that amount still due when complete.

Very truly, A. I. LAMB.

WHITSETT, N. C., November 9, 1909. (307)

MR. BAIN:

You will please excuse me. I do not know all or much about law, and will reserve your bill for settlement, all right.

Yours truly, A. I. LAMB.

The defendant moved for judgment of nonsuit and excepted to certain parts of the charge upon the following grounds:

(1) That the plaintiff failed to furnish an itemized statement of the material furnished.

(2) That there was no evidence that the material furnished was used in building the house of the defendant.

(3) That there was no evidence that there was any amount due the contractor by the defendant at the time she received notice of the plaintiff's claim.

The motion was overruled and defendant excepted.

His Honor, among other things, charged the jury as follows:

(1) "But if, by the preponderance of the evidence, he has satisfied you that he furnished the lumber and delivered the material for defendant's house, and that said material was so used, and that after notice to the defendant of the plaintiff's account for the same, that the defendant then owed or had in her hands for the contractor more than enough to satisfy the plaintiff's account, and has failed to do so, if you so find by the greater weight of evidence, it will be your duty to answer the issue $770.16 or such amount as you find the account amounted to, or such amount as you find she had in her hands at that time due the contractor." Defendant excepted.

(2) "If you find the facts to be, and are satisfied from this evidence and by its greater weight that the plaintiff is entitled to receive $770, you may, if you see fit, add interest thereon from the time this account was due and owing by the defendant." Defendant excepted.

(3) "The burden of proof is upon the plaintiff to make out his case by the greater weight of the evidence. If you are satisfied he has done so, you will answer the issue such amount as you find was in her hands, due the contractor, at the time the notice was given." Defendant excepted.

The jury returned the following verdict:

Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: $681.

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

*Stern & Swift, Brooks, Sapp & Williams for plaintiff.*

*Thomas H. Hoyle and G. S. Bradshaw for defendant.*

(308) ALLEN, J. The exception to the refusal to nonsuit the plaintiff cannot be sustained.

This action is not for the purpose of enforcing a lien, but to collect an amount for material furnished, alleged to be due by reason of the statutory duty imposed on the defendant to retain such amount from the balance due the contractor, upon compliance with the statute (Rev., sec. 2020) by the plaintiff.

The letter of the plaintiff to the defendant of date 1 November, 1909, gave full notice of the amount claimed to be due, and if the defendant would otherwise have been entitled to greater particularity in the statement of the claim, her letters of 2 November, 1909, and of 9 November, 1909, in the last of which she writes that she will reserve the plaintiff's bill "for settlement," are a clear waiver of the right.

The reasonable inference from the letters is that the defendant admits the correctness of the claim of the plaintiff against the contractor, and that she agreed, after completing the house, to pay it out of any balance due, and she ought not, therefore, to be permitted to say now that she ought to have had more specific information, and particularly when the record does not disclose that there is a real controversy as to the amount and value of the material furnished.

The letters also furnish evidence, in the nature of an admission, that the material was used in building the house of the defendant, as otherwise there would be no reason for promising to reserve the amount of the claim out of the balance due the contractor, and the evidence of the plaintiff tending to prove that the reasonable cost of completing the house would be about $200, which when added to the amount paid the contractor before notice of the plaintiff's claim ($1,100) and the total deducted from the contract price of $2,100, would leave a balance due on the contract of $800.

We therefore conclude that the defendant has waived the right to demand a more particular statement of the claim of the plaintiff, that there is evidence that the material furnished was used in the house of the defendant, and that there is some evidence that there was something due on the contract price.

The first part of the charge excepted to, standing alone, would be objectionable, because it lays down no rule for ascertaining the amount due on the contract, and furnished no guide for reaching a conclusion upon the alternative propositions contained in the instruction; but it would not be fair to the judge nor to the parties, and not in accordance with law, to so consider it. We must take the charge as a whole, and when this is done we find that the contention of the defendant was fully presented, and that the jury could not have failed to understand that the amount due the contractor was the contract price, less the amount paid,

added to the reasonable cost of completing the house, and that if (309) this exceeded the claim of the plaintiff, and the materials furnished were used in the house, he should recover the amount of his claim; and if less, that he could only recover the amount due the contractor.

This is the correct rule (27 Cyc., 102; *Supply Co. v. Eastern Star Home,* 163 N. C., 513), and when read in connection with the part of the charge excepted to, leaves it free from criticism.

It is also manifest from the verdict that the jury applied this rule and that they allowed the defendant every item of expense she testified to, and in addition about $40, presumably for defects in shingles and inferior workmanship which she described, but to which she affixed no value.

The verdict of the jury is for $681 and the uncontradicted evidence is that the material furnished by the plaintiff was worth $770.31.

The verdict does not, therefore, represent the value of the material, and must be the amount due on the contract by the defendant. How was this ascertained?

The contract price was $2,100, on which had been paid $1,100, leaving a balance due of $1,000.

The defendant testified that in order to complete the house she paid $36.50 for lumber, $6.50 for ceiling, $30 for mantels, $5 to have leaks repaired and for work on the flue, and that the labor for putting on ceiling was worth $4, and the cost of painting was $200, making a total of $282.

She also testified the shingles were defective, but did not state the amount of the damage by reason thereof, and if $37 be allowed for this defect, and this is added to the other items of $282, making a total of $319, and this total is deducted from the sum of $1,000 remaining due on the contract, we have $681, the balance due by the defendant after allowing her all she paid the contractor and every item of expense she testified to, and this is the verdict.

The defendant has been in possession of the house five years and was in position at the trial to give accurate information to the jury of expenses incurred and of defects in material and workmanship.

The jury allowed no interest, and we find no error in the other parts of the charge excepted to.

No error.

*Cited: Plyer v. R. R.*, 185 N.C. 362 (2c); *Hardware House v. Percival*, 203 N.C. 7 (1d).

(310)

BROWN McCALLUM v. W. D. McCALLUM.

(Filed 5 November, 1914.)

**1. Wills—Interpretation—Intent.**

While the intent of the testator as contained in the entire instrument is the object to be sought in construing a will, this intent must be gathered primarily from the language used by him, and when he has explained such intent in language that is clear, definite, and plain of meaning, this must be given effect by the courts, and other means of interpretation are not permissible.

**2. Wills—Presumptions of Testacy—Interpretation—Intent—Intestacy.**

The presumption that a testator did not intend to die intestate as to any of his property does not obtain when a different intent appears from the language used by him in his will; and it is *Held*, that a devise of land for life to the testator's widow and to his daughters remaining unmarried, without further direction or limitation, expresses the testator's intent to provide the daughters a home so long as they remain single, and at their death unmarried and the death of the widow the lands will descend to his heirs at law.

APPEAL by defendant from *Cooke, J.*, at July Term, 1914, of ROBESON.

Proceedings for partition of 240 acres of land in said county, the home place of John McCallum, deceased, heard on transfer from the clerk and on case agreed.

It appeared that John McCallum died in said county in 1863, leaving him surviving a widow, Lovedy, five unmarried daughters and other sons and daughters, some of whom have since died, leaving children; that said John McCallum, in the second clause of his last will and testament, made disposition of this 240 acres, the land in question, as follows:

"2d. I give and bequeath to my beloved wife, Lovedy, the tract of land on which I reside, containing 240 acres, more or less, to have and to hold to her, the said Lovedy, for and during the term of her natural life. My will and desire is that the above mentioned 240 acres of land after the death of my wife Lovedy shall go to the use and possession of all my daughters who are then single or have never been married, to be theirs during the term of their natural life; but if any of the said daughters, namely, those who are single or have never been married, should marry, the one or ones so marrying shall have no interest or claim to or in said land; in other words, my daughters who never marry are to have the use and possession of the above 240 acres of land of my wife, Lovedy, after her (Lovedy's) death, during their (my single daughters') natural life."

That the will disposed of other property, chiefly slaves, to the widow and all his children; that there was no residuary clause in the will and no reference made to this piece of land other than appears in the item

quoted; that the widow and unmarried daughters have since died, and Brown McCallum by devise and inheritance has acquired all (311) the interests in the property except that claimed by defendants; and it is further agreed that if John McCallum died intestate as to the remainder in the land, after the life estate to his widow and daughters, plaintiff is entitled to nine-tenths of the property; and if otherwise, plaintiff is entitled to six-sevenths; the defendants as a class owning the other interests.

The court being of opinion that there was intestacy as to such remainder, gave judgment for plaintiff, and defendants excepted and appealed.

*McIntyre, Lawrence & Proctor for plaintiff.*
*Lennon & Stacy for defendant.*

HOKE, J., after stating the case: It is urged for defendants that inasmuch as the will of John McCallum, in express terms, confers a life estate in the property on the unmarried daughters, this by correct inference should exclude them from any and all participation in the remainder, and that the second item of the will amounts in effect to devise of this remainder to his other children; but in our opinion such an interpretation is not permissible.

It is true, as shown in the authorities cited by the learned counsel, among others, *Austin v. Austin,* 160 N. C., 367, that when a man has made a will, the presumption is that he thereby intended to dispose of his entire property, and that the instrument must be construed in reference to that presumption; but the position is recognized only when the language and meaning of the will is sufficiently indefinite as to permit of construction, and is not allowed to prevail when, from the language used, the meaning is clear and explicit.

In wills, as in the case of deeds and statutes, we must, in the first instance, refer to the language employed, and if this is "free from ambiguity and doubt and expresses plainly, clearly, and distinctly the sense" of the testator (*Allen, J.,* in *Kearney v. Vann,* 154 N. C., 311), there is then no room for construction, and the courts must give effect to the will of the testator as he has seen proper to express it.

The principle was applied in the case of deeds in *Campbell v. Cronly,* 150 N. C., 469; *Wilkins v. Norman,* 139 N. C., 42, and has been frequently stated with approval in cases involving the interpretation of wills. *Whitehead v. Thompson,* 79 N. C., 450; *Foil v. Newsome,* 138 N. C., 115; *Sain v. Baker,* 128 N. C., 256; *Alexander v. Alexander,* 41 N. C., 231. In this last case, speaking to the argument made in behalf of the claimants, "that the testator evidently did not intend to die intestate as to any of his property," *Nash, J.,* delivering the opinion, said:

"This may be so, and very likely was, but in seeking for his intention we must not pass by the language he has used. If we do, we shall make the will and not expound it." In our case the testator, in clear and (312) explicit terms, confers a life estate on his widow, and then on his unmarried daughters, and is silent as to any other or further disposition of the property. His evident purpose was to provide a home for his widow and their daughters while they were single—a desirable and perfectly legitimate disposition of his property (*In re Miller*, 159 N. C., 123), and neither in the item stated nor in any other portion of the will is there any expression authorizing the Court to give the devise another or a different meaning than that the testator has himself clearly expressed.

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

*Cited: Shuford v. Brady*, 169 N.C. 226 (1c); *Satterwaite v. Wilkinson*, 173 N.C. 39 (1c); *Bowden v. Lynch*, 173 N.C. 207 (1c); *White v. Goodwin*, 174 N.C. 725 (1c); *White v. Goodwin*, 174 N.C. 726 (1j); *Grantham v. Jinnette*, 177 N.C. 238 (2j); *McIver v. McKinney*, 184 N.C. 396 (1c); *Sawyer v. Pritchard*, 186 N.C. 53 (1c); *Smith v. Creech*, 186 N.C. 191 (2d); *Kidder v. Bailey*, 187 N.C. 507 (1c); *Jolley v. Humphries*, 204 N.C. 674 (1c); *Case v. Biberstein*, 207 N.C. 515 (2d); *Heyer v. Bulluck*, 210 N.C. 327 (1c); *Rigsbee v. Rigsbee*, 215 N.C. 761 (2c); *Jefferson v. Jefferson*, 219 N.C. 340 (1j); *Williams v. Rand*, 223 N.C. 737 (1c); *Ferguson v. Ferguson*, 225 N.C. 377, 378 (2c); *Beam v. Gilkey*, 225 N.C. 524 (2p); *Cannon v. Cannon*, 225 N.C. 617 (1c); *Bank v. Brawley*, 231 N.C. 690 (1c).

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G. OLTMAN ET AL. v. H. H. WILLIAMS ET AL.

(Filed 11 November, 1914.)

**1. Vendor and Purchaser—Fraud—Conjecture—Trials—Evidence.**

Evidence which raises no more than a mere conjecture of fraud is insufficient to raise the issue; and recommendations which are only commendatory in the sale of a horse, relating to his foal-getting qualities, are insufficient, when they do not materialize, to raise the issue of fraud in the procurement of a note given for its purchase price.

**2. Vendor and Purchaser—Contracts—Warranties—Breach—Damages—Conditions—Performance by Purchaser.**

Where the vendor brings an action on a note given for a stallion, and the purchaser claims damages on a written warranty of the vendor that the stallion "be at least 60 per cent foal-getter," and if not as represented

and returned by a certain date, he would replace it with another or return the purchase money, it is necessary, to maintain his counterclaim, that the defendant shall have performed the conditions required of him and returned the stallion in the time specified.

**3. Trials—Issues—Evidence — Insufficiency — Verdict Set Aside — Judgments—Appeal and Error.**

When an issue, among others, has been submitted to the jury, upon which there is insufficient evidence, and so held by the trial judge, it is the better practice for the judge to set aside the verdict as to that issue and let the others stand, when such is allowable; but where the judgment rendered in effect sets the verdict to the issue aside, no error will be found on appeal.

APPEAL by defendant from *Lyon, J.*, at June Term, 1914, of ORANGE.

This is a civil action brought to recover on the purchase-money notes given for a German coaching stallion. These issues were submitted to the jury:

1. Did the plaintiffs warrant the horse, as alleged in the answer? (313) Answer: Yes.

2. Was there a breach of said warranty by the plaintiffs? Answer: Yes.

3. Did the defendants offer to return the horse on or before 1 March, 1909? Answer: No.

4. What amount, if any, are the plaintiffs entitled to recover of the defendants? Answer: $432, with interest, towit, $164.16.

5. What amount, if any, are the defendants entitled to recover of the plaintiffs by way of counterclaim for breach of warranty? Answer: $1,250.

6. Is the $600 note of 13 February, 1908, barred by the statute of limitations? Answer: Yes.

7. Did the defendants, within a reasonable time, offer to return the horse to the plaintiffs? Answer: No.

Upon the coming in of the verdict, his Honor rendered judgment in favor of the plaintiffs for the sum of $432, with interest, as returned by the jury under the fourth issue, being the amount due on one note, and declined to render judgment in favor of the defendants on the fifth issue. The defendants excepted and appealed.

*R. H. Sykes and S. M. Gattis for plaintiffs.*

*Mangum & Woltz, Stern & Swift for defendants.*

BROWN, J. The defendants set up two defenses: first, that the notes were procured by fraud; second, that there was a breach of an express warranty, for which they claim damages.

(1) We agree with his Honor that there was not sufficient evidence of fraud to justify the submission of that issue to the jury. It is well settled that where evidence raises no more than a mere conjecture of fraud or negligence, it is error to submit the issue to the jury. *Maguire v. R. R.*, 154 N. C., 385, and cases cited.

At the time of the sale of the horse the only representations that were made were merely commendatory, and relative principally to the foal-getting qualities of the horse. Such representations could not by any possibility have been made with a knowledge of their falsity, for of all the unfathomable processes of nature, the procreative powers of all animals seem to be the most delicate and mysterious as well as uncertain. In respect to such a matter it was impossible to prophesy with any degree of certainty. These representations could not, therefore, have been made with any knowledge of their falsity.

Besides, it is perfectly manifest that the defendants did not rely upon them, and they were considered no part of the warranty, and were not received as such, for the defendants required a written warranty, the (314) breach of which is the subject of their counterclaim. *Cash Register Co. v. Townsend,* 137 N. C., 652; *Whitmire v. Heath,* 155 N. C., 307; *Unitype Co. v. Ashcraft,* 155 N. C., 63.

(2) The paper-writing is entitled "Guaranty," and contains the following clause:

"The said party of the first part hereby guarantees said imported German coach stallion, named Ellmer, with proper care and handling, and bred to healthy producing mares, to be at least a 60 per cent foal-getter.

"If said horse does not prove to be as represented, the said party of the first part hereby covenants and agrees to replace said horse Ellmer with another German coach stallion equally as good or refund the money to said second party, provided said second party shall return said stallion to said first party in as good health and condition on or before 1 March, 1909, as when said stallion was delivered to said second party."

It is well settled that a party relying upon and setting up a written warranty of quality in the sale of personal property is bound by the terms of that warranty and must comply with them in order to be entitled to redress in an action to recover the purchase price. *Bank v. Walser,* 162 N. C., 54; *Main v. Griffin,* 141 N. C., 43; *Robinson v. Huffstetler,* 165 N. C., 459.

In the last case it is said: "It seems, therefore, to be settled that when there is an express warranty in the sale or exchange of personal property, and it is a part of the contract that the property is to be returned within a specified time, if not as warranted to be, that the complaining party can have no redress by reason of the warranty in the absence of fraud without offering to return the property within the time named."

The contract of warranty in *Piano Co. v. Kennedy,* 152 N. C., 196, is very similar to the warranty in this case. In that case it is said that "A party relying upon and setting up a written warranty of the quality in the sale of personal property and a counterclaim for damages for its breach, in an action by the seller for the purchase money, is bound by the terms of the warranty, and must comply with them in order to recover," citing 30 A. and E. Enc. Law, p. 199. See, also, *Main v. Field,* 144 N. C., 307; *Mfg. Co. v. Lumber Co.,* 159 N. C., 510; *Walters v. Ackers,* 101 S. W., 1179 (Kentucky); *Wilson v. Ward,* 159 Ind., 21; *Wisdom v. Nicholls,* 97 S. W., 18 (Kentucky).

As we construe this contract, it was obligatory and not discretionary with the defendants to return the horse to the plaintiffs on or before 1 March, 1909, in order that the plaintiffs may fulfill their guaranty by replacing the horse Ellmer with another German coach stallion equally as good, or refund the money to the defendants. This construction brings the case clearly within the principle laid down in all the authorities we have cited.

It is true, as contended by the defendants, that the record does (315) not show that his Honor set aside the verdict upon the fifth issue. It would have been better practice for him to have done so; but the judgment that was rendered is tantamount to setting aside the verdict on that issue. His Honor erred in submitting that issue to the jury, as all the evidence proved, and in fact it was not contested, that the defendants did not comply with the terms of the warranty on their part, as was found by the jury.

The judgment of the Superior Court is

Affirmed.

*Cited: Frick v. Boles,* 168 N.C. 657 (2c).

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S. E. MILLER ET AL. v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 18 November, 1914.)

**1. Appeal and Error—Objections and Exceptions — Effect of Evidence — Record—Instruction.**

Exceptions made upon the trial to the effect of evidence and not to its competency will not be favorably considered on appeal, when the charge is not excepted to or set out in the record, the presumption being in favor of the correctness of the charge of the court as to the effect of the evidence admitted.

**2. Telegraphs—Principal and Agent—Writing Messages at Sender's Request—Duty to Deliver—Service Messages—Better Address—Negligence.**

As to whether the local agent of a telegraph company becomes the agent of the sender of the message, for certain purposes, by assuming to write the message for him, *quere.* But it is *Held*, that when the company seeks to defend itself from the consequence of the act of its agent, under the circumstances, in making a mistake in the address of the sendee, whereby it claims the message was not delivered with reasonable promptness, it may not rely upon the mistake and absolve itself from the duty of making reasonable inquiry in its effort to deliver it, as addressed, and it is further held that, in any event, the agent would remain the agent of the telegraph company to send a better address when requested by a service message to do so, and the information is available to him, and his negligence therein would be imputed to the company.

APPEAL by defendant from *Lane, J.*, at Fall Term, 1914, of DAVIDSON.

This is an action to recover damages for mental anguish, the plaintiff being the sender of the telegram set out in *Hedrick v. Tel. Co., ante,* 234, where the facts are fully stated. The only exception is to the evidence of the plaintiff that the agent of the defendant, who wrote the telegram, was told that the address of H. F. Hedrick was "14 Street off Liberty Street," instead of "14 Liberty Street," as written in the telegram.

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

*J. F. Spruill and P. N. Critcher for plaintiff.*

*Walser & Walser for defendant.*

ALLEN, J. The argument of counsel for defendant is directed to the effect of the evidence admitted over his objection rather than to its competency, but we must assume that his Honor instructed the jury properly as to how the evidence should be considered and its bearing upon the case, as the charge is not a part of the case on appeal and there is no exception to it. *Ellison v. Tel. Co.*, 163 N. C., 14.

If, however, it be conceded, as contended by the defendant (and it must be understood that the Court does not assent to the proposition), that the agent of the telegraph company became the agent of the plaintiff when he wrote the message for him, the evidence would not for this reason be incompetent.

When the telegram was received at Winston with an incorrect street address on it, the defendant was not absolved from making further inquiry, nor could it rely upon the mistake and cease all efforts to deliver. *Kivett v. Tel. Co.*, 156 N. C., 306.

It became its duty, among others, to send a service message asking for a better address (*Griswold v. Tel. Co.*, 163 N. C., 174), and if it had done so the evidence tends to prove that the agent at Lexington, who would have received the message, had the information necessary to give the correct address.

If the operator at Lexington was the agent of the plaintiff in writing the message, he was also agent of the defendant, and notice to an agent is notice to the principal, except when engaged in a transaction antagonistic to the principal or where it is against his interest to disclose the information received. *Bank v. School Committee,* 118 N. C., 386.

In this case he owed the duty to the plaintiff and the defendant, and it was in his own interest to correct the message, if he had made a mistake in writing the address, and notice to him of the correct address was notice to the defendant.

No error.

(317)

CHLOE SANDERS ET ALS. v. R. M. SANDERS.

(Filed 18 November, 1914.)

**1. Divorce—Consent Decree—Support of Minor Children—Motion in Cause—Power of Court—Statutes.**

The trial court is authorized by statute (Revisal, 1570), both before and after final judgment in an action for divorce, either *a vinculo* or *a mensa et thoro*, "to make such orders respecting the care, custody, tuition, and maintenance of the minor children of the marriage as may be proper, and from time to time modify," etc., such orders, and where consent judgment in a suit *a mensa et thoro* has been entered in the action, without providing for such children, upon motion in the original cause the court has power to make such further orders as it deems proper requiring the father to provide for the support of his children, whether born before or after the rendition of the consent judgment.

**2. Same—Charge Upon Husband's Lands—Appeal and Error—Presumptions—Evidence—Custody of Children.**

The trial judge, on motion in the original cause wherein a judgment for divorce has been rendered, may direct the father to pay a sum certain at regular intervals for the support and maintenance of his minor children and decree that it shall constitute a lien upon his lands; and where the order of the court does not provide for the custody or tuition of the children, the appellate court will not reverse the order solely on that account, the matters being within the discretion of the trial court, and where the record is silent, the presumption is that the court below acted upon sufficient evidence to warrant the omission.

**3. Divorce—Minor Children—Property—Support—Duty of Father.**

There is a legal as well as a moral duty of the father to support his infant children, if he is able to do so, whether they have property or not, and after as well as before a decree of divorcement, though the custody of the children be awarded to the mother.

**4. Appeal and Error—Divorce—Improvident Appeal.**

Upon appeals by the wife and children in separate actions, the appeal of the children will be considered as improvidently taken if the relief sought is identical with that afforded under the judgment obtained in the action of the mother.

APPEAL by defendant from *Harding, J.*, at June Term, 1914, of UNION.

*Stack & Parker for plaintiff.*
*Redwine & Sikes for defendant.*

CLARK, C. J. In 1911 this action was begun by the plaintiff for divorce from bed and board, on the ground of cruelty and abandonment and for alimony. It came to this Court, *Sanders v. Sanders,* 157 N. C., 229. At February Term, 1912, below, a consent judgment was entered by which the parties released their rights in the property of each other (318) and were divorced *a mensa et thoro,* the defendant settling upon the plaintiff $1,500 and paying the costs and attorneys' fees in the action. No provision was made in that judgment for the support of the infant, Lynn Sanders, who was then the only child of the marriage.

Some time after this decree the defendant began visiting the plaintiff, and their previous relationship was to some extent renewed, and about a year and a half after the decree there was born to the parties the infant, J. D. Sanders. The defendant, who was a man of some means, refused to contribute to the support of either of the children. The plaintiff thereupon moved in the original cause, under Revisal, 1570, for an order making an allowance for the support of said children to be paid by defendant. That statute authorizes such order, and the findings of fact by his Honor fully justify his decree, if there was any evidence to support his findings. The defendant has brought up no case on appeal, and the presumption in favor of the regularity of judicial proceedings requires us to presume that there was evidence on which to base the findings of the court.

The first exception is the order redocketing the case. Revisal, 1570, provides that in actions for divorce, either *a vinculo* or *a mensa et thoro,* "both before and after final judgment therein, it shall be lawful for the judge of the court in which such action is or was pending to make such orders respecting the care, custody, tuition, and maintenance of the minor children of the marriage as may be proper, and from time to time

to modify or vacate such orders, and may commit their custody and tuition to the father or mother as may be thought best." *Setzer v. Setzer,* 129 N. C., 296. This applies though the first judgment was by consent. *Bailey v. Bailey,* 127 N. C., 474.

The court found as a fact that J. D. Sanders is the child of plaintiff and defendant, born since their marriage. The presumption is, in the absence of a case on appeal, that there was evidence to that effect.

The decree directs the defendant to pay $35 per month for the maintenance of his minor children, and that such decree shall be a lien upon his real estate in North Carolina and particularly upon the tract of land in Anson County which is described in the decree. If this were not done, the decree might be made a nullity.

In *Bailey v. Bailey,* 127 N. C., 474, this Court sustained a decree making temporary alimony a charge upon the land of defendant. In *Green v. Green,* 143 N. C., 406, it was held that the court could by order compel the husband to execute a deed in fee conveying his property to his wife, and attach him for contempt for refusal to obey the order. In *Wood v. Wood,* 61 N. C., 538, it was held that an allowance of alimony was a debt of record, enforcible by sale under execution.

The defendant objects because the decree does not go further (319) and make an order for the custody and tuition of the children. That was a matter in the discretion of the court, and doubtless there was evidence before the court that the children were in the custody of their mother's father, as counsel state in their brief. It is true, the fact is not stated in the record, but the defendant has set out in the record no evidence or ground to justify the reversal of the decree because it does not provide for the custody of the children. It seems their maintenance only was asked for and no cause was shown to the court, so far as the record shows, to change their custody. The decree is

Affirmed.

*Cited: S. v. Bell,* 184 N.C. 708 (3c); *S. v. Bell,* 184 N.C. 713, 718, 719 (3j); *Small v. Morrison,* 185 N.C. 592, 593, 594 (3j); *Thayer v. Thayer,* 189 N.C. 507, 508 (3c); *Jeffreys v. Hocutt,* 195 N.C. 344 (3c); *Walker v. Walker,* 204 N.C. 212, 213 (3p); *Brown v. Brown,* 205 N.C. 70 (1p); *Green v. Green,* 210 N.C. 149 (3c); *Story v. Story,* 221 N.C. 116 (3c); *S. v. Duncan,* 222 N.C. 14 (1c); *Walker v. Walker,* 224 N.C. 753 (3p); *Casualty Co. v. Lawing,* 225 N.C. 107 (31); *Wells v. Wells,* 227 N.C. 617 (3c); *Winfield v. Winfield,* 228 N.C. 257 (1c); *Allen v. Hunnicutt,* 230 N.C. 50, 51 (p).

LYNN SANDERS AND J. D. SANDERS BY THEIR NEXT FRIEND, W. J. PRATT, v. R. M. SANDERS.

CLARK, C. J. This action is brought by the two children named in the above decree, by their next friend, against the same defendant, their father, asking for a decree of maintenance. It is intended to present the question whether the father can be decreed to support the children. The judge below sustained a demurrer upon the ground that there was no cause of action.

There can be no controversy that the father is under a legal as well as a moral duty to support his infant children. (*Walker v. Crowder,* 37 N. C., 487), and, if he has the ability to do so, whether they have property or not. *Hagler v. McCombs,* 66 N. C., 345. There is a natural obligation to support even illegitimate children which the law not only recognizes, but enforces. *Burton v. Belvin,* 142 N. C., 153; *Kimbrough v. Davis,* 16 N. C., 74. Besides, the failure to support his children is a crime. Rev., 3355; *S. v. Kerby,* 110 N. C., 558.

The liability of the father primarily to support the children remains as well after, as before a divorce, and even where the custody of the children has been awarded to the mother. 14 Cyc., 812; 9 A. and E. (2 Ed.), 871.

The relief asked, however, having been granted in the proceeding above, this action was improvidently brought.

Action dismissed.

WALKER, J., concurs in result.

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(320)

R. M. COX AND W. A. MARTIN, ADMINISTRATORS, v. C. V. S. BOYDEN, ADMINISTRATRIX.

(Filed 5 November, 1914.)

**1. Judgments, Irregular — Course and Practice of Courts — Rendered in Wrong County—Power of Courts.**

In the absence of statute and without the consent of the parties litigant, the trial judge is without power to render a judgment outside of the county wherein the cause is pending, and a judgment thus rendered is contrary to the course and practice of the courts.

**2. Same—Motions in Cause—Procedure.**

Where a judgment rendered outside of the county wherein the cause was pending states that it was done with the consent of the parties, one

of them, whose substantial right is affected, may, by motion in the cause, move to set aside the judgment upon the ground that his consent was not in fact obtained; and it is error for the judge before whom the motion is made to refuse to entertain it for lack of power to do so.

**3. Limitation of Actions—Judgments—Course and Practice—Interpretation of Statutes.**

Revisal, sec. 513, requiring that application to relieve against a judgment for mistake, surprise, or excusable neglect be made within one year, does not apply to a judgment rendered contrary to the course and practice of the courts, as where the judgment was signed in a different county from the one in which the action was pending, without the consent of the complaining party.

APPEAL by defendant from *Devin, J.*, at February Term, 1914, of SURRY.

Motion to set aside judgment made in the above cause.

The cause was pending in the Superior Court of Surry County, and on reference had, report was made and judgment entered confirming report and, among other things, ordering a sale of certain lands of N. A. Boyden, deceased, etc., and application of proceeds to creditors.

This judgment was signed by his Honor, C. C. Lyon, judge, presiding at a Superior Court of Forsyth County, December, 1911, and concludes as follows: "This judgment is signed by consent of counsel both for plaintiff and defendant, in the Superior Court of Forsyth County, N. C."

Thereupon C. V. S. Boyden, at October, Term, 1913, entered a motion on notice given to set aside said judgment, and same having been continued to February Term, 1914, said defendant submitted an affidavit tending to show that her rights as a litigant were wrongfully prejudiced by said judgment and averring that same was signed in the county of Forsyth without her "knowledge and without the consent of either herself or her counsel," and the court, being of opinion that it was without power to disturb the judgment signed by Judge Lyon, declined to (321) consider the affidavit of defendant or find the facts relevant to the inquiry, and entered judgment that the former judgment was in all respects valid; and thereupon defendant excepted and appealed.

*Winston & Biggs for defendant.*

*No counsel contra.*

HOKE, J., after stating the case: In *Bank v. Peregoy-Jenkins Co.*, 147 N. C., 293, the Court held that except by consent or unless authorized by statute a judge was without power to sign a judgment affecting substantial rights of a party litigant in one county when the cause was pending in another, and, this being true, if the judgment objected to was signed without the consent of affiant or her counsel, in the county of Forsyth,

when the cause was pending in the county of Surry, it is open to her to question its validity, and whether the same is void or only irregular, our decisions are to the effect that the proper procedure is by motion in the cause. *Massie v. Hainey,* 165 N. C., 174; *Bank v. McEwen,* 160 N. C., 414; *Calmes v. Lambert,* 153 N. C., 248; *Roberts v. Pratt,* 152 N. C., 731; *Rackley v. Roberts,* 147 N. C., 201; *Flowers v. King,* 145 N. C., 234; *Becton v. Dunn,* 137 N. C., 559.

In reference to the position that this is a judgment in its nature final, to be impeached only by independent action, it was held in *Roberts v. Pratt* and affirmed in the more recent case of *Massie v. Hainey:* "While it is very generally recognized that a final judgment can only be impeached for fraud by means of an independent action, this position does not necessarily prevail when a judgment has been procured by fraudulent imposition on the court as to the rendition, or where it has been entered contrary to the course and practice of the court. In such case relief may ordinarily be obtained by motion in the cause, and this procedure, as a rule, is proper and allowable in all cases where courts of the common law would correct their judgment by writs of error *coram nobis* or *coram vobis;* and this is especially true under our present system combining legal and equitable procedure in one and the same jurisdiction." And on the provision of the statute, Revisal, sec. 513; Code, sec. 274, requiring that an application to relieve against a judgment for mistake, surprise, or excusable neglect to be instituted within one year, the cases of *Calmes v. Lambert, supra,* and *Becton v. Dunn, supra,* and others are to the effect that this limitation as to time applies, as a rule, to judgments which are in all respects regular, and does not obtain as to those which are taken contrary to the course and practice of the Court.

On the question of procedure, the case of *Bank v. McEwen, supra,* is an apt authority in support of defendant's motion, and in that case
(322) *Associate Justice Walker,* delivering the opinion, said: "A court has the power to open or vacate a judgment which appears to have been entered by consent or agreement of the parties on adequate grounds, *e. g.,* fraud or mistake or the real absence of consent, if so found." And this principle is also fully recognized in case of *Lance v. Russell,* 157 N. C., 448.

On authority, therefore, we are of opinion that the defendant was entitled to have her application heard and properly considered, and there was error in declining to entertain the motion from lack of power to set aside the judgment.

This will be certified, to the end that the cause may be considered and determined in accordance with law and the course and practice of the Court.

Error.

*Cited: Chavis v. Brown*, 174 N.C. 124 (2c); *Chemical Co. v. Bass*, 175 N.C. 430 (2j); *Cahoon v. Brinkley*, 176 N.C. 7 (1c); *Gough v. Bell*, 180 N.C. 270 (3c); *S. v. Humphrey*, 186 N.C. 535 (2p); *Livestock Co. v. Atkinson*, 189 N.C. 252 (3c); *Fowler v. Fowler*, 190 N.C. 539 (3c); *Foster v. Allison Corp.*, 191 N.C. 173 (3c); *Bisanar v. Suttlemyre*, 193 N.C. 712 (1c); *S. v. Crowder*, 195 N.C. 336 (1c); *Deitz v. Bolch*, 209 N.C. 206 (2c); *King v. King*, 225 N.C. 641 (2c); *Henderson v. Henderson*, 232 N.C. 10 (2c).

FINCH BROTHERS v. J. L. MICHAEL.

(Filed 18 November, 1914.)

**Contracts—Sale of Business—Good-will—Agreements Not to Enter Business—Breach of Agreement—Trials—Evidence—Nonsuit.**

In an action upon an alleged breach of contract for the sale of a mercantile business, good-will, etc., with provision that the vendor would not again engage in that character of business in the same town for a year and a half, the plaintiff's evidence tended only to show that his vendor had loaned money to another and newly formed partnership between third persons in the same town, engaged in the same character of business; that the telephone number he had used while in business had been given to this new concern, etc., and that in a few specific instances customers who had traded with him occasionally had, at times, traded with the new partnership. *Held*, the defendant had a perfect right to lend his money to the new concern, and that this, and the further instances mentioned, were not evidence sufficient to be submitted to the jury upon the question of his violating his contract by engaging in a business of a similar character to that sold by him to the plaintiff.

APPEAL by plaintiffs from *Lane, J.*, at February Term, 1914, of DAVIDSON.

*Phillips & Bower and E. E. Raper for plaintiff.*
*Walser & Walser and McCrary & McCrary for defendant.*

WALKER, J. This action was brought to recover damages for an alleged breach of a contract, by which defendant sold to the plaintiffs his retail grocery business in Lexington, with the fixtures and good-will belonging thereto, at cost for the goods, wares, and merchandise, and $1,000 for the fixtures and good-will, plaintiffs paying $200 as a bonus, and defendant agreeing not to conduct the same kind of business (323) in said town for one and a half years thereafter. The breach alleged was that defendant loaned money to Michael & Parker, a new grocery firm, and that the telephone number which had been used by the

defendant in the old store had been changed and the old number transferred to the phone of the new firm. There were some other minor complaints made against defendant, but we think they are not sufficient to show any breach of the contract. Even if defendant committed the small offienses imputed to him, and they were calculated to cause injury to plaintiff, the damages claimed are entirely too speculative and conjectural to form the basis of a recovery, and, besides, the causal connection between the imputed wrongs, if the latter are of sufficient consequence to be noticed by the law (*de minimis non curat lex*), and the alleged injury is not shown with any semblance of accuracy. We cannot jump to a conclusion, but the proof must be of such a character as to show with at least some degree of certainty that the alleged wrongs produced an injury, or resulted in a violation of plaintiff's rights. Both wrong and damage must be shown, and it must appear that the latter was the effect and the former the cause. *Byrd v. Express Co.,* 139 N. C., 273; *Machine Co. v. Tobacco Co.,* 141 N. C., 284. The defendant had no interest in the partnership of Michael & Parker, and he had a perfect right to lend them money. The principle is well stated by *Justice Burwell* in *Reeves v. Sprague,* 114 N. C., 647. It appeared there that Sprague sold part of his stock in trade and the good-will of his business to Reeves, with a stipulation that he would not engage in the same business in Waynesville, N. C., and afterwards Sprague sold the balance of the stock to one J. R. Davis who started and conducted the same kind of business in said town in competition with Reeves. At the time he bought the remnant of the stock Davis gave Sprague his note for the price, secured by a mortgage, and thereafter took possession and prosecuted the business of druggist. With reference to these facts, the Court said: "It cannot be seriously contended that Sprague is violating a contract not to engage in the business of a druggist in Waynesville merely because he has a lien on a stock of drugs at that place. We find in the evidence adduced no substantial foundation for the plaintiffs' allegation that the mortgage made by Davis to Sprague is a sham, and that Davis is merely the agent of Sprague. If, in fact, he is such agent, the injunction against the defendant Sprague and his agent is sufficient for the plaintiffs' purposes. They produce no proof whatever, as it seems to us, that the appellant is Sprague's agent—only facts that might raise a suspicion that he is. To stop his lawful business upon the evidence now before us seems unreasonable." The same was also held to be the law in *Kramer v. Old,* 119 N. C., 1, but the evi-

dence tended to show that the seller afterwards attempted to enter
(324) into competition with his buyer by becoming a member of a corporation which carried on the same business within the territory prohibited to him by the agreement, and it was properly held that this was a breach of the contract; but the Court thus referred to our point:

"While the courts will not restrain a party bound by such a contract from selling or leasing his premises to others to engage in the business which he has agreed to abstain from carrying on, or from selling to them the machinery or supplies needed in embarking in it (*Reeves v. Sprague,* 114 N. C., 647), a different rule must prevail when it appears that the prohibited party attempts, not to sell outright to others, but to furnish the machinery or capital, or a portion of either, in lieu of stock, in a corporation organized with a view to competition with the person protected by his contract against such injury. The three contracting defendants have presumably received the full value of the business sold, and which is protected by their own agreement against their own competition, and equity will not allow them, with the price in their pockets, to evade their contract under the thin guise of becoming the chief stockholders in a company organized to do what they cannot lawfully do as individuals." But in this case the defendant has no pecuniary interest in the firm of Michael & Parker, either directly or indirectly, as member, manager, agent, or otherwise, for he is only a creditor of the partnership, which is a very different thing from conducting the business or being interested therein. In a sense, he may be considered as having some concern for its success as its creditor, but this is all, and is not sufficient to constitute a breach of his contract, either under the sale of the good-will or the restrictive covenant.

We said in *Faust v. Rohr,* 166 N. C., 187, referring specially to *Scudder v. Kelford,* 57 N. J. Eq., 171: "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," and citing further the following cases: *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. It has been stated, as a general rule, that good-will exists in a professional as well as in a commercial business, subject to the distinction that it is not so much fixed or as localized as the good-will of a trade, but attaches to the person of a professional man or woman, as a result of confidence in his or her 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 (325) 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, 1091.

The difficulty which plaintiff encounters in this case is that he offers no tangible proof of a breach of the contract. There is, perhaps, something from which we may suppose or conjecture that there was a slight interference with the quiet and reasonable enjoyment by plaintiff of the goodwill which he had purchased; but this will not do, and the evidence must be more definite. We thus expressed ourselves in *Crenshaw v. Street Railway,* 144 N. C., at p. 320: "The kind of proof which must be forthcoming in order to establish the issues in favor of the plaintiff was considered recently by us in *Byrd v. Express Co.,* 139 N. C., 273, where we said: 'There must be legal evidence of the fact in issue, and not merely such as raises a suspicion or conjecture in regard to it. The plaintiff must do more than show the possible liability of the defendant for the injury. He must go further, and offer at least some evidence which reasonably tends to prove every fact essential to his success.'" And in *Campbell v. Everhart,* 139 N. C., at p. 516: "The sufficiency of evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one, in his own affairs, may base his judgment on mere probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact and as a basis for the judgment of a court, he must adduce evidence other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for a mere guess, and must be such as tends to actual proof. But the province of the jury should not be invaded in any case, and when reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury," citing *Lewis v. Steamship Co.,* 132 N. C., 904; *Byrd v. Express Co., supra; Wheeler v. Schrœder,* 4 R. I., 383; *Offutt v. Col. Exposition,* 175 Ill., 472; *Day v. R. R.,* 96 Me., 207; *Catlett v. R. R.,* 57 Ark., 461; *R. R. v. Stebbing,* 62 Md., 504.

The defendant may not have acted with due propriety, nor with perfect good faith, but we cannot see that he has committed any legal wrong. The telephone was entirely under the control of the telephone company, and Michael & Parker had the right to it if the company consented that they might use it, or did not object thereto, after notice of their doing so. It promised to restore it to the plaintiff, but, it seems, did not do so, for some reason, we suppose, satisfactory to itself.

It may be added that defendant was not required by his contract to see that plaintiff retained all the customers of the old business. He could not do this, as they were at liberty to trade where they pleased; nor does it sufficiently appear how many, if any of them, were lost by plain-
(326) tiff, whether by any action of defendant or not. We are, therefore, left suspended in the realm of conjecture, without any appreciable

thing, either definite or certain, being proved, and the damages more uncertain than anything else, if there was any wrong.

The case, in its final analysis, seems to have been reduced to the very attenuated matter of a few eggs and a small quantity of butter sold by W. N. Shoaf, a former customer of defendant, to Michael & Parker; but Shoaf testified: "I had several places to trade and went everywhere, for that purpose, that I pleased," or words to that effect. Taking all the evidence together, it does not measure up to the standard fixed by the law.

The court nonsuited plaintiff at the close of his evidence, and we see no error in its doing so.

Affirmed.

*Cited: Martin v. Vinson*, 174 N.C. 134 (c); *Sineath v. Katzis*, 218 N.C. 755, 757 (c); *Carter v. Realty Co.*, 223 N.C. 192 (p).

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THE JAMES SANATORIUM v. YADKIN RIVER COMPANY.

(Filed 18 November, 1914.)

**Corporation—Officers—Vice-President—Authority — Trials — Evidence — Nonsuit.**

In an action against a corporation to recover for medical attention, and care of its employee by the plaintiff sanatorium, the defendant resisted recovery upon the ground that it had not authorized the services rendered. There was evidence tending to show that the employee was carried to the sanatorium by the salaried physician of the defendant company, and thereafter its vice-president called up the plaintiff by phone and directed that special care be given this patient; that the bill should be sent to him and that the defendant would pay it; and, also, that formerly the defendant had paid for the attention given by the plaintiff to another employee on such authorization. *Held*, the position of vice-president of a corporation does not necessarily empower this officer to bind the company by such acts; but the evidence in this case was sufficient to be submitted to the jury upon the question of his authority, and judgment of nonsuit was properly denied.

APPEAL by defendant from *Shaw, J.*, at March Term, 1914, of SCOTLAND.

*Cox & Dunn for plaintiff.*

*Walter H. Neal for defendant.*

CLARK, C. J. This is an action to recover of defendant for medical services rendered one Fred Flake. Practically the only question presented is the refusal to nonsuit.

(327) Flake was an employee of defendant. Fred W. Abbott was its vice president and Dr. Rufus Jackson its physician. It was in evidence that Flake was brought to the hospital by Dr. Jackson, who stated that he had brought him to the hospital by order of Abbott, and that the plaintiff would send its bill to the defendant, who would pay it. The next day Mr. Abbott called over the phone from the factory of the defendant, to the president of the plaintiff company, Dr. James, and inquired, "How is my man Flake I sent you last night?" He further asked the details and told Dr. James to "give him every possible attention, and, if he needed any special care, to give him special nurses, and he would see that there was no trouble about the money, and to send the bill to him, and the Yadkin River Power Company would pay it." Prior to that time the plaintiff had rendered medical services to one McLean, a typhoid fever patient, at the request of Mr. Abbott and Dr. Jackson, who stated that the Yadkin River Power Company would pay the bill, and it was paid, according to the evidence of both plaintiff and defendant.

The chief contention is that the office of vice president does not necessarily confer power to contract debts for the corporation. It is true enough that the power of a vice president depends not upon his title, for his function differs according to the by-laws or according to the use and practice of the particular company. In some railroad companies there are many vice presidents who have great authority. There are other companies in which the vice presidency is a mere ornamental position.

In this case there was evidence sufficient to go to the jury to establish the authority of the vice president to act for the company in cases of this kind. His calling up the president of the sanatorium company from the office of the defendant, stating to him that Flake had been sent there by his authority, making full inquiries about him and directing the bill to be sent to him and saying that the defendant would pay it, and asking for special attention to be given to Flake, together with the fact that Flake was also carried to the sanatorium by the salaried physician of the defendant, and the further fact that another patient had been sent there by the vice president, accompanied by the physician of the company, and that by their direction the bill had been sent to the defendant and paid by it—all these things were sufficient to submit to the jury on the question as to the authority of the vice president in this case.

No general rules can be laid down as to the power of a vice president to bind the company, which would arise as a presumption in the case of the president. But it would have been error to direct a nonsuit upon this evidence. The exceptions to the evidence do not require discussion. There was no exception to the charge.

No error.

*Cited: Miller v. Cornell,* 187 N.C. 556 (c).

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J. D. BOUSHALL, RECEIVER OF THE RALEIGH CUSTOM SHIRT MANUFACTURING COMPANY, v. W. A. MYATT.

(Filed 11 November, 1914.)

**1. Corporations—Subscriptions to Capital Stock—Bona Fides—Test.**

A subscription to the capital stock of a corporation is *bona fide* whenever made by one who subscribed in good faith with a reasonable expectation and apparent prospect of being able to pay assessments on his stock as they might thereafter be called for, and when there is no evidence presented or offered tending to show that the subscriptions were not *bona fide*, under this test, one who has subscribed to the stock under an agreement that the subscriptions should be *bona fide* may not avoid the obligation on his subscription in an action brought against him for its payment, on the ground that the subscribers at a preliminary meeting had refused to accept as the test of their good faith the cash payment at once and in full for the amount of their subscriptions.

**2. Corporations—Subscribers to Stock—Management—Release—Contracts—Consideration—Trials—Evidence—Questions for Jury.**

Both by the general law and under our statute, Revisal, sec. 1141, the management of a corporation, before the first directors are elected, vests entirely in the subscribers, and before the rights of creditors have supervened, the subscribers or stockholders may, by the consent of each and all of them and within the limits of the charter, release one from his subscription to the stock, the consent of one party to such arrangement, as in other contracts, being a sufficient consideration for the consent of the others; and under the circumstances of this case it is held that there was sufficient evidence of the release of the defendant, against whom action was brought for payment of his subscription to stock in a corporation, to be submitted to the jury.

APPEAL by defendant from *O. H. Allen, J.*, at June Term, 1914, of WAKE.

Civil action to recover on a subscription to stock in plaintiff corporation.

Plaintiff offered in evidence certificate of incorporation duly signed by the Secretary of State, showing a subscription of one hundred and five shares of stock, including five shares by defendant, as alleged, and admission in the answer that these shares had never been paid for, and there was evidence of insolvency and appointment of receiver, etc.

Defendant offered evidence tending to show that he and some others had signed a preliminary written agreement to take a stated number of shares, "the same not to be binding until *bona fide* subscriptions for at least one hundred shares of stock are received." That they afterwards obtained a charter of incorporation, on a subscription absolute in terms for the one hundred and five shares, including that of defendant, and that at the meeting held for the purpose of organizing under the charter the defend-

ant being then ready to pay, he had demanded as evidence of good
(329) faith that the subscribers pay up in full; that one C. H. Towles, another subscriber and chief promoter of the enterprise, had replied that this was not to be expected, and if required would work a great hardship on him and some of the others, and, on defendant's insisting upon his position, said Towles, then and there, in the presence of the others, said that if such was defendant's attitude, he would have to be excused, and defendant thanked the company present and, accepting this as the sense of the other members, he left the meeting and had not taken any part in the organization or business of the corporation nor received any shares of stock nor attended any meetings or been notified to do so, etc.

There was evidence for plaintiff in contradiction of some of these statements.

The evidence offered by defendant having been first tentatively received, his Honor afterwards withdrew from the consideration of the jury any and all testimony tending to show a breach of the alleged condition and also any testimony tending to show a release. Defendant excepted.

The court then charged the jury that if they believed the evidence they would render a verdict for plaintiff.

Verdict for amount of subscription. Judgment, and defendant excepted and appealed.

*W. H. Pace and S. Brown Shepherd for plaintiff.*

*Clark & Broughton and Manning & Kitchin for defendant.*

HOKE, J. The defendant, admitting his subscription for five shares absolute in terms and which he has not paid, resists recovery, claiming that he is relieved of his obligation by reason of noncompliance with condition precedent attached to a preliminary agreement among some or all of the subscribers, to the effect that their subscriptions should not be binding unless there were as much as one hundred shares *bona fide* subscribed. (2) Because he was legally released from his contract.

It is undoubtedly the general rule that except in cases of fraud, and then only in restricted instances (*Chamberlain v. Trogden*, 48 N. C., 139), a subscriber to stock in a corporation, absolute in terms, may not be relieved of his obligation by reason of nonperformance of conditions attached to a preliminary agreement among some of the members prior to incorporation; a position especially insistent where the rights of creditors have supervened (*Foundry Co. v. Killian*, 99 N. C., 501; *North Carolina Co. v. Leach*, 49 N. C., 340; *Thompson v. Reno Savings Bank*, 19 Nev., 103; *Burke v. Smith*, 16 Wallace, 390; *R. R. v. Bailey*, 24 Vt.,

465; 2 Clark and Marshall on Corp., sec. 460), and, in any event, there has no harm come to appellant by reason of the ruling of his Honor on the first position, because, on perusal of the evidence, we are of opinion that there was no evidence of any fraudulent imposition (330) on the defendant, nor is there any testimony worthy of consideration tending to show that the condition had not been complied with.

The position insisted upon by defendant and, to some extent, presented in the record, that in order to a *bona fide* subscription, there must be a present payment in cash or a solvent subscriber, cannot be sustained, but, on authority, a subscription should properly be considered *bona fide* whenever made by one who "subscribes in good faith with a reasonable expectation and apparent prospect of being able to pay assessments on his stock as they might thereafter be called for." *Holman v. The State,* 105 Ind., pp. 569-73; this according to the terms of the contract and valid regulations made pursuant to the charter. And, according to this interpretation, there is no evidence presented or offered tending to show that the subscriptions made in this case were not *bona fide,* even if the position were available to defendant.

We must hold, however, that there was reversible error in withdrawing from the jury any and all testimony tending to establish a release, as claimed in the second position. Under our statute, Revisal, sec. 1141, until directors are elected, the corporate affairs and management are vested entirely in the subscribers, and both under this section and by the general law it is fully recognized that before any rights of creditors have arisen the subscribers or stockholders may, by the consent of each and all of them and within the limits of the charter, release one from his subscription to stock, the consent of one party to such arrangement, as in other contracts, being regarded as sufficient consideration for the consent of the others. *Shoemaker v. Lumber Co.,* 97 Wis., 585; *Scottish Security Co. v. Starks,* 117 Ky., 609; 1 Cook on Corporations (7 Ed.), sec. 168; 2 Clark and Marshall on Corp., p. 476; 1 Purdy's Beach on Corp., sec. 240; Clark on Corp., p. 328. In Cook, *supra,* it is said: "A subscription contract, like any other, may be waived, canceled, or dissolved by the mutual consent of all the parties interested. The interested parties are the subscriber himself, the stockholders, and the corporate creditors existent at the time of the cancellation. Frequently the directors of a corporation attempt to usurp this right and power of the general stockholders. The well established rule, however, is that corporate directors are not authorized to agree with a subscriber that his subscription shall be canceled, unless such power is given them by the charter or statute or the laws of the corporation," and in Clark, *supra,* the author says: "A subscriber may be released in whole or in part from his contract by the corporation with the consent of *all* the other shareholders;

but he cannot withdraw and surrender his shares without the consent of the corporation; nor can he do so with the consent of the corporation, unless the other subscribers consent; nor can he do so with the consent both of the corporation and the other subscribers if the amount due from him is required to pay corporate debts."

(331)

Applying the principle and without adverting to the evidence in detail, we think there was testimony presented on the part of the defendant requiring that the issue as to defendant's liability be submitted to the jury on the question whether there was a valid release of defendant's subscription; each and all the other subscribers assenting thereto and before any rights of existent creditors had arisen.

For the error indicated there will be a new trial, and it is ordered.

New trial.

*Cited: Cooperative Asso. v. Boyd*, 171 N.C. 190 (c); *Drug Co. v. Drug Co.*, 173 N.C. 512 (c); *Improvement Co. v. Andrews*, 176 N.C. 282 (c).

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C. M. PALMER v. R. L. LOWDER AND WIFE.

(Filed 18 November, 1914.)

**1. Contracts, Written—Substitution by Parol—Principal and Agent—Broker's Commission—Statute of Frauds—Evidence.**

An agreement made between the owner of lands and a broker, that the latter should sell the lands divided into lots, etc., and receive as compensation for services to be rendered the difference between an agreed price and that which the lots would bring at the sale, does not come within the meaning of the statute of frauds requiring the contract to be reduced to writing; and where performance of the contract is sought by the broker, it is competent for the defendants to show that the written contract had been subsequently abandoned and a new contract substituted by the parties by parol, which the plaintiff had refused to carry out.

**2. Contracts, Written—Statute of Frauds—Entire Contract—Parol Evidence.**

When specific performance of a written contract is sought, which the law does not require to be in writing, it is competent for the defendant to show, when it does not vary or contradict the writing, that the entire agreement between the parties had not been embraced in the written contract, and that it in part rested in parol.

**3. Reformation of Instruments—Equity—Mutual Mistake—Parol Evidence.**

Where the specific performance of a written contract is sought in an action, it is competent for the defendant to show by parol evidence the omission of certain parts of the agreement by mistake or inadvertence of the parties, their draftsman, or agent, in drawing up the instrument.

PALMER *v.* LOWDER.

APPEAL by defendants from *Shaw, J.*, at February Term, 1914, of STANLY.

*R. L. Smith and Jerome & Price for plaintiff.*
*R. E. Austin, J. R. Price, and R. Lee Wright for defendants.*

CLARK, C. J. This is an action for specific performance of a (332) contract to sell land. The plaintiff was a real estate agent in Albemarle, and testified that he had no interest in the land except to sell it as a broker. The plaintiff and defendants entered into a contract relative to the lots in question in which it was agreed that the plaintiff should have the lots laid off, streets run, blocks made, and a map of the property, one of which should be turned over to the defendants, and the plaintiff was to put certain lots on the market at certain prices, and all over and above these particular prices the plaintiff was to have for his services. R. E. Austin, attorney, was requested to reduce the agreement to writing. The defendants contend that he put only a portion of the contract in writing, which, hurriedly signed by defendants, was left in the attorney's hands with instructions not to be delivered to plaintiff till further instructions from the defendants, but by some means the plaintiff obtained possession of it and put it on record. The defendants further contend that the words "to him or" which were interlined were not put there by their authority.

The defendants further contend that a difference having arisen between the parties, they later orally agreed to abrogate the written contract and made a new contract.

There was evidence from Mrs. Lowder that the plaintiff told her of this new contract which he had made with her husband, and stated the substance of the new contract, which he went over and which was entirely inconsistent with the contract sued on; that the plaintiff told her the details of this new contract, which she recited. The plaintiff objected to this evidence, and it was excluded, and defendants excepted. This exception must be sustained. "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"; and the Court further said: "Such subsequent oral agreement may enlarge the time of performance or may vary other terms of the contract or may waive and discharge it altogether. The term cancellation of a contract implies a waiver of all rights thereunder by the parties. If, after a breach by one of the parties, they agree to cancel it and make a new contract with reference to its subject-matter, that is a waiver for any cause growing out of the original breach. And

this is the rule, even though the original contract was under seal." *Lipschultz v. Weatherly,* 140 N. C., 365; *Brown v. Lumber Co.,* 117 N. C., 287. The exclusion of this evidence was a material error, and entitles the defendants to a new trial. She also testified that the plaintiff told her the same thing in another conversation, and when she asked him for
(333) the old contract, he had answered: "Mrs. Lowder, I destroyed that when we went into the new contract, because it was no good." This evidence was struck out, which was also error.

In *Adams v. Battle,* 125 N. C., 158, the Court holds that in many cases an instrument under seal may be released or discharged by parol agreement or a contract subsequently entered into, notwithstanding former rulings to the contrary. The court below evidently erred by supposing that this was a conveyance, or a contract for an interest in land, which required an instrument under seal to reconvey. It was, however, merely a broker's agreement to sell the land, he agreeing to act as agent for a certain compensation and the other parties agreeing to pay that compensation.

In *Harris v. Murphy,* 119 N. C., 34, the Court says: "The rule that parol evidence will not be permitted to contradict, modify, or explain a written contract does not apply where the modification is alleged to have been made subsequent to the execution of the contract." In *Robinet v. Hamby,* 132 N. C., 356, citing *Holden v. Purefoy,* 104 N. C., 167, it is said: "The parol waiver of a written contract to convey land, amounting to a complete abandonment, will bar specific performance. But the acts and conduct constituting such abandonment must be positive, unequivocal, and inconsistent with the contract." The excluded evidence of the defendants tended to show a complete waiver on the part of plaintiff, and further, that there was a new contract to take the place of the written contract, which the plaintiff failed and refused to carry out, and this precludes him from asking for specific performance.

While parol evidence is not admissible to vary or contradict a written agreement, yet when the agreement is not one which the statute requires to be in writing, it is competent to show by parol that only part of the agreement was in writing and what was the rest of the agreement. *Nissen v. Mining Co.,* 104 N. C., 309; *Colgate v. Latta,* 115 N. C., 138; *Taylor v. Hunt,* 118 N. C., 171; *Sams v. Price,* 119 N. C., 573; *Bresee v. Crumpton,* 121 N. C., 125; *Jones v. Rhea,* 122 N. C., 725; *Ivey v. Cotton Mills,* 143 N. C., 194; *Stern v. Benbow,* 151 N. C., 462; *Audit Co. v. Taylor,* 152 N. C., 274; *Kernodle v. Williams,* 153 N. C., 476; *Rogers v. Lumber Co.,* 154 N. C., 112; *Lumber Co. v. Brown,* 160 N. C., 283. Indeed, no proposition of law can be better settled. This contract being a mere authority to a broker to sell real estate, his authority was

not required to be in writing. *Lamb v. Baxter,* 130 N. C., 67; *Abbott v. Hunt,* 129 N. C., 403; *Smith v. Brown,* 132 N. C., 365.

The court also erred in refusing the prayer to instruct the jury that the defendants had a right to show that the written contract was not all of the contract, but that certain parts were omitted and were in parol and that a certain part had been inserted by mistake and inadvertence. *Evans v. Freeman,* 142 N. C., 61; *Typewriter Co. v. Hardware* (334) *Co.,* 143 N. C., 97; *Brown v. Hobbs,* 147 N. C., 73. If there was a mistake in the insertion or omission of matter by Mr. Austin, his evidence was competent to prove that fact, and the Court would correct the mistake. *Warehouse Co. v. Ozment,* 132 N. C., 839; *King v. Hobbs,* 139 N. C., 173; *Bourne v. Sherrill,* 143 N. C., 381.

The court also erred in refusing to charge the jury, as prayed, that contracts with brokers to sell real estate need not be in writing, and that the terms of such agreements may be proven by parol. *Abbott v. Hunt,* 129 N. C., 403, and cases there cited and cases since, citing that case. See Anno. Ed.

This contract need not have been in writing, and if only part was in writing, the other part could be shown by parol. It was competent to show that it was abrogated by a subsequent parol agreement. And it was also competent to show that there were errors by mutual mistake or by mistake of the mutual agent in drawing up the instrument. Of course, if it was not abrogated and there was not mutual mistake in any of its terms, the writing was conclusive as to the agreement of the parties, so far as it went, and could not be contradicted or varied by a contemporaneous parol agreement.

In the exclusion of evidence and in the refusal to charge as above set out there was

Error.

*Cited: Sumner v. Lumber Co.,* 175 N.C. 657 (1c, 2c); *Thomas v. Carteret,* 182 N.C. 392 (2j); *Henderson v. Forrest,* 184 N.C. 234 (2c); *McNeill v. Mfg. Co.,* 184 N.C. 424 (1p); *Anderson v. Nichols,* 187 N.C. 809 (2c); *Lee v. Brotherhood,* 191 N.C. 361 (1c); *Miller v. Farmers Federation,* 192 N.C. 147 (2c); *Highway Com. v. Rand,* 195 N.C. 811 (2c); *Crown Co. v. Jones,* 196 N.C. 210 (2c); *Dawson v. Wright,* 208 N.C. 419 (2c); *White v. Pleasants,* 225 N.C. 762 (1c).

SAVANNAH MURPHY, ADMINISTRATRIX OF PETER J. MURPHY, DECEASED, v. LAFAYETTE MUTUAL LIFE INSURANCE COMPANY

(Filed 18 November, 1914.)

**1. Insurance, Life—Premium Notes—Conditions of Forfeiture—Subsequent Agreements—Waiver—Trials—Questions for Jury.**

The delivery of a life insurance policy absolute and unconditional is a waiver of the stipulation for a previous or contemporaneous payment of the first premium; and where the insurer has received the insured's note for the payment of this premium upon condition that the policy shall be avoided unless the note is paid at maturity, the condition will be upheld unless the time for its payment has been postponed by valid agreement or the stipulation, made for the benefit of the company, has in some way been waived by it, or the company has so acted in reference to the matter as to induce the policy-holder, in the exercise of reasonable business prudence, to believe that prompt payment is not expected and that forfeiture on that account will not be insisted upon.

**2. Same—Renewal Notes—Principal and Agent.**

Where the insured has had the policy of life insurance sued on delivered to him by the company, and for the payment of the first premium has given his note with provision that unless paid at maturity the policy should become null and void, and there was evidence tending to show that this note was indorsed to its agent, likewise indorsed by him and given to the local bank for collection, and by it transmitted to the bank of the home office for collection, and that the insured, before the maturity of the note, went to the company's home office to make arrangements for an extension of time of payment, was referred by it to the bank there, which accepted a part payment on the note and a renewal note extending the time of payment for the balance; that the company sent written notice to the insured's address, to pay the extension note given by him, advising him to get remittance there by its due date to keep his policy from lapsing; that the insured died after the date the first premium note was due, but before that of the renewal note, for which payment was offered at the home office of the company before maturity, and refused: *Held*, sufficient for the determination of the jury upon the question of whether there was a valid agreement to postpone the payment of the first note or a waiver of its conditions, by which the insured was given until the due date of the renewal note to make payment of the balance due on his first premium.

**3. Insurance, Life—Premium Notes—Renewals — Conditions of Policy — Waiver—Specified Officers—Approval—Trials—Questions for Jury.**

Where the insured has given his note for the payment of his first premium on his life insurance policy with provision that the policy should become null and void if the note is not then paid, and it is shown that the insured applied at the home office of the company for a renewal of the note, which was accorded by the company's bank, to which the insured was referred; that the insured subsequently received a notice from the home office, in its official envelope signed by its cashier, son of the secretary, that the premium (renewal) note was due on a certain date, and be sure to get

remittance there by that date, to keep the policy from lapsing, it is *Held*, sufficient for the determination of the jury upon the question as to whether the notice was sent with the knowledge and approval of the officers designated in the policy, the president, vice president, and secretary, as having sole power in behalf of the company to extend the time for the payment of the premium, etc., so as to bind the company therewith.

APPEAL by defendant from *Rountree, J.*, at March Term, 1914, (335) of CUMBERLAND.

Civil action. It was admitted at the trial that the policy declared on and presented by plaintiff had been duly executed by defendants and that Peter J. Murphy, the insured named in the policy, was dead, having died on 19 February, 1913.

Defendant contended that the policy was avoided for nonpayment of the first premium note and also because of fraudulent representations by the insured in his application as to his physical condition.

The jury rendered the following verdict:

1. Was the premium given for the policy paid in accordance with the terms of the policy and of the note? Answer: "Yes."

2. Did Peter J. Murphy in his application make fraudulent (336) representations of his physical condition which were material, as alleged? Answer: "No."

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

*Rose & Rose for plaintiff.*

*Q. K. Nimocks for defendant.*

HOKE, J. There is no specific exception to his Honor's charge to the jury, and the evidence being ample to show good faith and to sustain plaintiff's position on the second issue, the question recurs on the refusal of his Honor to nonsuit plaintiff by reason of the failure of the insured to pay the first premium note.

It is well established in this jurisdiction that, in the absence of fraud and in so far as the contract of insurance is concerned, the delivery of an insurance policy absolute and unconditional is a waiver of the stipulation for a previous or cotemporaneous payment of the first premium. *Pender v. Ins. Co.*, 163 N. C., 98; *Waters v. Annuity Co.*, 144 N. C., 663; *Rayburn v. Casualty Co.*, 141 N. C., 425; *Grier v. Ins. Co.*, 124 N. C., 315. And our decisions are to the effect, further, that where a note for such a premium contains provision that unless the same is paid at maturity the policy shall be avoided, the condition will be made effective by proper proof unless the time for payment has been postponed by valid agreement or the stipulation has been in some way waived on the

part of the company. *Sexton v. Ins. Co.*, 160 N. C., 597; *Perry v. Ins. Co.*, 150 N. C., 145; *McGraw v. Ins. Co.*, 78 N. C., 149; Vance on Insurance, pp. 175 and 178.

It is also held by well considered cases on the subject here and elsewhere that this provision as to forfeiture, being inserted for the benefit of the company, may be waived by it, and such a waiver will be considered established and a forfeiture prevented whenever it is shown, as indicated, that there has been a valid agreement to postpone payment or that the company has so far recognized an agreement to that effect or otherwise acted in reference to the matter as to induce the policy-holder, in the exercise of reasonable business prudence, to believe that prompt payment is not expected and that the forfeiture on that account will not be insisted on. *Gwaltney v. Assurance Society*, 132 N. C., 925; *McCraw v. Ins. Co.*, 78 N. C., 149; *Ins. Co. v. Eggleston*, 96 U. S., 572; *Ins. Co. v. Custer*, 128 Ind., 25; *Homer v. Ins. Co.*, 67 N. Y., 478; Vance on Insurance, p. 222.

In the present case the note given for the first premium, and on its face maturing 20 October, 1912, contained the provision that unless same was paid at maturity the policy should become null and void. The (337) same was not paid by the insured in full as originally promised, and, applying the principles heretofore stated, the disposition of the present appeal will properly be made to depend on whether there was a valid agreement to postpone the time of payment or whether the stipulation as to payment has been waived by the company or there was evidence presented from which such agreement or waiver could be properly inferred. On this question there was testimony on the part of plaintiff tending to show that "The application was written by Mr. John McDuffie, an agent and director of the company, 23 July, 1912 (record, p. 13 *et seq.*), and premium note for $52.64 taken for the amount of the premium, payable 20 October, 1912. (Record, p. 20, exhibit 2.) The note was indorsed by the LeFayette Mutual Life Insurance Company to its agent, John McDuffie, and likewise indorsed by him, and by him deposited with the First National Bank of Oxford for collection. That bank transmitted same to the Fourth National Bank of Fayetteville for collection. (Record, p. 21, and evidence of E. E. Page, secretary, p. 42) The sum of $25 and interest in advance was paid upon note to Mr. Peace, cashier of the Fourth National, and funds sent back to Oxford bank. The intestate, with his brother, went to home office of defendant, and was referred by those in charge of the office to the bank, as they did not have the note. Renewal interest was taken, which carried note to 1 March, 1913. The insured died 19 February, 1913, and balance due on premium note was tendered to secretary in the home office on 28 February, 1913, the day before the note fell due, which the secretary refused to accept. On

15 February, 1913, defendant company sent to the insured a written notice that the premium note for $27.64 would be due 1 March, 1913, saying: 'Be sure to get your remittance here by the above date to keep your policy from lapsing.' (Record, p. 29). This notice was sent out by the home office of the company, in their official stamped envelope, on the company's form of notice, and was signed by A. P. Page, son of the secretary, who was cashier."

From these, the facts chiefly relevant to the issue, we think it not only the permissible but eminently the correct inference, as made by the jury, that there was an agreement to postpone or a waiver of the conditions, and the insured was thereby given the privilege of not paying the premium note until 1 March, thus keeping the policy in force until that date.

We are not inadvertent to the provision of the policy referred to by counsel to the effect that "Only the president, vice president, or secretary has power in behalf of the company to make or modify this or any contract of insurance to extend the time for paying any premium, and the company shall not be bound by any promise or representation heretofore or hereafter given by any person other than the above"; but when it is shown, and on a motion to nonsuit we must accept it as (338) proven when there is evidence tending to show it, that the note was first extended ninety days on prepayment of the interest for that period and $25 on the principal to the bank acting as the company's agent, and that the insured afterwards went to the home office of the company for the purpose of obtaining another renewal and subsequently he [illegible] notice from such home office, in an official stamped envelope of the company, signed by A. B. Page, cashier, and son of the secretary, to the effect that his premium note for $27.64 was due 1 March, "Be sure to get your remittance here by the above date to keep your policy from lapsing," we think it follows, by fair and reasonable inference, that this notice was sent with the knowledge and approval of the officers designated on the face of the policy and that their action in the premises is binding on the company. Vance on Insurance, pp. 351-53.

On the record, we are of opinion that the cause has been correctly tried and determined and that the judgment in plaintiff's favor should be affirmed.

No error.

*Cited: Owens v. Ins. Co.*, 173 N.C. 374 (2c); *Underwood v. Ins. Co.*, 177 N.C. 334 (2c); *Paul v. Ins. Co.*, 183 N.C. 161 (1c, 2c); *Hayworth v. Ins. Co.*, 190 N.C. 759 (1d); *Arrington v. Ins. Co.*, 193 N.C. 346 (1c); *Hill v. Ins. Co.*, 200 N.C. 121 (1c); *Green v. Casualty Co.*, 203 N.C. 773 (1c); *Sellers v. Ins. Co.*, 205 N.C. 356 (2d); *Hutson v. Ins. Co.*, 206 N.C. 329 (2d); *Paramore v. Ins. Asso.*, 207 N.C. 304 (1c, 2c);

*Shackelford v. Woodmen of the World,* 209 N.C. 636 (1c); *Stallings v. Ins. Co.,* 229 N.C. 531 (1c); *Stallings v. Ins. Co.,* 230 N.C. 305 (1c).

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

(Filed 25 November, 1914.)

**Principal and Agent—Commissions—Pleadings—Trials—Proof.**

In an action to recover commissions for sale of lands it is unnecessary for the plaintiff to allege in his complaint the various stages leading up to the consummation of the transaction: and in this case it is held that it was not necessary for the plaintiff to have alleged that the defendant procured a loan for the purchaser through the agent of the former as a condition for the sale, and that the same agent therein acted for both, in order to show the fact by his evidence. The charge of the court is according to the decision on a former appeal. 164 N. C., 19.

APPEAL by defendants from *Adams, J.,* at February Term, 1914, of MECKLENBURG.

*Pharr & Bell and John W. Hutchison for plaintiff.*

*Cansler & Cansler for defendants.*

CLARK, C. J. This case was before the Court, 164 N. C., 19, when the judgment of nonsuit was reversed. The defendants now appeal from a verdict and judgment for $350. The plaintiff conducts a real estate business, acting as agent and broker in buying and selling real estate. The defendants placed their property in plaintiff's hands for sale and asked Griffith, the plaintiff's agent, to sell the property to one Lummus,
(339) with whom they knew Griffith was negotiating for the sale of such real estate. The male defendant wanted $35,000 for the property. Griffith had several meetings with Lummus in regard to selling the property to him. Before the sale was perfected Lummus saw the male defendant, and he agreed to sell for $31,000 and a second-hand automobile, valued at $1,500. The defendant Goode then informed Griffith, and asked him to draw up the terms of the contract, one of the terms of which was that Goode would secure a loan for Lummus of $20,000. Griffith, at Goode's request, procured this loan for Lummus and placed the amount to Goode's credit in the bank. There was subsequently a disagreement as to the amount of the commission, Griffith demanding 3 per cent, according to the custom of brokers in Charlotte, and brought this action to

recover $975. The jury gave him a verdict of $350, and from the judgment on this verdict the defendants appeal.

The defendants insist strongly upon their assignment of error, No. 22, which is because the court charged, "If you find by the greater weight of the evidence that the plaintiff was negotiating the sale of the property to Lummus, and you further find that Griffith was the plaintiff's agent, and as such agent acted also as the agent of the defendants in securing the loan for the buyer, and procured the loan to be made, and that the procuring of this loan was the condition upon which the trade was to be consummated—that is, that the sale was to be effected on condition that the loan was made—you will find in that event that the plaintiff, nothing else appearing, was the procuring cause of the sale."

The defendants assign error because there is no allegation in the complaint that the sale was conditioned upon the procurement of the loan or that the plaintiff's agent was acting for the defendants in securing the same, and because there was no evidence to support the charge that the sale was conditioned upon the procurement of the loan.

The matter of procuring the loan was only an incidental matter, so to speak, a part of the *res gestæ*. Being merely evidential, it was not necessary that it should be pleaded in the complaint. The broker was entitled to give a full narration of the incidents connected with the sale without having pleaded them.

The charge of the court on the various phases of the evidence is in entire accord with the principles of law laid down in the former appeal in this case, in which it was held that, "While real property remains in the hands of a broker for the purpose of sale, the owner may not consummate the sale with one who had become interested as the proposed purchaser through the efforts of the broker, and escape liability for the payment of a commission." As pointed out in that case, the defendants received the full benefit of Griffith's services in selling the property, negotiating the loan, and in preparing and executing the necessary papers. The defendants inquired the amount of the commissions, (340) and on disagreement about the amount the defendants denied all liability; but the plaintiff is entitled to recover reasonable commissions, and the jury have determined the amount under a very proper charge from the court.

No error.

SOUTH ATLANTIC WASTE COMPANY v. RALEIGH, CHARLOTTE, AND SOUTHERN RAILWAY COMPANY.

(Filed 2 December, 1914.)

**1. Railroads—Easements—Equity—Restraining Order—Injunction.**

*Semble*, an owner of a lot on a city street, after having been refused a restraining order in the Superior Court against a railroad company from continuing the construction of the roadway in front of his property on the street, and from which order he has not appealed, is not entitled to consideration in equity upon his application thereafter for a permanent injunction against the continued use of the road by the common carrier, which had been put into full operation. *Griffin v. R. R.*, 150 N. C., 315, cited and applied.

**2. Same—Municipal Authority—Damages.**

The defendant railroad company in this case petitioned the city to change the location of one of the streets by using for street purposes a strip of land the defendant owned, and to permit it to use the street running in front of plaintiff's property for its roadway and railroad purposes, which was granted, and the road constructed in accordance with a blue-print, etc., filed with the petition and under the direction and supervision of the city engineer and with the approval of the city authorities. *Held*, the location of the road through the city was a matter to be determined by the city authorities, and the plaintiff is not entitled to injunctive relief, the remedy being in an action for damages.

**3. Railroad—Easements—Abutting Lands—Ingress to Lands—Damages—Evidence.**

Damages are recoverable of a railroad company which has constructed its railroad along and upon a city street upon which the plaintiff's lands abut, whether the plaintiff has shown any title to the street, or not, which arise from the inconvenience the plaintiff has sustained by reason of the interruption of access to his property, by rendering it less convenient for the purposes to which he had put it; and it is held competent, in this case, for the plaintiff to show that by the construction of the railroad at this place the plaintiff's ingress and egress had been impaired to and from leased property used in connection with its business conducted there.

**4. Railroads—Easements—Abutting Lands — Depreciation — Damages — Evidence.**

When compensatory damages are recoverable from a railroad company by an owner of lands abutting on the street by reason of its construction of its roadway upon the street, it is competent for the plaintiff to show the diminution in value to his property by reason of the construction complained of, and while a witness testifying in behalf of the plaintiff may not be able to express in dollars and cents the amount of the damages caused, they may, in proper instances, give their opinion that the property has been damaged a certain per cent of its value.

**5. Railroads—Easements—Abutting Lands—Measure of Damages.**

The plaintiff sues a railroad company for damages to his property arising from its constructing and operating its railway upon the street in front of his lot abutting thereon, and it is held that the defendant's prayer for instruction asking that the jury should not take into consideration any effect upon the mere appearance of the plaintiff's property caused by the construction of the road was substantially incorporated in the charge given, of which the defendant cannot complain.

APPEAL by both parties from *Adams, J.*, at May Term, 1914, (341) of MECKLENBURG.

PLAINTIFF'S APPEAL.

Civil action to permanently enjoin defendant from operating its railway along what was Brevard Street in Charlotte in front of plaintiff's property and for permanent damages if injunction is denied.

His Honor, after hearing all the evidence, denied the injunction, and submitted the issue of permanent damages to the jury. The plaintiff appealed from the judgment denying the injunction.

*Cameron Morrison, D. B. Smith, J. H. McLain for plaintiff.*

*Pharr & Bell for defendants.*

BROWN, J. The application of plaintiff for an injunction certainly comes very late, and seems to have but little merit. Before the railroad was constructed along Brevard Street, and when construction work reached plaintiff's property, plaintiff sued out a restraining order, enjoining the further construction of the railway. The matter was heard by *Webb, J.*, and the restraining order dissolved. The plaintiff appealed, but did not prosecute the appeal.

The defendant thereupon proceeded to finish its construction work and completed its road, and it is now in full operation as a common carrier. Under such circumstances the plaintiff has very little claim upon the interference of a court of equity in its behalf. It should have prosecuted its appeal and not have stood by and seen the road constructed and in operation and again ask the court to interfere.

As is well said in *Griffin v. R., R.*: "It is against the policy of the law to restrain industries and such enterprises as tend to develop the country and its resources. It ought not to be done except in extreme cases, and this is not such a one. It is contrary to the policy of the law to use the extraordinary powers of the court to arrest the develop- (342) ment of industrial enterprises, or the progress of works prosecuted apparently for the public good as well as for private gain. The court

will not put the public to needless inconvenience. The court should have dissolved the restraining order." *Griffin v. R. R.*, 150 N. C., 315; *Navigation Co. v. Emery*, 108 N. C., 133; *Pedrick v. R. R.*, 143 N. C., 510; *R. R. v. R. R.*, 116 N. C., 925.

Nevertheless, we do not think the plaintiff is entitled to the injunction in any view of the facts.

The plaintiff's property borders on Brevard Street in the city of Charlotte. There is no evidence that the plaintiff owns the fee in said street or any other rights than those of an abutting owner. The defendant's road does not run on its land or touch it at any point. The facts appear to be that on 14 October, 1912, the defendant purchased from the Highland Park Manufacturing Company a small strip of land on the east side of North Brevard Street opposite to the plaintiff's property, where said street turns east from Brevard Street towards Caldwell Street, and on 14 October, 1912, petitioned the board of aldermen of the city of Charlotte to be allowed to change the location of Brevard Street to the strip of land so purchased from the Highland Park Manufacturing Company, and to use the portion of Brevard Street immediately in front of the plaintiff's property for the location and construction of its railway track into the city of Charlotte, filing with said petition a blue-print showing the proposed change, with a profile of the track, its elevation, and underpasses to be built under the track in front of the plaintiff's property.

This petition was allowed by the city authorities, and the course of the street was accordingly changed and the road constructed on what was formerly a portion of Brevard Street in front of plaintiff's property. The change in the street was made by the defendant and the road located under the direction and supervision of the city engineer and with the approval of the city authorities.

The rights of the plaintiff as an abutting owner are conceded, and it is immaterial whether it owned the fee or not. It involves simply a question of damage. As we have heretofore said: "It is immaterial whether the title of the street is in the municipality or the abutting owner. If in the former, it is a breach of the trust reposed in the authorities, and if in the latter, it is an additional burden. In either case damages or compensation will be awarded proportionate to the injury sustained." *Staton v. R. R.*, 147 N. C., 437.

The city clearly possessed the right to assent to the use of the street by the railway, and it is plain that it has given its assent. The desig-
(343) nation of the street to be used and the location of the route of the road through the city is a matter to be determined by the city authorities. *Griffin v. R. R., supra.*

If the plaintiff's property has been subjected to injury or additional servitude because it abuts on the street, the remedy is in damages, and not by injunction.

Affirmed.

DEFENDANT'S APPEAL.

The court submitted to the jury an issue to establish the damage, and in response thereto the jury assessed the plaintiff's damage at $10,000. The defendant excepted to rulings of his Honor upon this issue and assigns the same as error.

The defendant excepts to the evidence of witnesses to the effect that a portion of Brevard Street running by the property of the plaintiff had been entirely occupied by the defendant; that previous thereto there was a road at this place over which the plaintiff had ingress and egress to some property which it had leased across the way or near by, and was using in its business, and that its right of ingress and egress to this leasehold property had been injured by the construction of the railroad.

We see no error in this. Whatever damage and inconvenience the plaintiff had sustained by reason of the interruption of access to its property or by rendering it less convenient for the use to which the plaintiff had put it is an element of damage.

Other exceptions relate to the admission of evidence of certain witnesses who testified that while they could not express in dollars and cents the damage to the property on account of the defendant's fill and embankment, yet in their opinion the property had been damaged to a certain percentage of its value and had been depreciated 33⅓ per cent on account of the defendant's road. We see no objection to this testimony. It was proper to prove that after the building of the road and on account of the injury done to the plaintiff's property, it had depreciated in value.

Other exceptions relate to the refusal of the court to instruct the jury that they should not allow any damages for injury to the appearance of the plaintiff's property. The appellant asked for a special instruction upon this subject, and excepts to the refusal of the court to give this special instruction and also to what the court did instruct the jury upon the subject.

The special instruction asked for was as follows: "The court instructs the jury that, in arriving at any award, should they award damages to the plaintiff, they will not take into consideration any effect caused by the construction of the defendant's railroad track upon the mere appearance of the plaintiff's property."

The instruction given was as follows: "You cannot award dam- (344) ages to the plaintiff for any danger which may arise from apprehended fires, because if the plaintiff's property should happen to be

burned by the negligence of the defendant in this respect, the plaintiff would be entitled to recovery of damages; nor would the plaintiff be entitled to recovery for such inconveniences as arise from the ordinary operation of railway trains, such as noise and smoke or the mere proximity of the railway to the plaintiff's property, or the vibrations, if any, caused by the operation of the train, except as they may affect the physical condition of the property of the plaintiff; and the same rule applies to the interference with the general appearance of the property."

We think the prayer of the defendant was substantially given, and whether a correct proposition of law or not, the defendant has no reason to complain.

Upon the issue of damages, the charge of his Honor was very clear and entirely favorable to the defendant. The proposition is laid down and enforced in the charge that damages in this case are recoverable only when they arise from some physical interference with the plaintiff's property, or physical interference with a right or use appurtenant to the plaintiff's property. His Honor carefully instructed the jury that they were to assess permanent damages and that under that issue the plaintiff could recover only one compensation for any actual direct physical injuries caused to the plaintiff's property by the construction of the defendant's road in the street in front of it.

His Honor spoke as follows: "The question is this, What is the direct damage to the value of the plaintiff's property caused by the defendant's interference with its use for the purpose for which it was established? To what extent does such interference impair the actual market value of the property? The damages recoverable are only such as arise from some physical interference with the plaintiff's property, or physical interference with a right or a use appurtenant to the property. Now, that is the rule by which you are to be guided in assessing damages. 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 result to the plaintiff or to the plaintiff's property from the construction, operation, and maintenance of the defendant's road."

Upon the whole record, we find

No error.

*Cited: Jones v. Lassiter,* 169 N.C. 751 (2c); *Bennett v. R. R.,* 170 N.C. 394 (3c); *Hales v. R. R.,* 172 N.C. 108 (2d); *Greenville v. Highway Com.,* 196 N.C. 228 (2c).

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MOSES WATTS v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 2 December, 1914.)

**Negligence—Contributory Negligence—Trials—Evidence—Nonsuit.**

It appearing from the evidence in this case that an alderman of the city of Charlotte and an employee of an oil company there, in his endeavor to relieve the city from a "water famine" by the use of trains of the defendant railroad company tendered by the defendant to the city for the purpose, and the use of the oil company's tanks, hired hands and organized a force to pump the water into the tanks for transportation over the defendant's road; and the plaintiff, so employed, but when off duty, went up the road a short distance, and to get out of the rain then falling went under an empty box car placed on a siding frequently in use, and while sitting there was injured by a freight train backing into the car he was under, without signal or warning. Apart from the question of the breach of any duty owed by the defendant to the plaintiff, it is held that the latter's contributory negligence continuing to the time of impact, barred his recovery as a matter of law, and defendant's motion for nonsuit was properly granted.

APPEAL by plaintiff from *Adams, J.*, at May Term, 1914, of MECKLENBURG.

Civil action to recover damages for physical injury caused by alleged negligence on the part of the defendant railroad company.

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

*W. M. Wilson and Stewart & McRae for plaintiff.*

*Cansler & Cansler for defendant.*

HOKE, J. After carefully considering the record, the Court is of opinion that his Honor took a correct view of the evidence in entering a judgment of nonsuit. It appeared that in August, 1911, there was a "water famine" in the city of Charlotte, and the defendant road tendered its trains to the city for the purpose of hauling water from the Catawba River to relieve this condition, the city paying the operating expenses; that a Mr. Thompson, alderman and chairman of the finance committee of the city of Charlotte and an employee of the Southern Cotton Oil Mill, undertook the active management of the relief effort, procured tanks from the oil company and, hiring hands, organized a force to pump the water into the tanks for transportation over defendant road; that plaintiff was employed by this Mr. Thompson, either for the oil company or for the city, and was a part of the night force engaged in pumping the water into the cars; that some time during the day, when he was off duty, he and a comrade went up the road a short distance, and, in order to get

out of a rain which had commenced falling, he and his associate (346) went under an empty box car, on the siding at Mount Holly, sat down on the track, and, while sitting there, a freight train, without signal warning, backed onto this siding, struck the car under which plaintiff was sitting, knocking same back on plaintiff and cutting off his leg. There was evidence that the man who changed switch when the freight train backed onto the siding, if he had looked, might have seen plaintiff's legs, which were stretched out over the track, and the testimony showed further that the freight trains going east and west usually stopped and used this side-track every day when engaged in shifting and loading and unloading at Mount Holly station.

On this, the evidence chiefly relevant, and putting aside the view insisted on, that no breach of duty by defendant has been shown towards the plaintiff, we think the nonsuit must clearly be sustained by reason of plaintiff's own negligence, existent to the very time of the impact; for, according to his statement, he was under the car for his own purposes, on a live track, engaged in the performance of no duty whatever, awake and in full possession of his faculties, and utterly inattentive to his own safety to the very time of the injury.

If it be conceded that defendant was negligent in backing on the siding without signal, the case presents a typical case of contributory negligence, concurring with that of plaintiff and barring his claim for damages. *Ward v. R. R., ante,* 148.

There is no error, and the judgment of nonsuit is

Affirmed.

*Cited: Horne v. R. R.,* 170 N.C. 658 (j); *Buckner v. R. R.,* 194 N.C. 107 (d).

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TERESA E. PAGE v. JOSEPH B. PAGE.

(Filed 2 December, 1914.)

**1. Divorce a Mensa — Husband's Misconduct — Provocation — Statutes — Trials—Questions for Jury—Former Appeal — Appeal and Error — Weight of Evidence—Courts.**

In this action for divorce *a mensa et thoro,* brought by the wife, it is *Held,* that the separate issues as to the husband's conduct and the wife's provocation are sufficiently raised by the pleadings, Revisal, sec. 1562 (4), and the verdict of the jury thereon in the plaintiff's favor, rendered upon competent evidence and correct rulings of law, will not be disturbed: the question of the sufficiency of the evidence to sustain the verdict is one that should have been addressed to the discretion of the trial judge; and it is

*Further held,* that the former appeal in this case, deciding that the wife was not entitled to alimony *pendente lite,* did not affect the right of the plaintiff to introduce further evidence in her favor upon the issues raised.

**2. Divorce a Mensa—Misconduct—Continued Acts—Evidence.**

Where the wife sues the husband for divorce *a mensa et thoro,* under Revisal, 1562 (4), it is not error to admit on the trial evidence of his misconduct occurring "more than ten years ago" when it is a part of the whole course of his dealings coming down to "within six months of the beginning of the action."

**3. Divorce a Mensa—Condonation—Requisites—Evidence.**

Evidence merely of forgiveness by the plaintiff, in her action for divorce against her husband *a mensa et thoro,* is insufficient to establish condonation, for condonation is forgiveness upon condition to abstain from like offenses afterwards, which revives their original status when violated.

**4. Appeal and Error—Objections and Exceptions—Courts—Statements—Arguments—Briefs.**

A statement made by the judge upon the trial, excepted to but not argued, is deemed to have been abandoned.

**5. Divorce a Mensa—Custody of Children—Bonds—Appeal and Error.**

In this action for divorce the order of the judge appointing the plaintiff custodian for the court of a minor child of the marriage, pending appeal, requiring a bond in a certain sum to keep the child within the jurisdiction of the court and amenable to its orders, etc., is found to be without error.

APPEAL by defendant from *Harding, J.,* at September Term, (347) 1914, of POLK.

*Quinn, Hamrick & McRorie for plaintiff.*
*Smith & Shipman and Spainhour & Mull for defendant.*

CLARK, C. J. This is an action for a divorce from bed and board. It was before us, *Page v. Page,* 161 N. C., 170, upon appeal from a decree granting alimony *pendente lite.* The defendant excepted to the refusal of the court to dismiss the action upon that opinion. But on reference thereto it will be found that it rested upon the statement that notwithstanding the facts found by the court in that case, the judge had added a finding that he acquitted the defendant of any intended wrong. This Court said: "We do not concur with the court in its conclusion that, assuming the defendant's testimony to be true, the plaintiff is entitled to alimony. . . . Our decision does not prevent a trial of the issues. The plaintiff hereafter may allege and establish a better case than she has in the present record and one entitling her to a divorce, but there is no such case now presented." This was based upon the statement above set out, "assuming the defendant's testimony to be true."

While the plaintiff did not see fit to amend her complaint, she strengthened the testimony in her favor, and the jury further found that the defendant's testimony was not true, for in response to the issues submitted they returned the issues as follows:

(348) 1. Did the defendant offer such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome, as alleged? Answer: "Yes."

2. Did the plaintiff, by her own conduct, cause and provoke the defendant to offer such indignities as to make her life burdensome, as alleged? Answer: "No."

Our former decision was based upon the finding of the judge in that case that the evidence of the defendant was true. In this trial, his version was submitted to the jury and the jury found otherwise.

The allegations in the complaint are sufficiently specific in an action for divorce from bed and board on the ground that the defendant had offered such indignities to his wife as to render her condition intolerable and life burdensome. Revisal, 1563 (4). It is unnecessary to recite the unpleasant details. It is sufficient to say that if the jury believed the evidence of the plaintiff and rejected that of the defendant, or most of it, there was enough to justify the verdict, and the weight of the testimony was a matter for the jury, subject to the supervisory power of the judge to set aside the verdict if he found it against the weight of the testimony. This he has not done.

The jury have found on the second issue, against the allegations of recrimination on the part of the defendant, that he had been provoked to offer these indignities by reason of the conduct of the plaintiff.

The defendant excepted that much of the evidence as to these indignities was as to his conduct more than ten years ago. But it was only as a part of the whole course of dealings, coming down to "within six months of the beginning of this action." In *Sanders v. Sanders,* 157 N. C., 230, it is said where "the defendant's conduct was a long course of neglect, cruelty, humiliation, and insult, repeated and persisted in, it is sufficient to bring the case within the purview of Revisal, 1652 (4), that he had offered such indignities to the person as to render her condition intolerable and life burdensome."

The defendant places stress on the fact that the plaintiff said she had forgiven the defendant. In *Lassiter v. Lassiter,* 92 N. C., 129, it is said: "Condonation is forgiveness upon condition, and the conditon is that the party forgiven will abstain from like offense afterwards, and moreover treat the forgiving party in all respects with conjugal kindness." If the condition shall be violated, the original status is revived.

From the evidence it would seem that this was a case of too much mother-in-law on both sides. The parents of both parties seemed to have had more animosity in the case than the parties themselves.

Though the defendant was acquitted of an assault upon his mother-in-law by kicking her, the court says that the defendant testified that he did not remember whether he did so or not, and the judge attributed his acquittal to the fact that the burden of proof was upon the (349) State. It is true that this statement is made by *Judge Long* on the appeal in the same case, *post,* 350, from him, but it was referred to in the argument.

We find no error in the charge of the court nor to that part of the decree awarding the custody of the little girl, which is as follows: "The plaintiff is better suited and capacitated to take care of the little girl than the defendant, and she is hereby appointed custodian for the court, pending appeal, on her giving bond in the sum of $2,500 to keep the child within the jurisdiction of the court, and to keep her amenable to the order of the court. The defendant, Joe Page, is likewise appointed custodian of the little boy, Paul Page, on like terms, and the custody of the said Eva Page is hereby awarded to her mother, Teresa Page. It is further ordered that the custody of the little boy, Paul Page, is hereby awarded to the father, Joseph Page, and that both the father and mother be required to enter into bond in the sum of $2,500 each, payable to the State of North Carolina, to keep the said children in the jurisdiction of the Superior Court until otherwise ordered."

This decree in no wise conflicts with what was said in this case, *Page v. Page,* 166 N. C., 90, in which the Court held, citing *Harris v. Harris,* 115 N. C., 587, that the "lower court should refrain from changing the custody of the child, pending an appeal, nor permit it to be carried out of the State"; and also said that the defendant was "entitled to have the court retain jurisdiction of the child till the hearing of his appeal, so that the final determination of the court, if in his favor, may be effective."

There is no exception to the allowance of $25 per month alimony, which does not indeed seem to be excessive in view of the finding of fact as to the estate of the defendant. While the finding of the jury is against the defendant, there was strong evidence in his favor, but the judges of the facts have determined them. The action of the court in giving the custody of the little girl to the mother, and of the boy to the father, seems to have been well considered, upon all the evidence in the case, and the judge has observed the requirement of this Court to assure the retention of the children in this State to abide the final action upon this appeal.

No error.

*Cited: Jones v. Jones,* 173 N.C. 285 (3c); *Rodman v. Rodman,* 198 N.C. 139 (1c); *S. v. Mason,* 204 N.C. 54 (3c); *Brooks v. Brooks,* 226 N.C. 286 (3c); *Eggleston v. Eggleston,* 228 N.C. 679 (3c); *Cameron v. Cameron,* 231 N.C. 128 (1p).

(350)

TERESA E. PAGE v. JOSEPH B. PAGE.

(Filed 2 December, 1914.)

**Divorce a Mensa—Custody of Child—Former Decision—Appeal and Error —Improvident Appeal.**

In this suit for divorce *a mensa* it was directed on a former appeal (166 N. C., 90) that the lower court retain jurisdiction of a minor child of the marriage until the hearing, etc., and to refrain from changing the custody of the child or permitting it to be carried out of the State, and the judgment of the lower court having already been sustained as in accordance with the former appeal, this appeal becomes irrelevant and improvident.

APPEAL by defendant from *Long, J.,* at April Term, 1914, of POLK.

*Quinn, Hamrick & McRorie for plaintiff.*

*Spainhour & Mull, Smith & Shipman for defendant.*

CLARK, C. J. This is an appeal from a decree of *Long, J.,* awarding the custody of the little girl, Eva Page, to her mother, who is a non-resident of this State, pending the appeal, upon giving bond in the sum of $1,000 for her production at the order of the court.

This matter was presented to us on a motion for supersedeas, *Page v. Page,* 166 N. C., 90, and the Court directed the lower court to "retain jurisdiction of the child until the hearing of the appeal, so that the final determination of this Court, if in favor of the father, may be effective," and also required the lower court to "refrain from changing the custody of the child, pending an appeal, or permitting it to be carried out of the State," citing *Harris v. Harris,* 115 N. C., 587. The cause has since been tried and the issues found by a jury, and the appeal in this latter case has been determined at this term, *Page v. Page, ante,* 346.

This appeal, therefore, is now irrelevant and improvident.

Appeal dismissed.

*Cited: In re DeFord,* 226 N.C. 192 (c).

MARGARET E. McLAURIN v. W. B. McINTYRE.

(Filed 2 December, 1914.)

**1. Landlord and Tenant—Justice's Court—Court's Jurisdiction—Title to Lands—Superior Court.**

The jurisdiction conferred by the landlord and tenant act upon justices of the peace does not obtain where the title to the land is in dispute; and when, in the course of the trial, it appears that the matters involved do not fall within the jurisdiction conferred in these respects, the justice should dismiss the action; and upon appeal, the Superior Court, acquiring no further jurisdiction than the court wherein the action was commenced, may not proceed with the trial.

**2. Same—Mortgage—Fraud—Equities.**

The mortgagor and mortgagee having agreed after the latter had acquired the lands at a foreclosure sale, under a paper-writing whereby the mortgagor was given another opportunity to purchase upon his payment of rent and the performance of certain other conditions, the mortgagee brings his action before a justice of the peace in summary ejectment, wherein a controversy arose, under conflicting evidence, as to whether the defendant had relinquished his rights under the paper-writing, or had executed another writing wherein he became merely a tenant, concerning which the defendant contended, upon competent evidence, that he had not signed, or had signed it in ignorance of its terms, or through fear or by coercion. *Held*, the controversy involved the disputed title to real property, out of which certain equities arose, and not being within the jurisdiction of the justice of the peace, was properly dismissed by him; and, further, the Superior Court acquired no jurisdiction on appeal to determine the controversy *de novo*.

CLARK, C. J., dissenting.

APPEAL by plaintiff from *Shaw, J.*, at June Term, 1914, of (351) SCOTLAND.

This is a proceeding in summary ejectment under the landlord and tenant act, begun before a justice of the peace and heard on appeal in the Superior Court.

In 1881 L. B. McLaurin sold the land in controversy to the defendant for $1,000, of which $200 was paid in cash and the remainder secured by mortgage on the land.

The defendant failed to pay the debt, and in 1894 the land was sold under foreclosure proceedings and bought by said L. B. McLaurin, to whom a deed was regularly executed.

The defendant was ousted from the land, and on 25 April, 1895, the following paper was executed by the parties:

NORTH CAROLINA—Richmond County.

I have rented to W. B. McIntyre the place on which he now resides (and which I own) for the year 1895. He desires to redeem the said place, and I agree with him that if he pays this year's rental as per contract already made, at the time it becomes due, and then pays me the rental due for five (5) consecutive years to an amount which will equal eight (8) per cent interest on the amount due me on the place at the time of the purchase thereof made by me at the commissioner's sale made by order of the Superior Court of Richmond County, I will give him a chance to redeem the same at $1,500 and said interest. It is especially stipulated that if the said McIntyre fails in any payment above set forth, then his said tenancy is to be at an end, and he thereby agrees to surrender said lands to said McLaurin or his heirs and assigns, and hereby waives all notice of the end of his tenancy, and the said McLaurin (352) is to have all the liens now given to landlords for the performance of the contract. I give to the said McIntyre the privilege to clear any land on said place and to use the wood.

25 April, 1895. (Signed) L. B. McLAURIN.

I accept the above on the foregoing terms.

25 April, 1895. (Signed) W. B. McINTYRE.

L. B. McLaurin died in 1898 and the plaintiff claims to be the owner of the land under a deed from his executor.

The plaintiff offered evidence tending to prove that the defendant executed to her a rental contract for said land in 1901, and that he had been in possession thereof since that time as her tenant, paying rent.

This was denied by the defendant, who claimed that the amounts paid by him were on the contract of purchase.

The court found as a fact that the title to real estate was in controversy, and dismissed the action, and the plaintiff appealed.

*Edward H. Gibson and Walter H. Neal for plaintiff.*

*G. B. Patterson and Cox & Dunn for defendant.*

ALLEN, J. The right of the owner of land to recover possession before a justice of the peace against one who has entered into a rental contract, and the limitations upon the right, are clearly and accurately stated by *Justice Hoke* in *Hauser v. Morrison*, 146 N. C., 249. He says: "The authorities of this State have established the principle that the remedy by summary proceedings in ejectment given by the landlord and tenant act (Revisal, sec. 2001 *et seq.*), is not coextensive with the doctrine of estoppel arising where one enters and holds land under another, but is

restricted to the case expressly specified in the act, and where the relation between the parties is simply that of landlord and tenant, and when, on the trial of such a proceeding, it is made to appear that the relation existing is that of mortgagor and mortgagee, giving the right to an account, or vendor and vendee, requiring an adjustment of equities, a justice's court has no jurisdiction of such questions, and the proceeding should be dismissed. . . . And it is equally well settled that the jurisdiction does not extend to the relation of mortgagor and mortgagee and vendor and vendee, in which, although the mortgagor and vendee may technically be tenants at law, they are viewed in equity as the owners of the estate, and are allowed, in order to avoid the circuity of letting judgment go and then going into equity to enjoin the execution, to set up in one action under our present system their equitable title in defense to any action which may be brought to recover the possession. . . .

"There are decisions here and elsewhere to the effect that a mortgagee of property, after default, and a vendor, under an executory contract, may at times rent the property to the mortgagor or vendee (353) in possession, as in *Crinkley v. Edgerton,* 113 N. C., 444, and that such a lease will, under certain circumstances, be upheld so far as to give the lessor the benefit of a landlord's lien as against a claim by outsiders. But these cases and the principle upon which they rest do not go to the extent of depriving the mortgagor or vendee occupying the property of his right to account and adjustment; or of conferring on a landlord under such a contract the right of summary proceedings in ejectment, which, as stated, applies only when the simple relation of landlord and tenant exists between the parties."

It is also held in *Boone v. Drake,* 109 N. C., 82, that the jurisdiction to determine whether there has been an abandonment of a contract of purchase is in the Superior Court, and in *Cheese Co. v. Pipkin,* 155 N. C., 396, that the jurisdiction of the Superior Court on appeal from a justice is entirely derivative.

In *Boyett v. Vaughan,* 85 N. C., 365, the Court said in a unanimous opinion: "It is the jurisdiction of the justice of the peace which, on appeal, gives jurisdiction to the Superior Court, and of course if the justice had no jurisdiction, the Superior Court could have none"; and again in *Ijames v. McClamroch,* 92 N. C., 365: "The jurisdiction of the Superior Court in appeals from justice's courts is entirely derivative. If the justice in such cases has no jurisdiction of the action, the Superior Court can derive none by the appeal."

Both of these cases were cited and approved in *Robeson v. Hodges,* 105 N. C., 49, in an opinion written by *Chief Justice Clark,* in which he quotes from the first that "It is the jurisdiction of the justice of the

peace which, on appeal, gives jurisdiction to the Superior Court, and, of course, if the justice had no jurisdiction, the Superior Court could have none, and, therefore, by allowing an amendment in the transcript, which enlarges the cause of action beyond the jurisdiction of the justice it must necessarily oust itself of jurisdiction"; and the same learned judge concurred in the opinion written by *Chief Justice Furches* in *S. v. Wiseman,* 131 N. C., 797, in which it was said: "In cases where bills are found in the Superior Court, its jurisdiction is original. But in cases of appeal from justices of the peace its jurisdiction is derivative, and it has no more or greater jurisdiction than the justice of the peace had; and if the justice had none, the Superior Court had none."

If these principles are applied to the facts in the record, a statement of the questions involved in the appeal is sufficient to demonstrate that the justice did not have jurisdiction and that the action was properly dismissed.

(1) Is the plaintiff a purchaser for value? This is at least in controversy, as her own testimony may mean that she paid nothing for
(354) the land, but that it and three other tracts were allotted to her as a part of her husband's estate, to which she was entitled, at a valuation of $3,400.

(2) Is the paper-writing of 25 April, 1895, a contract to convey, or an option?

(3) If a contract to convey, has there been an abandonment of the contract by the defendant?

(4) If a contract to convey, and there has been no abandonment, what payments have been made thereon?

(5) If an option, was the writing at the foot of the paper, "I accept the above on the foregoing terms," intended by the parties as an acceptance of the offer to sell?

(6) If not, has there been an acceptance since that time by payments made by defendant?

(7) If an option, and the offer to sell has been accepted, has the defendant abandoned the rights acquired thereunder?

(8) If there has been an acceptance and no abandonment, what amounts have been paid by the defendant?

(9) Did the defendant execute the paper spoken of as the rental contract under which the plaintiff claims?

(10) If so, was there any imposition upon him?

There is ample evidence on the part of the plaintiff that the defendant did sign the rental contract, that it was read to him, and that the transaction was open and fair; but the defendant testified that it was not read to him, and that he did not know what was in it.

It was in evidence that the defendant is ignorant, and that the paper was prepared by the agent and attorney of the plaintiff in South Carolina, and executed in his office there.

The defendant further testified in reference to this paper: "I have never made any settlement with Mrs. McLaurin for rent of this land. I cannot see the paper you have handed me without my specks. I have not got them with me. I am 60 years old and I can't read it, because I can't see it. I can read and write a little bit. The signature to the paper looks like my own. It kinder looks like it. I would not swear to it. If I signed it, I don't remember about it. Mr. McCall told me to sign. That man scared me to death. I went down there and I went to see Mrs. McLaurin first and it looked like he got insulted. I don't know what I done. I would not swear that is my signature. It kinder looks like it. I will not swear it is or is not. I don't remember what was in the paper. It was several years ago. I know I went to Mr. McCall's office and he scared me half to death. I went to see Mrs. McLaurin first, then I went to the office. I remember that much.

"I don't know whether that is my signature or not. I signed no paper giving away my home. I tell you at the time I was in there I was most wild; that man scared me so bad. That looks like I signed it. (355) I cannot read without my specks. That looks like my handwriting. I would not swear I did it. It looks like my handwriting. Mr. McCall just simply got offended because I went to see her first. I think I signed some paper-writing down there."

It is rare that a more complex situation is presented, and it is not only manifest that the title to land is in controversy, but also that equities may arise when the facts are definitely settled, which it was never intended should be committed to a justice of the peace for adjustment.

We have refrained from expressing an opinion upon the different questions in controversy because not necessary to this decision, and it is better and fairer to the parties to await a fuller development of the facts in a court having jurisdiction of the whole case.

The only matter before us is whether the questions arise, and if so, has a justice of the peace jurisdiction of them?

It is but just to counsel for plaintiff to say that when this proceeding was instituted it appeared to them that the relation between the plaintiff and defendant was that of landlord and tenant, pure and simple, and that the question of jurisdiction arises on account of the claims of the defendant under an unregistered paper.

Affirmed.

CLARK, C. J., dissenting: When this case was dismissed by the justice of the peace the appeal brought it into the Superior Court. If the jus-

tice erred, the case should have been tried in the Superior Court *de novo*. If he was correct in dismissing, the case was all the more in the Superior Court by virtue of the appeal, and as that court had jurisdiction of the subject-matter it should have proceeded to try the case on its merits. In this day when there is search for more efficiency in the administration of the courts, there is no reason to dismiss a cause which is in a court which has full jurisdiction of the subject-matter, simply that the plaintiff may issue another process and come back into the very same court. To do so is but to follow the ancient ideas by which if a cause was brought in *debt* when it should have been in *covenant*, or in *detinue* when it should have been in *replevin*, or in *equity* when it should have been at *law*, the plaintiff was dismissed and told to come back into the same court.

On a like appeal from a justice in a criminal action, if the justice did not have jurisdiction, the defendant is not dismissed, but a bill is sent to the grand jury. In the appeal in a civil case, jurisdiction should likewise be retained and a complaint filed.

It is sometimes said that on appeal from the justice the Superior Court acquires only *derivative* jurisdiction. There is nothing in the Constitution to that effect and no warrant for the position. The case if tried on appeal in the Superior Court is tried *de novo* and in (356) every particular as if the cause had been originally brought to that court. The warrant and trial before the justice and the appeal in this case have given the defendant certainly as much notice of the nature of the case as if a summons had been served on him returnable to the Superior Court.

The Superior Court is a court of general jurisdiction. Formerly when an action was brought before the clerk when it should have been brought to the court at term, the action was dismissed, upon exactly the same ground that it is now sought to oust the jurisdiction of the Superior Court. But the Legislature passed the statute which is now Revisal, 614, which provides: "Whenever any civil action or special proceeding begun before the clerk of the Superior Court shall be, for any ground whatever, sent to the Superior Court before the judge, the judge shall have jurisdiction," and authorizes him "to hear and determine all matters in controversy in such action." The decisions hold that the judge may make any amendment whatever in such case, and even though the proceeding before the clerk was a nullity. *In re Anderson*, 132 N. C., 243; *R. R. v. Stroud, ib.*, 416; *Ewbank v. Turner*, 134 N. C., 81. This was so, logically, under our system of courts, without the passage of the act to correct decisions theretofore to the contrary. The same rule, and for the same reason, should obtain on appeals from a justice of the peace in civil

cases as fully as in criminal cases. The Superior Court having general jurisdiction, is seized fully of all cases brought on its docket by appeal, as fully as if they had originated there, and the judge should have power to make amendments and try the cases as if they had begun in that court.

This matter has been fully discussed in *Unitype Co. v. Ashcraft,* 155 N. C., at p. 71; *Cheese Co. v. Pipkin, ib.,* at p. 401; *S. v. McAden,* 162 N. C., at p. 578, and in *Sewing Machine Co. v. Bullock,* 163 N. C., at p. 547.

*Cited: Hosiery Mills v. R.R.,* 174 N.C. 453 (j); *Jerome v. Setzer,* 175 N.C. 392 (c); *Holmes v. Bullock,* 178 N.C. 378 (p); *Comrs. v. Sparks,* 179 N.C. 583 (c); *Hargrove v. Cox,* 180 N.C. 361, 363 (c); *Sewing Machine Co. v. Berger,* 181 N.C. 248 (d); *Hobby v. Freeman,* 183 N.C. 242 (d); *Hall v. Artis,* 186 N.C. 106 (d); *Ogburn v. Booker,* 197 N.C. 689 (d); *Ins. Co. v. Totten,* 203 N.C. 433 (c); *Fertilizer Co. v. Bowen,* 204 N.C. 376 (d); *Dean v. Duvall,* 208 N.C. 824 (p); *Simons v. Lebrun,* 219 N.C. 47 (d).

## THOMAS J. KEENAN v. COMMISSIONERS OF NEW HANOVER COUNTY AND I. B. RHODES.

(Filed 25 November, 1914.)

**1. Counties—Torts of Officers—Trespass.**

Counties are instrumentalities of government given corporate powers for executing the purposes for which they were created, and, in the absence of statutory provisions, are not liable in damages for the torts of their officers. Hence, an action will not lie against a county for wrongful trespass and damages.

**2. Trespass—Authorized—Adjoining Owners—Lessor and Lessee—Measure of Damages.**

Where an action for wrongful trespass and damages for quarrying rock on the plaintiff's land is brought against the lessor of adjoining lands upon the theory that the defendant authorized the trespass and entry of his lessee and received the profits, which is denied, with further defense that if the lessee quarried beyond the line of the leased land upon the plaintiff's land, it was done without his authority, the only damages recoverable by the plaintiff are for the defendant's authorized act of his lessee in going beyond the line of the leased lands and committing the trespass and for which he received the proceeds.

**3. Trespass—Adjoining Lands—Dividing Line—Judgment Rolls—Parties—Evidence.**

Where in an action for wrongful trespass and damage to lands it becomes necessary to locate the true dividing line between the parties, a judgment roll in a former action to which the defendant was not a party is incompetent as evidence against him of the location of the dividing line.

**4. Witnesses—Hypothetical Questions—Trials—Evidence.**

A hypothetical question, asked an expert witness upon evidence that the party thereafter expected to introduce, is incompetent.

(357) APPEAL by defendants from *Allen, J.*, at February Term, 1914, of NEW HANOVER.

Civil action, tried upon these issues:

1. Is the plaintiff the owner in fee and entitled to the immediate possession of the lands and premises described in the complaint? Answer: "Yes."

2. Did the defendants wrongfully trespass upon and injure the plaintiff's property, as alleged in the complaint? Answer: "Yes."

3. What damages, if any, is the plaintiff entitled to recover against the board of commissioners of New Hanover County? Answer: "$1,400."

4. What damages, if any, is the plaintiff entitled to recover against the defendants in this action, other than the board of commissioners of New Hanover County? Answer: "$1,400."

5. Did the board of commissioners of New Hanover County enter upon and remove rock and other road-building material from the plaintiff's lands under, by virtue of, and in pursuance to a lease or contract from I. B. Rhodes? Answer: "Yes."

6. Has the board of commissioners of New Hanover County paid the said I. B. Rhodes and his personal representatives in full for all the rock and road-building material quarried from the plaintiff's land? Answer: "Yes; up to 1 February, 1914."

7. Is the plaintiff's cause of action barred by the statute of limitations? Answer: "No."

8. What damages, if any, from pumping water across the plaintiff's land? Answer: "$100."

From the judgment rendered, both defendants appealed.

*Ricaud & Jones, E. K. Bryan for plaintiff.*

*J. O. Carr, Kenan & Stacy, and J. D. Bellamy for defendants.*

(358) BROWN, J., after stating the case: This is an action to recover damages against the board of commissioners in their corporate

capacity, and also I. B. Rhodes, for entering upon the plaintiff's land and taking rock from his quarry.

The defendant Rhodes leased to the board of commissioners certain lands containing a rock quarry, upon which the defendant board entered and quarried rock for the use of the county. This action is brought to recover damages from the county of New Hanover and I. B. Rhodes for the alleged wrongful trespass.

Can the action be maintained against the county for the tort of its officials? It is well settled that counties are instrumentalities of government, and are given corporate powers to execute their purposes, and are not liable for damages for the torts of their officials in the absence of statutory provisions giving a right of action against them. *White v. Comrs.*, 90 N. C., 437; *Jones v. Comrs.*, 130 N. C., 452; *Hitch v. Comrs.*, 132 N. C., 573.

In this last case it is expressly held "That a county cannot be sued for trespass upon land or for any other tort in the absence of statutory authority." How far the individual members of the board of commissioners or others who may have committed the trespass, or directed or authorized it, may be liable, is a question not before us.

We are, therefore, of opinion that his Honor erred in rendering judgment against the board of commissioners in their corporate capacity. The defendant Rhodes is joined as a codefendant with the commissioners, and is sought to be held liable upon the theory that he authorized the trespass and entry upon the plaintiff's lands and received the proceeds of the rock quarry thereon. The evidence tends to prove that the plaintiff and Rhodes owned adjoining lands; Rhodes owning a tract of upland and the plaintiff owning a tract of lowland adjoining it.

It appears in the record that Rhodes leased, on 12 June, 1907, in consideration of certain rents specified in the written lease, to the board of commissioners a certain tract of land just beyond and east of the city of Wilmington, adjoining Mill Creek and Green's mill pond on the east, situate in the township of Harnett, county of New Hanover, as far eastwardly to a point 100 feet west of where the slaughter-house belonging to the party of the first part is now situate, and southward of said Mill Creek and Green's mill pond, for the purpose of searching for rock, stone, marl, lime, etc., and conducting mining and quarrying operations thereon.

It is claimed by the plaintiff that the defendant Rhodes leased to the board of commissioners his land, or a part thereof, and authorized and directed the said quarrying operations and other trespasses thereon. The defendant Rhodes claims that he leased to the defendant board his own land, and that if they quarried on the plaintiff's land (359)

and beyond the dividing line, it was done without his authority. It thus became important to locate the plaintiff's land as well as that of the defendant Rhodes.

On the trial the court permitted the introduction of a judgment roll in the case of Thomas J. Keenan against the city of Wilmington and Louisa G. Wright, for the purpose of locating the boundaries between Thomas J. Keenan and the defendant Rhodes. It appears that Rhodes was not a party to said suit, and is, therefore, not bound by any judgment or decree entered therein. Such judgment would not be competent to locate division line between plaintiff and Rhodes. We think his Honor erred in admitting it as evidence against Rhodes.

The second assignment of error is as follows:

"2. That the court erred in allowing the following question and answer: 'Q. Suppose the jury should find from the evidence we hereafter expect to offer that the line of Everett ran from the corner up there at the chinquapin, at the end of the 14 poles, directly across at the Market Street road at the corner of the Catholic Cemetery, ruled on the map. If you begin at that point at the Catholic Cemetery lot, at the northeast corner, would such a situation cover the land claimed by Keenan? A. A straight line across there would take in more land than Keenan claims.'"

The exception is well taken. A hypothetical question should never be permitted upon evidence which up to that time had not been introduced. A promise to introduce it does not warrant a hypothetical question based thereon.

We do not find in the record that the promise was made good, and the evidence introduced. In *Dameron v. Lumber Co.*, 161 N. C., 496, it is held that a hypothetical question, which presupposes the existence of facts of which there is no evidence introduced, is incompetent.

The only theory upon which the plaintiff can recover damages of the defendant Rhodes in this action is that his lease to the defendant board covers some part of the plaintiff's land or that he authorized or ratified the trespasses made upon his land and received the proceeds thereof. In which case Rhodes would be liable to the plaintiff only for such actual damage as was done to the plaintiff's land by Rhodes' authority.

The motion to nonsuit as to the defendant board should have been allowed; as to the defendant Rhodes, there must be a new trial of the entire case.

New trial.

*Cited: Snider v. High Point,* 168 N.C. 609 (1c); *Jenkins v. Griffith,* 189 N.C. 634 (1c).

E. G. FAUST v. A. J. ROHR.

(Filed 2 December, 1914.)

**1. Contracts, Written—Abandoned—Parol Evidence—Statute of Frauds—Quantum of Proof.**

Parties to a written instrument, unless in violation of some provision of law, may by parol rescind or by matter *in pais* abandon it, the proof required thereof being by the greater weight of the evidence.

**2. Contracts, Written—Partly in Parol—Parol Evidence—Entire Contract.**

Where it is not required in law that a contract to be enforcible must be in writing, it is competent to show by parol that the entire contract was not embraced in the writing, but rested partly in parol, and when not contradictory of the written part, the entire contract may be shown.

**3. Same—Subsequent Contract.**

A valid contract was made between the parties that one of them should not engage in a certain trade in a certain town for a specified time, in opposition to the other; and thereafter they made a second contract for associating together in the same trade, which was terminated. The present suit is to restrain the defendant from violating his first contract not to engage in that trade, and it is held competent for the defendant to show that it was also agreed between the parties that the original contract should be canceled and annulled, and this provision was omitted from the second contract because the plaintiff said it was unnecessary to refer to it, the effect of this evidence being that the second contract rested partly in writing and partly by parol, and to show the part not reduced to writing.

APPEAL by plaintiff from *Lane, J.*, at August Term, 1914, of (360) UNION.

Civil action to restrain the defendant from carrying on the barber business in the town of Monroe, N. C., by reason of a written contract to that effect entered into between them in December, 1902.

The cause was before us last term on an appeal by plaintiff from a judgment dissolving a preliminary restraining order, on the ground, partly, that a subsequent contract of partnership in the barber business, entered into by the partners in 1913 and which was afterwards dissolved, etc.

The Supreme Court being of opinion that a mere contract of partnership, without more, would not of itself abrogate the original agreement, and that, on the facts as they were then presented, the restraining order should be continued to the final hearing, gave judgment accordingly. See case, 166 N. C., 187.

This opinion having been certified down and defendant having obtained leave, amended his answer so as to allege that on entering the second contract of partnership it was also agreed between the parties that

the original contract, binding defendant not to enter further into
(361) the barber business in Monroe, should be canceled and annulled and that it was not put into the second contract, as plaintiff said it was not necessary to refer to the old contract in writing out the new agreement.

On issue so joined, the jury rendered the following verdict:

1. Was the contract referred to in the complaint as Exhibit A canceled by agreement of the parties, as alleged in the answer of the defendant? Answer: "Yes."

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

*Adams, Armfield & Adams for plaintiff.*
*Vann & Pratt and Redwine & Sikes for defendant.*

HOKE, J., after stating the case: After a full and impartial hearing, the jury have rendered a verdict on the issue in favor of defendant, and we find no good reason for disturbing the result.

It was contended, first, that the original agreement, being in writing, could not be altered except by clear, strong, and convincing testimony; but while this principle is well recognized in proper instances, it does not apply in the present case. Unless in violation of some provision of law, it is recognized that parties to a written instrument may, by parol, rescind or by matter *in pais* abandon the same. *May v. Getty,* 140 N. C., 316, citing *Holden v. Purefoy,* 108 N. C., 630, and other cases.

It is not proposed here to show that the written agreement was incorrectly expressed, but admitting that same was written exactly as agreed upon, the defendant undertook to show that the parties, by a subsequent agreement, had changed or done away with the first, and this they may do by the greater weight of the testimony.

Again, it is insisted that the defense offered is in violation of the principle which forbids a party to contradict or alter a written instrument by contemporaneous oral stipulations; but the principle only prevails in cases where the parties have put the entire contract in writing, and not when same is partly in writing and partly in parol. *Mfg. Co. v. Mfg. Co.,* 161 N. C., 430; *Nicholson v. Reeves,* 94 N. C., 559; *Braswell v. Pope,* 82 N. C., 57; *Kerchner v. McRae,* 80 N. C., 219. In such case parol evidence is received to establish the oral part of the agreement and to the extent that the same does not contradict that which is written. *Walker v. Venters,* 148 N. C., 388.

In the present case the defendant contended and offered evidence tending to show that at the time the second contract was made it was also agreed that the first contract restraining defendant was annulled; that

the same was not put in the written contract of partnership, as it was not considered necessary to do so. The one might have been an inducement or consideration for the other, but, being a part of the (362) agreement which the parties did not undertake to put in writing, it may be properly established by parol.

While plaintiff, at the former hearing, showed a *prima facie* right to relief, the facts having now been established against him and no reversible error being found, the judgment in defendant's favor must be affirmed.

No error.

*Cited: Farrington v. McNeill,* 174 N.C. 421 (2c); *Sample v. Gray,* 184 N.C. 26 (2c); *Ins. Co. v. Gavin,* 187 N.C. 17 (2c); *Bixler v. Britton,* 192 N.C. 201 (1c, 3c); *Greene v. Bechtel,* 193 N.C. 98 (2c); *Highway Com. v. Rand,* 195 N.C. 811 (1c, 3c); *Bell v. Brown,* 227 N.C. 322 (1c).

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BARGER BROTHERS v. A. S. ALLEY.

(Filed 2 December, 1914.)

**Superior Courts—Verdicts Taken by Clerks of Court—Agreement of Counsel—Notification to Counsel—Judgments Signed Out of Term—Appeal and Error.**

By agreement of counsel, the clerk of the Superior Court can represent the judge in taking the verdict of the jury; and when so done, and counsel representing one of the parties are not present, owing to the failure of the deputy clerk to notify them as he had promised to do, the validity of the verdict is not thereby affected, especially when no prejudice to the complaining party has been shown. Agreements of counsel that the clerk should take the verdict of the jury and judgment be mailed to the judge to be signed as out of term is discussed and disapproved, though not held for error.

APPEAL by defendant from *Harding, J.*, at May Term, 1914, of IREDELL.

*H. P. Grier and A. L. Starr for plaintiffs.*

*G. A. Morrow and W. D. Turner for defendant.*

CLARK, C. J. There was no exception to the evidence or the charge. The court finds the facts that at 10 a. m. Saturday, the last day of the court, this case was given to the jury. It was the last case on the calen-

dar for trial, all the business of the term having been transacted. While waiting for the jury to return their verdict before adjourning the court for the term, the judge ascertained that the train for his home would leave in about thirty minutes. Counsel on both sides consented that the clerk might take the verdict, it being a plain action of debt, and that the judgment should be mailed to be signed by the judge at Winston, as of the term, and the judge left for home. The judge instructed the sheriff and the clerk that if the jury did not agree upon a verdict by 5 o'clock that day to withdraw a juror and make a mistrial, and this was consented to by counsel on both sides. About 4 p. m. the jury
(363) came in. The clerk was present, received and recorded their verdict, and judgment in accordance therewith was sent to the judge at Winston and signed.

There was no exception that the verdict was thus taken by the clerk in the absence of the judge according to the agreement of counsel. The only exception is that about 3 p. m. counsel for the defendant asked the deputy clerk, in the absence of the clerk himself, to notify them when the jury came in. The deputy clerk failed to so advise counsel, and the clerk, in the absence of such information, took the verdict. There is no suggestion that any detriment accrued to the defendant thereby.

It is not unusual to agree that judgment may be entered in vacation as of the term. It is also not unusual to agree that the clerk may receive the verdict, in the absence of the judge. It is rather unusual to agree for the clerk to accept a verdict after the judge has left the court. It is a practice not to be commended. It may lead on occasions to serious inconvenience, for strictly speaking the court ends when the judge leaves. *Delafield v. Construction Co.*, 115 N. C., 21. An agreement that the judge may sign the judgment out of term is subject to the same objection, though there is less probability of confusion.

In this case, however, counsel distinctly say that they do not wish to disavow their agreement that the clerk might take the verdict. They rest their sole exception upon the ground that the deputy clerk did not tell the clerk that they wished to be present, but they offer no evidence of the defendant having suffered any injury by reason of their absence.

It has always been held that parties have a right to be present at the rendition of the verdict, but that, except in capital cases, they can waive such right. *S. v. Paylor,* 89 N. C., 539. It has also been held that this right is personal to the parties themselves, and that it is not ground of a new trial if counsel are absent at the rendition of the judgment.

By agreement, the clerk can represent the judge in taking the verdict. *Ferrell v. Hales,* 119 N. C., 199; 38 Cyc., 1873, citing this and many other cases.

Even in a criminal case it is held: "The presence of counsel at the rendition of the verdict has never been held essential to its validity." *S. v. Jones,* 91 N. C., 654; *S. v. Austin,* 108 N. C., 780. In the latter case, which fits this case, it is said: "It is not suggested that the defendants were prejudiced in any way by the judge's absence. If there is any evidence indicating that they had been, we are sure their able and astute counsel would have pointed it out and the judge would have promptly set the verdict aside. The motion seems rather based upon a dislike to the tenor of the verdict itself, and a desire to be relieved from it, than upon any grievance sustained by the manner of its rendition." In *S. v. Jones,* 91 N. C., 654, it is said: "Whether or not a verdict (364) will be set aside because of the absence of defendant's attorney at the time of the rendition of the verdict is in the discretion of the presiding judge." While we distinctly consider the practice of taking a verdict after the departure of the judge from the court, which can only be done by consent, as one to be avoided, we cannot hold it in this case ground for new trial, since counsel are unwilling to disavow their agreement and no prejudice is shown to have accrued thereby.

The failure of the deputy clerk to notify the clerk of the wish of counsel to be present was a personal arrangement between them, and the failure to do so ought not to be visited upon the plaintiffs in this action, who are in no wise responsible for such failure. It was no part of the agreement between counsel that defendant's counsel were to be present at the rendition of the verdict, and the presence of counsel is not a matter of right, like the presence of the parties themselves, which is required unless waived. This may be done during the term of court, without express agreement, by the negligent and voluntary absence of the party, for he is fixed with notice of all that transpires and is made of record in the progress of the action and of all the pleadings and admissions of facts by his counsel in the cause, after he is once served with process. *Sparrow v. Davidson,* 77 N. C., 35; *University v. Lassiter,* 83 N. C., 38; *Ferrell v. Hales,* 119 N. C., 199, and cases there cited; Clark's Code (3 Ed.), sec. 595. But as to action taken out of term he is not fixed with notice except by consent expressly given, as in this case.

It is not found as a fact, nor is there any exception, in this case that the defendant himself was not present at the rendition of the verdict. It was his duty to see that his counsel was present, if he so desired.

No error.

*Cited:* *Coleman v. McCullough,* 190 N.C. 593 (p); *In re Sugg,* 194 N.C. 643 (q).

DAVID M. SCOTT ET AL. v. PAULINE JARRELL.

(Filed 25 November, 1914.)

**Process—Return Term—Interpretation of Statutes—Courts—Motion to Dismiss.**

When, contrary to the provisions of our statute, Revisal, sec. 434, a summons has been issued in an action returnable within less than ten days from the term in which the defendant is to appear and answer, etc., the action will be dismissed on defendant's motion. As to the power of the court to permit amendment to the summons upon request of plaintiff, *Quere.*

APPEAL by plaintiff from *Devin, J.*, at August Term, 1914, of GUILFORD.

(365) This is an appeal from an order dismissing the action, upon the ground that the summons is void or irregular.

The summons was issued by the clerk of the Superior Court of Guilford County, North Carolina, on 12 August, 1914, and was made returnable to the next regular term of said court, which commenced on the 17th of said month. The summons was received and served by the sheriff on the 13th of said month.

During the court commencing 17 August, 1914, the defendant entered a special appearance, and made the motion to dismiss the action for the reason that the original summons bears date 12 August, 1914, and was returnable on 17 August next thereafter.

The motion of the defendant was allowed, to which the plaintiffs excepted.

*R. R. King, Jr., King & Kimball for plaintiffs.*

*Peacock & Dalton, Morehead & Morehead, Brooks, Sapp & Williams for defendant.*

ALLEN, J. It is not necessary to pass on the power of the court to amend the summons, as the plaintiff declined to ask for an amendment, and elected to abide by the summons as issued.

The statute provides (Rev., sec. 434) that "If any summons shall be issued within less than ten days of the beginning of the next term of the Superior Court for the county in which it is issued, it shall be made returnable to the second term of said court next after the date of its issuing, and shall be executed and returned by the proper officer accordingly," and the summons is in direct contravention of its terms and at least irregular.

As was said in *Stafford v. Gallop,* 123 N. C., 23, "The object of service of process is to advise the defendant of the plaintiff's action, and

that he must appear at the time and place named and make his defense, and in default therein judgment will be prayed," and by the writ in this case the defendant was notified to appear at a time and place other than that required by the statute.

Treating it as irregular and not void process, the case of *S. v. Johnson*, 109 N. C., 852, furnishes an analogy. In that case the notice of appeal from a justice to the Superior Court was defective, and a motion to dismiss for that reason was made and denied. Upon appeal to this Court the action was dismissed, although the power was recognized in the Superior Court to allow notice of appeal to issue upon the motion to dismiss being made.

No request for the exercise of the power having been made, and the writ being in violation of the language of the statute, the action was properly dismissed.

Affirmed.

(366)

GUILFORD COUNTY ET AL. v. W. C. PORTER ET AL.

(Filed 25 November, 1914.)

**1. Interpretation of Statutes—Counties—Deeds and Conveyances—Conditions—Open Squares.**

Where a county owning a site upon which to build its courthouse is authorized by statute to buy, sell, and exchange real estate surrounding it upon such terms and conditions as it may deem just and proper, and for the best interest of the county, "for the purpose of preventing the erection of any building near the courthouse and thereby lessen the danger of fire" and "to enlarge the public square," and in pursuance of this authority have acquired conveyance of lands from adjoining owners upon condition that they shall be used as a public square and kept open for that purpose, etc., it is *Held*, that whether the conditions be called conditions subsequent or otherwise, they were within the purview of the authority conferred upon the county by the statute; and, coming within the intent of the parties as expressed in the conveyance, and forming a material part of the consideration for the lands, they are valid and binding upon the county.

**2. Same—Specific Performance—Equity—Injunction—Alleyways—Power of Courts.**

A county, under the purview of a statute authorizing it, having acquired lands from adjacent owners to its courthouse square upon a valid condition, expressed in the conveyance, that the property should be kept clear as a part of the open square around the courthouse, may be restrained, by proceedings of an equitable nature, from an intended breach of the covenants of the deeds by conveying the square to another corporation for the purpose of erecting a large building thereon to take up nearly the entire square; nor will the courts assume to pass upon the sufficiency of an 18½-foot alley for the defendants' needs, to be left between the pro-

posed building and those of defendants; for the defendants are entitled to the continued performance of the conditions upon which the deeds were made.

**3. Actions at Law—Titles—Equity—Interpretation of Statutes—Appeal and Error—Cause Remanded—Costs.**

Though this action is denominated a suit to remove a cloud upon plaintiff's title to land, it appears that the cloud complained of was put thereon by the plaintiff itself, and the case on appeal is therefore treated by the Court as a proceeding, under Revisal, sec. 1589, to determine the title to the property; and it appearing that the court below erroneously granted defendant's motion to nonsuit, where, under the facts shown, a decree in defendant's favor should have been entered, the case is remanded to set aside the nonsuit, and the court below is directed to enter the decree in accordance with the opinion and to tax plaintiff with costs of both courts.

APPEAL by plaintiff from *Devin, J.*, at August Term, 1914, of GUILFORD.

Civil action. From a judgment sustaining motion to nonsuit, the plaintiff appealed.

(367) *John N. Wilson, Brooks, Sapp & Williams for plaintiff.*

*W. P. Bynum, King & Kimball, Stern & Swift, A. W. Cooke, R. W. Harrison, R. C. Strudwick, W. M. Hendren, A. M. Scales for defendant.*

BROWN, J. This is stated to be an action to remove a cloud from the plaintiff's title to part of the courthouse square in Guilford County, but as the alleged cloud was placed thereon by the act of plaintiff, we prefer to treat it as a proceeding under section 1589, Revisal, to determine the title to the property described in the complaint growing out of the adverse claims of the defendants.

The courthouse of Guilford County was burned in 1872, and by virtue of chapter 16, Laws 1872, the commissioners proceeded to acquire additional ground adjacent to the old site for the purpose, as set forth in the act (section 6), of enlarging the public square, and authority was conferred by said act upon the county commissioners "to buy, sell, and exchange real estate surrounding said courthouse, upon such terms as they may deem just and proper and for the best interests of the county." The courthouse was rebuilt on the old site and the commissioners proceeded to acquire land surrounding it for the public square.

Thereupon, on 5 February, 1873, the commissioners acquired a frontage on West Market Street of 23 feet and 8 inches from W. C. Porter, under a deed in fee containing this clause: "*Provided, however,* and it is understood and agreed, that the said lot herein conveyed shall be used by the said parties of the second part as a public square and be forever

kept open for that purpose, and should any building or structure of any character inconsistent with said purpose be erected thereon, the said party of the first part, his heirs or assigns, may enter upon the land herein conveyed and abate and remove any and all buildings or parts of buildings inconsistent with its use as aforesaid."

On the same date the commissioners, by exchange for other land, acquired from W. A. Caldwell an additional 20 feet on West Market Street, under a similar deed containing a similar proviso. On 3 February, 1873, the commissioners acquired, by exchange for other land, 24½ feet frontage on Elm Street from Waller R. Staples under a deed of exchange in fee, with full covenant of warranty.

On the same date the commissioners, in exchange for his land, conveyed to Waller R. Staples a strip of land on N. Elm Street immediately adjacent to that acquired from Staples, by deed in fee containing the following covenant immediately following the habendum: "The said party of the first part (the board of commissioners) doth further covenant and agree with the said party of the second part that the lot or parcel of ground lying between said brick building and the courthouse, on which formerly stood the office of C. P. Mendenhall, shall forever be kept open as vacant and unoccupied ground, except such (368) obstruction as may be made by shade trees thereon planted, and they shall not be planted within 20 feet of said brick building, and then only in such a manner as will leave free ingress and egress to said brick building on the south side thereof."

The purpose of this action upon the part of the plaintiffs is to get rid of these restrictions upon the use of the property so they can sell it to their coplaintiff, the Jefferson Insurance Company, for purpose of erecting thereon a large structure.

It is contended by the plaintiff that the provision in said deeds is void:

First. Because the condition is repugnant to the estate in fee simple already granted, and that such condition should be rejected and treated as surplusage. This position is untenable. If such a construction of a deed ever obtained in this State, it does not now. The narrow rules of the common law in construing deeds and other instruments, as expounded in *Hafner v. Irwin,* 20 N. C., 570, taken from Coke and Blackstone, have given way to a more enlightened and broader doctrine. The whole of a deed is now so construed as to effectuate the plainly expressed intention of the grantor, and to carry out the manifest purposes of the parties. The technicalities of the common law will not be permitted to override the intention so expressed. 1 Dev. on Deeds, sec. 215; *Triplett v. Williams,* 149 N. C., 394; *Beacon v. Amos,* 161 N. C., 365.

Second. Because the commissioners had no power to accept deeds containing such restrictions. This position is likewise untenable. The case

of *School Comrs. v. Kesler,* 67 N. C., 443, relied on by plaintiffs, does not sustain their contention, assuming that it is not practically overruled by *Hall v. Turner,* 110 N. C., 305. The decision in the *Kesler case* is based upon the theory that the condition or qualification contained in the deed accepted by the school committee is inconsistent with and repugnant to the very object and purpose for which the deed was made and the property acquired.

In acquiring the property, the commissioners of Guilford were acting under a statute expressly authorizing them "to buy, sell, and exchange real estate surrounding said courthouse upon such terms as they may deem just and proper, and for the best interests of the county." They were not acquiring property as a site for a courthouse building, but solely, as recognized in the statute, "for the purpose of preventing the erection of any building near the courthouse, and thereby lessen the danger of fire" and "to enlarge the public square."

The county had a site for the building, conveyed to it by Solomon Hopkins in 1858. The courthouse was again erected on that site, and the purpose of the act was, not only to provide a new courthouse,
(369) but to provide a public open space or square around it for its protection as well as public convenience. And it was for this latter purpose only that they acquired the land subject to these restrictions.

Instead of such restrictions being at variance with the purpose for which the property was acquired, they are wholly consistent with and in furtherance of it.

The grantee as well as the grantor is bound by the stipulations or agreement in these deeds, there being no suggestion of fraud or collusion (*Herring v. Lumber Co.,* 163 N. C., 483), and it would be inequitable and unjust to set aside the restrictive agreements in them without setting aside the entire deed—something the plaintiff evidently does not desire.

The case of *Edwards v. Goldsboro,* 141 N. C., 60, in our opinion, has no application to the facts of this case. The judgment in that case is based upon an evident fraud on the public, because the plaintiff had subscribed and paid to the city a sum of money for the purpose and with the intent of inducing the city officials to locate its city hall and market house near the plaintiff's property with the view of enhancing its value. The contract was illegal and against public policy. The parties, being *in pari delicto,* the Court refused to enforce the contract. We fail to see any similarity between the two cases.

In taking these deeds, the commissioners were acting directly in line with the purposes of the statute, and every restriction contained in them

is consistent with the purpose to provide an open space around the courthouse building.

The purpose of the statute, to provide an open space around the courthouse, manifestly could not be executed without acquiring this land, as it adjoined the courthouse site. No other land would answer the purpose. The commissioners were compelled to take that of these adjacent owners, and they had to acquire it on the best terms they could. Therefore, the statute conferred upon the commissioners large discretionary powers. The commissioners desired an open space all around the new courthouse for its protection. These grantors desired it for the benefit of their remaining property, so they would not be completely shut in. These restrictions and agreements, therefore, met the common desires, purposes, and interests of all parties. We see nothing in the transaction contrary to any public policy or *contra bonos mores.*

It is unnecessary to consider the argument that these clauses in the deeds are conditions subsequent, and if void the estate would vest in the grantee freed from the conditions. As they are not void, it is immaterial what name is given them. A somewhat similar stipulation in a deed is construed in *Church v. Bragaw,* 144 N. C., 126, not to be a condition subsequent, but rather as a covenant or a restrictive clause, to be enforced by a resort to the equitable power of the court for the (370) purpose of restraining its violation, citing *Graves v. Deterling,* 120 N. Y., 455; *Woodruff v. Woodruff,* 44 N. J. Eq., 349.

It is again contended that a court of equity will not enforce such an agreement by injunction.

No overt act of violation has yet been committed, but it appears that it is the purpose of the insurance company, if it acquires the entire courthouse site and square, to occupy it all with a building, leaving open, according to the terms of purchase, only an alleyway on the west of 18½ feet, an alleyway on the north and also to Gaston Street.

The plaintiff contends that this alleyway is sufficient for defendants' needs and affords them access to their own buildings, and, therefore, equity will not enjoin.

It seems to be well settled that such restrictive covenants in deeds and other instruments limiting the use of land in a specified manner, or prescribing a particular use, which create equitable servitudes on the land, will be specifically enforced in equity by injunction. *Busmeyer v. Jablosky,* 28 A. and E. Anno. Cases, p. 1104, and cases cited.

In *Church v. Bragaw, supra,* the right to injunctive relief to compel the observance of such covenants or restrictive clauses is clearly recognized.

Mr. Pomeroy says: "The injunction in this class of cases is granted almost as a matter of course upon a breach of the covenant." 4 Pom-

eroy Eq., p. 2672. And again he says (sec. 689): "On the same principle, if the owner of land enters into a covenant concerning the land, concerning its use, subjecting it to easements or personal servitudes, and the like, and the land is afterwards conveyed or sold to one who has notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it or will be restrained from violating it; and it makes no difference whatever, with respect to this liability in equity, whether the covenant is or is not one which in law runs with the land." *Hodge v. Sloan,* 107 N. Y., 246; *Post v. Weil,* 115 N. Y., 371.

The easements reserved in these deeds are necessary for the full enjoyment of defendants' property, occupied by them. They add greatly to its value, and doubtless they and their predecessors would not have parted with a part of their land to the county without reserving such rights. It was the purpose of making a public square in front of them that they sold a portion of their land to the county. No court will compel them to part with these valuable rights in exchange for the privilege of using an 18-foot alley. It is not for the Court to say that they should be content with less than what their title deeds give them in order that the county may have more.

(371) When the restriction is still of substantial value to the dominant estate, equity will enforce it and not require the owner thereof to be content with less than his bargain gives him. It is not for his adversary to say that he has more than he needs, and therefore he shall have less, so that his adversary may have back a part of that with which he has parted. *Landell v. Hamilton,* 175 Pa. St., 327; *Schworer v. Boylston Market Assn.,* 99 Mass., 295; *Kirkpatrick v. Peshine,* 24 N. J. Eq., 206, 216; 5 Pom. Eq., secs. 279-281.

In the Massachusetts case the easement was on an open passage-way or court for light, view, and access. The defendant was preparing to build over the passage-way a building, leaving a space of 15 feet in height beneath the building. The Court declared that the intention was that there should be no building at all put thereon, and declined to accept the defendant's argument that the plaintiff would have all in reason and equity that he should have. See, also, 27 Am. Dec., pp. 80 and 83, and notes.

In the New Jersey Equity case, at page 216, the rule is very clearly stated. Where the easement is for light and view as well as for access, and especially where the provision is for an open court or square, the courts with entire uniformity lend their aid to protect such rights, because it necessarily appears that the existence and continuation of such rights is of substantial value to the owner of the land, and they decline to "rob Peter to pay Paul."

The quotation from the Court of Appeals of New York with which the plaintiffs conclude their brief is from a case reported in 104 N. E. at page 631. In that case the Court of Appeals notes the cases where equity will lend its aid and when it will withhold it. In the course of the opinion the Court cites, as an instance where the aid of the court of equity will be forthcoming, the case of *Zipp v. Barker,* which was a case where the provision was for an easement of light, view, and access.

In Kerr on Injunctions, p. 532, it is said: "There may be cases in which the damage to arise from the breach of the covenant would be inappreciable, and in which the Court would refuse to interfere. But the case must be free from all possibility of doubt. It must be clear that there is no appreciable, or at all events no substantial damage, before the Court will, upon the ground of smallness of damage, withhold its hand from enforcing the execution. The mere fact that a breach of covenant is intended is a sufficient ground for the interference of the Court by injunction. A covenantee has the right to have the actual enjoyment of the property, *modo et forma,* as stipulated for by him. It is no answer to say that the act complained of will inflict no injury on him, or will be even beneficial to him. It is for the plaintiff to judge whether the agreement shall be kept as far as he is concerned, or whether he shall permit it to be violated. It is not necessary that (372) he should show that any damage has been done. It being established that the acts of the defendant are a violation of the contract, the Court will protect the complainant in the enjoyment of the right he has purchased."

This extract from Kerr is quoted with approval by the Supreme Court of New Jersey in *Kirkpatrick v. Peshine, supra.*

Who can say that the damage that will be suffered by these defendants will be inappreciable? We know of no principle of law or equity that will compel them to surrender their valuable easements of light, view, open space, and access, reserved in their deeds, in exchange for a narrow and dark alleyway between their modest buildings and a great modern sky-scraper.

We are of opinion that the defendants are entitled to have their easements preserved and protected by a decree of the court.

As this is a proceding to settle the title to this property, under the statute, the nonsuit is set aside and the cause is remanded to the Superior Court of Guilford County with instructions to enter a decree for defendants, adjudging the title to said easements in accordance with this opinion.

All the costs of Superior Court, as well as of this Court, will be taxed against the plaintiffs.

Remanded.

*Cited: Guilford County v. Porter,* 170 N.C. 310 S.c.; *Guilford v. Porter,* 171 N.C. 359 S.c.; *Whichard v. Whitehurst,* 181 N.C. 81 (1c); *Shephard v. Horton,* 188 N.C. 788 (1c); *Peel v. Peel,* 196 N.C. 783 (1c); *Realty Co. v. Barnes,* 197 N.C. 7 (2c).

B. F. WITHERS v. R. A. POE & CO., ET AL.

(Filed 2 December, 1914.)

**Contracts — Corporations — Assumption of Liabilities — Consideration — Debtor and Creditor.**

An agreement made between two sole remaining shareholders in a corporation upon a valuable consideration moving between themselves, that one should take over the assets and assume the liabilities of the corporation, and the other assist in the collection of the assets under certain circumstances, is valid and binding between the parties; and contemplating the payment of the corporation's debts, its creditor has a right of action thereunder against the partner assuming its liabilities, under the consideration of the contract made in their interest. *Supply Co. v. Lumber Co.*, 160 N. C., 428, cited and applied; *Morehead v. Winston,* 73 N. C., 398, overruled.

APPEAL by plaintiff from *Shaw, J.,* at October Term, 1914, of MECKLENBURG.

Civil action, heard on appeal from a justice's court. The action was to recover $191.06, with interest from 22 April, 1913, for goods and building material sold by plaintiff to defendant.

(373) Defendant denied liability and pleaded statute of frauds, want of valuable consideration, etc.

On the hearing there was evidence offered tending to show that plaintiff had sold building material to said amount to defendant company and had not been paid therefor; that at the date of the execution of the contract of indebtedness R. A. Poe and D. S. Caldwell were the only stockholders of the corporation, said Poe being the president and general manager and D. S. Caldwell secretary and treasurer, and in December, 1913, these parties, in adjustment of the corporate affairs and related matters between themselves, entered into a written contract, under seal, in terms as follows:

"That the said D. S. Caldwell, for and in consideration of the sum of $1 to him in hand paid, and in the further consideration of the premises hereinbefore and hereinafter set out, doth hereby covenant and agree, and for that purpose doth bind himself, his heirs, executors, administra-

tors, successors, and assigns, to pay and cause to be paid to the said R. A. Poe, within sixty days from the date of this agreement, the sum of $250 in good and lawful United States currency.

"Second. That I hereby release and relinquish and give unto the said R. A. Poe the sum of $50, which I heretofore advanced to him, and to no longer hold him liable for same.

"Third. Further, the said D. S. Caldwell covenants and agrees to liquidate, discharge, and pay, and cause to be liquidated, discharged, and paid, one note of $75, belonging to the said R. A. Poe, same being due and payable to the Charlotte National Bank of the city of Charlotte.

"Fourth. The said D. S. Caldwell further agrees that the said R. A. Poe is to have, in his own right and title, all property belonging to the said R. A. Poe & Co. in which the said D. S. Caldwell is interested, as evidenced by ten shares of certificate stock of the said company, over and above all moneys, machinery, or fixtures, or other things of value that is in excess of $5,811.78.

"The said D. S. Caldwell assumes the indebtedness of said R. A. Poe & Co., and releases R. A. Poe from all obligations except as set out in this agreement.

"Fifth. The said party of the second part doth covenant and agree, for and in consideration of the sum of $1 to him in hand paid, the receipt of which is hereby acknowledged, and for that purpose doth bind himself, his heirs, executors, administrators, successors, and assigns, to the following: That the said R. A. Poe will give so much of his time as may be necessary, and use his best efforts in securing from the town of Brevard, N. C., a final settlement of the balance due the said R. A. Poe & Co.; and further doth agree that he will endeavor to sell all machinery turned over to the said R. A. Poe & Co. by the town of Brevard, at the [best market price possible.]

"In witness, etc. . . ."

That in making this adjustment, this particular account was (374) included in estimating the amount of the company's indebtedness; that prior to entering into the above stated contract the company had been engaged in paving the streets of the town of Brevard, N. C., and, having failed to carry on the work satisfactorily, the town authorities took over the contract, machinery, fixtures, etc., and completed the job; that there was due and owing R. A. Poe & Co., on said work, $8,000 or $9,000, including money earned under the contract, machinery, fixtures, appliances, etc., taken by the town and still unaccounted for, but that the demand was involved in longer time, and D. S. Caldwell had not yet realized anything on same.

The court, being of opinion that there was no consideration accruing to defendant Caldwell on which to base the contract, and that the instru-

ment was only an agreement between the parties, D. S. Caldwell and R. A. Poe, in which plaintiff had no interest, on motion, entered judgment of nonsuit as to said defendant, and plaintiff excepted and appealed.

*Thaddeus A. Adams for plaintiff.*

*T. L. Kirkpatrick and H. L. Taylor for defendant.*

HOKE, J., after stating the facts: In *Supply Co. v. Lumber Co.,* 160 N. C., 428, it was held that "the beneficiaries of a contract can ordinarily recover, though not named therein, when it appears by express stipulation or reasonable intendment that their rights and interests were contemplated and being provided for." The ruling was intended as an interpretation of several of the later decisions in which the principle was announced and sustained, notably, *Gastonia v. Engineering Co.,* 131 N. C., 363; *Shoaf v. Ins. Co.,* 127 N. C., 308, and *Gorrell v. Water Co.,* 124 N. C., 328, and where the same applies, the consideration moving between the parties named, like the obligation, inures to the benefit of the claimant, and will sustain a recovery on the contract. This was expressly held in all of these cases, that of *Shoaf v. Ins. Co.* bearing perhaps the greatest resemblance to the one now before us.

In *Shoaf's case* one company had reinsured all the outstanding risks of another and taken over its assets. A recovery by a policy-holder was allowed directly against the latter company, although there was an express stipulation that no such direct liability should attach, and *Faircloth, J.,* in stating the position as applied to the facts of that case, said: "If A., on receipt of good and sufficient consideration, agrees with B. to assume and pay a debt of the latter to C., then C. may maintain an action directly on such contract against A., although C. is not privy to the consideration received by A.; and *Johannes v. Ins. Co.,* 66 Wis., is in recognition of the same general principle."

(375) The cases in this State where recovery by third parties has been denied have been chiefly on contracts giving no indication that the interests of these persons were contemplated or being provided for, as in contracts of strict indemnity, a case presented in *Clark v. Bonsal,* 157 N. C., 270, and in which there was nothing to indicate that the interests of third persons were at all considered, and the case of *Peacock v. Williams,* 98 N. C., 324, may be referred to a like principle. It seems that the case of *Morehead v. Winston,* 73 N. C., 398, cannot be reconciled with the later decisions involving the position, and, to that extent, same may be considered as overruled.

From the facts, as they are now presented in the record, it appears that D. S. Caldwell, for valuable consideration moving between himself

and R. A. Poe, has covenanted for himself, heirs, assigns, and successors, to assume the indebtedness of R. A. Poe & Co., and to release said Poe from any and all obligation except to aid in collecting the assets, and it further appears that these assets, to the amount of $5,811.78, have been withdrawn from any and all control of said R. A. Poe and set apart, if required, for the purpose of paying such indebtedness, and, applying the principle as it now prevails with us, we think it thus sufficiently appears that the interest of the company's creditors, including plaintiff, were being considered and provided for in the contract, and, if the facts stated are accepted by the jury, that plaintiff is entitled to recover.

For the reasons stated, we must hold there was error in entering judgment of nonsuit, and the same will be set aside.

Reversed.

*Cited: McCausland v. Construction Co.,* 172 N.C. 711 (c); *Crumpler v. Hines,* 174 N.C. 285 (c); *Lumber Co. v. Johnson,* 177 N.C. 47 (c); *Rector v. Lyda,* 180 N.C. 578 (c); *Dixon v. Horne,* 180 N.C. 586, 587 (c); *Irvin v. Harris,* 182 N.C. 653 (c); *Bank v. Assurance Co.,* 188 N.C. 753 (c); *Schofield v. Bacon,* 191 N.C. 256 (c); *Glass Co. v. Fidelity Co.,* 193 N.C. 773 (c); *Trust Co. v. Williams,* 209 N.C. 810 (c).

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B. B. SAUNDERS, ADMINISTRATOR, v. SOUTHERN RAILWAY COMPANY.

(Filed 25 November, 1914.)

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

An employee of a railroad doing an interstate business upon its line of railway extending beyond the borders of the State, and engaged, in a gang of hands, in putting in a new block system along the line of the railway, is engaged in interstate commerce, within the meaning of the Federal employees' liability act, and an action to recover damages for his negligent injury or wrongful death while thus employed comes within its provisions; and the Federal act is held to apply to the circumstances of this case, where such employee, while being transported from one location to another, in the course of the work, had left the defendant's car, provided for the accommodation of the work gang, for a necessary purpose, and was injured by another of defendant's trains, moving upon a different track, which had failed in its duty to give the required signals or warnings of its approach.

**2. Same—Contributory Negligence—Issues—Damages.**

In an action by an administrator of an employee of a railroad company to recover damages of the company for his wrongful death, coming within

the meaning of the Federal employers' liability act, an affirmative answer by the jury to the issue of contributory negligence does not preclude an answer to the issue of damages, when the issue as to the defendant's negligence has been correctly answered in the affirmative.

**3. Courts—Federal Employers' *Liability* Act—Common Law—*Negligence*—Pedestrians—Warnings—Train Signals.**

There is no difference in the administration of the common law of negligence between the State and Federal courts where the jurisdiction is concurrent, the seeming difference arising in the application of this law to the varying combinations of facts, or confusing negligence, which may or may not cause the injury complained of, with actionable negligence, which unites cause and effect; and where suit is brought in the State court, under the Federal employers' liability act, against a railroad company for the wrongful death of plaintiff's intestate, and it is shown that while the intestate, an employee of the defendant, in its interstate business, was walking upon or across the defendant's railroad track, in a populous town and where the conditions were dangerous, owing to a double main line and several spur or side tracks, and the customary use of the right of way by pedestrians, the defendant's freight train approached at a speed of from 20 to 25 miles an hour, without signals or other warnings, required by the dangerous condition of the locality and the company's rules, and running over the defendant, caused the death complained of, it is *Held*, that the defendant is negligent under the common law as administered either in the State or Federal court, and that the defendant is liable under the Federal statute.

**4. Statutes—Federal Employers' Liability Act—Compensatory Damages—Evidence.**

In this action brought under the Federal employers' liability act to recover damages sustained by the father for the wrongful death of his son, an employee of the defendant railway company, there was evidence tending to show that the relationship between the plaintiff and the deceased was affectionate, and that the latter had contributed to the support of the former, and it is held sufficient to support a verdict awarding more than nominal damages. *Irvin v. R. R.*, 164 N. C., 5; *Dooley v. R. R.*, 163 N. C., 454, cited and approved.

(376) APPEAL by defendant from *Lyon, J.*, at February Term, 1914, of PERSON.

This is an action under the Federal employers' liability act to recover damages for the alleged negligent killing of Kemp Saunders, who was struck by a southbound freight train on the yards at Thomasville, while crossing the southbound main line returning to the camp train, to the crew of which he belonged.

Saunders was employed by the defendants as a member of a crew engaged in erecting an electric block signal system for the defendant from Salisbury, N. C., to Denim, N. C., in place of another sys-
(377) tem then in use. The work this crew was doing was planting poles near the track and stringing wires thereon. At the time in

question the work had progressed as far as Thomasville, at which point, in the outskirts of the town, the train on which the crew slept and ate camped. On the morning of 17 August, 1912, between 6:30 and 7 o'clock a. m., the work train left the camp, moving on the northbound main line to a point just south of the passenger station, from which point it was to proceed in a short while to the place where they were working, at or about the northern outskirts of the town of Thomasville. At the point where the work train stopped there are four tracks, viz., the northbound main line, on which the camp train stood, the southbound main line, a side-track, and another track called the delivery track, next to the freight depot. When the camp train stopped near the passenger station, Saunders, together with a fellow-workman, Thornbro, and, according to some of the witnesses, with another fellow-workman whose name was not recalled, left the camp train, passed over the railroad main line and the two side-tracks and went between some box cars standing next to the freight depot. While returning from the point to get aboard his own train, which began moving out just as or shortly after he had left the box cars, and while in the act of crossing the southbound main line, he was struck and killed by a southbound freight train.

G. D. Gloer, a witness for plaintiff, testified as follows: "I live at Statesville and work in furniture factory there. I was working for Southern Railway Company on the block signal line at Thomasville at the time of the death of Mr. Saunders. I had been working there about three weeks and had become acquainted with Saunders. He was there when I went there. This construction force was called the block signal gang. I do not know how long Saunders had been there when I went there. We spent the nights in a car of the Southern Railway Company. I saw Saunders on the morning he was killed; it was at breakfast, about 6:30. The cars were at the orphanage grounds at Thomasville. The cars were moved up to Thomasville over the northbound main line and stopped south of the station. I was sitting in the car door on the left-hand side. I saw Saunders after the car stopped; he had gotten off and gone across the southbound track and was coming back when I saw him. There are four tracks at this point. He was over about the box car, I think. I do not know what he was doing. He was coming back from the car when I saw him. I think he relieved his bladder. He was between two box cars; the box cars were standing on the side-track near the loading place near the depot and on the side-track across the main line. There were no toilet facilities provided on our train. Our train had not started in motion when I saw him coming back—it started just about the time he got near the southbound track; our train was going north, moving slowly, and Saunders was going in the direction of our (378) train. He was crossing the southbound track and had stepped

one foot over the last rail when the train hit him. It was a southbound freight train that hit him. I would judge it was running 20 or 25 miles an hour. I did not hear the freight train blow and whistle or ring any bell. I was on the side of the car next to the freight train. I do not know what part of Saunders' body the train struck. I did not see him after the train hit him. He kind of had his back to the train. He was something like 3 or 4 feet from our train when he was hit. Our train was on the northbound track going north, and the train that struck him was on the southbound track going south. I know where two street crossings are, and Saunders was something like 30 or 40 yards from the north street crossing when the train struck him. I was sitting in the third or fourth car of our train. Saunders was right across the railroad right opposite me when the train struck him. I do not know how many cars in our train or how many there were in the through freight that was passing. It looked like it was going at full speed through Thomasville. It is built on both sides of the track and near the hotel." There was other evidence to the same effect.

The rules of the defendant were introduced.

The jury returned the following verdict:

1. Was the plaintiff's intestate killed by the negligence of the Southern Railway Company, as alleged in the complaint? Answer: "Yes."

2. Did plaintiff's intestate, by his own negligence, contribute to his own death? Answer: "Yes."

3. What damages, if any, is plaintiff administrator entitled to recover of the defendant? Answer: "$3,500."

Judgment was rendered in favor of the plaintiff, and the defendant appealed.

*Bryant & Brogden, Manning & Kitchin for plaintiff.*

*William D. Merritt, Manly, Hendren & Womble for defendant.*

ALLEN, J. Three questions are presented by the appeal:

1. Was the intestate of the plaintiff employed in interstate commerce at the time of his death?

He was an employee of the defendant engaged in installing a new and improved block system along the track of the defendant in place of another system already in use, and at the time of his death was returning to his work train, from which he had been absent for a necessary purpose only a few minutes, and it is admitted that the defendant was engaged in interstate commerce over said track.

Upon these facts two recent decisions of the Supreme Court of the United States (*R. R. v. Zachary,* 232 U. S., 248, and *Pedersen v.*

*R. R.*, 229 U. S., 146), which were approved in *R. R. v. Behrens,* (379) 283 U. S., 473, compel us to answer the question in the affirmative.

In the *Zachary case* it was held that a fireman, who had prepared his engine for its run in interstate commerce, and was temporarily absent, going to his boarding-house, was "still on duty and employed in interstate commerce, notwithstanding his temporary absence from the locomotive," and, in the *Pedersen case,* that an employee was employed in interstate commerce who was carrying a sack of bolts or rivets to be used in repairing a bridge, which was regularly used in interstate and intrastate commerce.

In the last case the Court says: "That the defendant was engaged in interstate commerce is conceded, and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is, Is the work in question a part of the interstate commerce in which the carrier is engaged?"

In support of the ruling that the plaintiff there was engaged in interstate commerce, the Court cited, among others, the case of *Zikos v. O. R. and N. Co.* (C. C. A.) 179 Fed., 893, where it was held that a section hand, working on a track of a railroad over which both interstate

and intrastate traffic is moved, is employed in interstate com-
(380) merce within the meaning of the act; *Central R. Co. of N. J. v. Colasurdo,* 192 Fed., 901, 113 C. C. A., 379, where the same was held as to a railroad trackman injured while repairing a switch in a terminal yard; and *Darr v. B. and O. R. Co.,* (C. C. A.) 197 Fed., 665, to the same effect, where the employee was injured while making repairs on a car used indiscriminately in both interstate and intrastate commerce.

The question was considered by the Supreme Court of Utah in an able and learned opinion upon facts substantially like those in the record before us (*Grow v. Oregon R. R.,* 138 Pac., 398), and the same result reached. The reasoning of the Court covers so fully the contentions made here that we reproduce it at some length. The Court says: "We think the rule announced in the *Pedersen case* is decisive of the question here. If, as there announced, an employee engaged in repairing a car, engine, or track, or constructing or repairing a switch or bridge along a track used in interstate commerce, is, within the meaning of the act, employed in such commerce, then, do we think, was the deceased here also employed in such commerce. The defendant confessedly was engaged in interstate commerce. In carrying on such commerce it had been, and then was, using its track and line of railway for such purpose from Salt Lake to Huntington. For the better conduct of such commerce and the moving of such traffic, and to promote the safety of employees in operating interstate trains and of passengers transported from State to State, it was necessary, or at least desirable, to equip its line of railway with block signals. For that purpose were they installed. They are not separate and apart from the track—something operating independently of it, or independently of the interstate commerce in which the defendant was engaged—but are, in a sense, a part and parcel of the track itself, something attached to and operated in connection with it in carrying on such commerce. Now, should it be said that an employee in repairing a car which had been, and was intended to be, used in interstate commerce is employed in such commerce, but if he be engaged in attaching to such a car a new appliance, or equipment, something not theretofore used on such a car, he is not engaged in such commerce? Or, if the employee is engaged in repairing a bridge along a track used in interstate commerce he is engaged in such commerce, but if he, along such a track, is engaged in putting in a new bridge or conduit where theretofore there was none, he is not engaged in such commerce? Or, if one along such a track—one used in interstate commerce—is engaged in taking up an old or defective rail and inserting a new one, he is engaged in such commerce, but if he, for the better operation of trains along such track and to promote the safety of passengers carried on and employees operating interstate trains,

is engaged in attaching to such a track some new appliance or equipment, he is not engaged in such commerce? Suppose that in pursuance of its business of interstate commerce, and to better carry (381) it on, the defendant had been engaged in putting in a switch along its track used in such commerce, or in constructing a double track over a part or all of its way. Is there any good reason for holding that an employee, who is engaged in repairing the track, or switch theretofore constructed or used, is employed in such commerce, but that one engaged in putting in the new switch, or the additional track, is not employed in such commerce?

"We think it clear that one employed in installing and equipping the road with the block signals was engaged in doing something which was a part of the interstate commerce in which the defendant was engaged, to the same extent as one engaged in repairing a bridge or a track in such commerce."

2. If the intestate of the plaintiff was employed in interstate commerce, the employers' liability act is applicable, and the finding upon the second issue does not bar a recovery, but it is necessary to examine the instructions upon the first issue.

The defendant contends, if the case is to be tried under the Federal statute, that the common law of the Federal courts must be administered, and that under the decisions of those courts it was error to charge the jury that if the defendant failed to give notice of the approach of its train by signal, and this failure was the cause of death, they should answer the first issue "Yes," as the deceased was not killed at a crossing.

Speaking accurately, there is no common law of negligence of the Federal courts as distinguished from the common law of negligence of the State courts.

The law of negligence is the same in both, and apparent differences of opinion arise because of the application of the law to different combinations of facts, and frequently on account of confusing negligence which may or may not be the cause of an injury and actionable negligence which unites cause and effect.

In *Western Union Tel. Co. v. Pub. Co.*, 181 U. S., 101, the Court quotes with approval from *Smith v. Alabama*, 124 U. S., 465, that: "There is no common law of the United States in the sense of a National customary law distinct from the common law of England as adopted by the several States, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Wheaton v. Peters*, 8 Pet., 591. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that courts of the United States, in cases within their

jurisdiction where they are called upon to administer the law of the State in which they sit, or by which the transaction is governed, (382) exercise an independent, though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *R. R. v. Lockwood,* 17 Wall., 357, where the common law prevailing in the State of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied is none the less the law of that State."

The Federal courts and the courts of this State concur in holding that a failure to exercise the diligence and care of a person of ordinary prudence, or a failure to perform a duty due from one to another is negligence, and that if this breach of duty is the proximate cause of an injury, it is actionable.

"Both parties are charged with the mutual duty of keeping a careful lookout for danger, and a degree of diligence to be exercised on either side is such that a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty." *Improvement Co. v. Stead,* 95 U. S., 161. They also agree that the care required is dependent on the circumstances then existent.

Let us, then, see the conditions surrounding the deceased and the engineer of the defendant, and whether the defendant owed the deceased any duty which it failed to perform.

The deceased was killed in the populous and busy town of Thomasville, near the depot of the defendant and between two public crossings. The defendant operated four tracks at this place, two of them main-line tracks and two sidings. On one of the side-tracks there were box cars and on another track the work train of the defendant. The train which killed the deceased was an extra, and was running upon another track at a speed of from 20 to 30 miles an hour. This train was rounding a curve and was about 200 yards from the deceased when the engineer could first see him.

The rules of the defendant then in force required the alarm whistle to be sounded and the brakes applied when any person, animal, or other obstruction appeared on the track or so close thereto to be in danger, and to give reasonable warning when persons or cattle were on the track, and to ring the bell on approaching every crossing, and to sound the whistle at all whistling posts, and, when running extra trains, to sound the whistle on approaching curves where the view of the track was obstructed.

These rules were promulgated by the defendant for the protection of its employees as well as for the protection of the general public, and they

were presumably known by the engineer on the track and by the deceased, and both had a right to assume that they would be observed. If so, the defendant owed the duty to the deceased of giving notice of the approach of the train by signal, and the jury has found that it (383) has failed to perform its duty and that this failure was the cause of the death of the intestate.

The instructions given to the jury which are the subject of criticism by the defendant imposed no higher duty than the defendant had undertaken to perform, and it is not certain that they did not require the plaintiff to prove more than the law demanded of him, as in each of them the burden is cast upon the plaintiff not only to prove that no signal was given for the benefit of the plaintiff, who was on or near the track of the defendant, as required by its rules, but, in addition, that no signal was given at the crossings.

This case is distinguishable, in our opinion, from those relied on by the defendant, holding that the duty imposed upon a railroad company to sound its whistle when approaching a crossing is not due to one injured between the crossings, in that the deceased was killed near the depot of the defendant in a town where people use the streets between the crossings, and in the further fact that the location of the cars and tracks made the conditions dangerous and that the rules of the defendant required it to give notice to the deceased of the approach of its train.

3. Was the plaintiff entitled to recover more than nominal damages?

The evidence tends to prove that the relations between the deceased and his father were affectionate, and that the deceased had contributed to the support of his father, from which the jury had the right to infer that he would continue to do so.

We have recently considered the question in *Dooley v. R. R.*, 163 N. C., 454, and in *Irwin v. R. R.*, 164 N. C., 5, and are content to abide by the conclusion we then reached.

Upon a consideration of the whole case we are of opinion that there is no reversible error.

No error.

*Cited: Gaddy v. R.R.*, 175 N.C. 517 (1c); *Lancaster v. Coach Line*, 198 N.C. 109 (3p); *Griggs v. Sears, Roebuck & Co.*, 218 N.C. 168 (3p).

HARRISON T. SAVAGE v. W. M. MOORE.

(Filed 25 November, 1914.)

**Penalty Statutes—Register of Deeds—Age of Woman—Inquiry—Trials—Instructions.**

In this action brought by the father of the woman against the register of deeds, for issuing a license for the marriage of his daughter under 18 years of age, the judge charged the jury, among other things, that it was the duty of the register of deeds to make the inquiry as to the age of the woman, not as a mere matter of form, but for the purpose, conscientiously, of ascertaining the fact; such inquiry as a business man, acting in the important affairs of life, would make. *Held*, the charge is correct, and approved under *Joyner v. Harris*, 157 N. C., 298; *Furr v. Johnson*, 140 N. C., 159; *Trollinger v. Burroughs*, 133 N. C., 312.

(384) APPEAL by plaintiff from *Adams, J.*, at February Term, 1914, of MECKLENBURG.

This is an action brought by the plaintiff against the register of deeds of Mecklenburg County for the penalty prescribed for the issuing of a marriage license to his daughter, not 18 years of age. The action was tried before *Judge Adams* and the issues involved, including the issue of "reasonable inquiry," submitted to a jury and answered in favor of the defendant. The facts in the case are as follows:

It appears from the evidence that the plaintiff, Harrison T. Savage, had been a resident of Mecklenburg County for a little more than two months prior to June, 1912, when the marriage license was issued for the marriage of his daughter, Stella Savage, to Robert Parrish; that on the date of the issuance of such marriage license, Robert Parrish went to the office of the register of deeds for Mecklenburg County in company with J. L. Groves, a resident of the county and who had been for many years; that when Parrish applied to the register of deeds, Mr. Moore, the register, made inquiry of him as to the age of the girl he intended to marry, and he was informed that the girl was 21 years of age. Parrish was not known to the register, and the register required him to have some one to identify him and vouch for his character. Parrish referred the register to Mr. Groves, who had accompanied him to the courthouse for that purpose. J. L. Groves, to whom Parrish referred the register of deeds, was well known to the register, he having lived for many years in the community where the register had resided prior to his becoming register of deeds. Groves, upon inquiry by the register, informed him that he knew Parrish; that he boarded at his home and had been boarding there for six or eight months; that he knew Parrish to be straightforward and reliable, and that the register of deeds could rely upon the truth of the statements made by Parrish. Mr. Moore, the register, in

addition to the statement made by Parrish as to the age of the girl, asked Mr. Groves if he knew her age. Mr. Groves told him that he did not know how old she was, but stated that she was about grown, and that he certainly thought she was 18 years of age. He stated further to the register that he knew of no objections on the part of the parents to the marriage, and that he thought he would have known had there been such an objection. Groves stated further that he knew that Parrish visited the home of the girl frequently, and that the girl came to his home frequently to see Parrish; that the girl's family lived across the street from where he did. Mr. Moore, the register, had known Groves for fifteen years and considered him of good character and reliable, (385) and stated that he believed Groves when he, Groves, said that he could rely upon the statements that Parrish had made him with reference to the facts in the case; that thereupon the register read over the affidavit containing the facts set out in the license application, and Parrish was duly sworn to these facts. Harrison T. Savage, the plaintiff and the father of the girl who was married, had moved to North Charlotte in March, 1912, from South Carolina, and was employed by the Southern Railway Company as section foreman. Parrish had previously been employed under Savage, and during that time had boarded at the plaintiff's house.

His Honor charged the jury, among other things, as follows:

"It was the duty of the defendant to make inquiry as to the age of Stella Savage, not as a mere matter of form, but for the purpose, conscientiously, of ascertaining the facts as to her age—such inquiry as a business man, acting in the important affairs of life, would make." To which plaintiff excepts.

"And if you find from the evidence that the defendant failed to do so, you will then find that he did not make reasonable inquiry, and your answer to the second issue will be 'Yes.' If, on the other hand, you find from the evidence that Robert Parrish applied to the defendant for the marriage license; that the defendant inquired of Parrish the age of Stella Savage; that Parrish told the defendant she was 22 years of age; that the defendant, in good faith, then inquired of Groves the age of the girl, and whether Parrish was himself reliable, and that the defendant did not know that Parrish was not reliable (if you find from the evidence that Parrish was not reliable), and that Groves told the defendant that Stella was grown, and that Parrish was a straight boy and altogether reliable, and that Groves was himself reliable and was known to the defendant to be reliable; and that the defendant then required Parrish to make a sworn statement of Stella's age, and that Parrish in the sworn statement said that she was 22 years of age; and that the defendant

believed these statements to be true and acceptable, and acted on them in good faith, you will, in that event, find that the defendant made reasonable inquiry, and your answer to the second issue will be 'No.'" To which the plaintiff excepted.

There were no exceptions to evidence. The jury returned a verdict in favor of the defendant, and from the judgment rendered thereon the plaintiff appealed.

*Flowers & Jones for plaintiff.*
*Pharr & Bell for defendant.*

(386) ALLEN, J. The charge of his Honor is fully sustained by *Trollinger v. Burroughs,* 133 N. C., 312; *Furr v. Johnson,* 140 N. C., 159; *Joyner v. Harris,* 157 N. C., 298.

No error.

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G. E. CROWELL ET AL v. CHARLES O. JONES AND WIFE.

(Filed 25 November, 1914.)

**1. Pleadings—Deeds and Conveyances—Insufficient Description—Appeal and Error.**

In an action upon a note given for the purchase price of lands and to foreclose a mortgage given thereon to secure it, the position is not open to the defendant that the description in the mortgage was insufficient, when it is not denied in the answer that the mortgage covered the *locus in quo.*

**2. Deeds and Conveyances—Stakes—Beginning Points—Definite Location.**

While it is true, as a rule, that a stake is not sufficiently definite to be considered as a beginning corner in the description of the lands conveyed, this rule obtains only in cases where there are no data presented in the description from which the true location of the stake can be determined, and does not apply to this case, wherein the location of the stake is definitely given as "the point in the center of the public road where it crosses the Piedmont Railway Company," etc.

**3. Bills and Notes—Interest in Advance—Short Periods—Usury.**

Interest on a note may be taken in advance for short periods by way of discount, and a note which provides for the payment of 6 per cent interest per annum, payable monthly, does not appear to be usurious upon its face.

**4. Actions—Pleadings—Counterclaim—Uncollected Accounts.**

A counterclaim alleged by reason of accounts of defendant in the plaintiff's hand, remaining uncollected, cannot be sustained, when it does not appear that the plaintiff had in any manner guaranteed their collection.

**5. Fixtures—Deeds and Conveyances—Flouring Mills.**

A flouring mill with engine, boiler, and usual machinery and fixtures, attached to lands, will pass to the grantee of the lands without being mentioned in the conveyance.

**6. Deeds and Conveyances—Covenants of Seizin—Indefeasible Fee—Breach—Measure of Damages—Verdicts.**

A covenant of seizin is ordinarily one for an indefeasible title, and being *in præsenti*, a right of action accrues to the covenantee for its breach at the time he receives his conveyance; and unless he has bought the paramount title for a less amount, the rule of damages is the amount of the purchase price, where there has been an entire failure of title, and a proportionate diminution when the failure goes only to a part of the property, the purchase price being the basis of estimate, and the proportion being that of value and not of quantity; and the trial court having correctly charged this principle with relation to defendant's counterclaim, in plaintiff's action to foreclose a mortgage given for the purchase price, it is held that a verdict in plaintiff's favor upon the issue will not be disturbed.

**7. Trials—Verdict, Directing — Nominal Damages — Costs — Appeal and Error—Harmless Error.**

The failure of the jury to regard the instruction of the trial judge for them to allow nominal damages upon the issue of the defendant's counterclaim, which only had significance upon the question of costs, is held immaterial, the plaintiff being entitled to recover costs by reason of the verdict of the jury in his favor on the other issues involved in the action.

APPEAL by defendant from *Devin, J.*, at August Term, 1914, (387) of DAVIDSON.

Civil action. It appeared that plaintiffs had conveyed to defendants a certain interest, six-fifteenths, in a piece of property on which there was a flouring mill with engine, boiler, and usual machinery and fixtures, and the action is brought to collect note given for the purchase money and to foreclose a mortgage on the property to secure the same. The note for $3,317.80 is in form as follows:

"$3,317.80.

"One year after date we promise to pay to Millie Jones Crowell and G. E. Crowell the sum of $3,317.80, with interest from date at 6 per cent per annum, less 1 per centum per annum to be applied to the insurance, for value received. This note is secured by real estate mortgage of even date herewith. It is further agreed that the interest on this note is to be paid monthly."

Defendant resisted recovery, contending:

1. That the mortgage did not sufficiently describe the land.
2. That same did not convey the machinery and fixtures.

3. That there was a counterclaim by reason of certain accounts turned over to defendants in the trade which were worthless.

4. And by reason of a breach of the covenant of seizin in the deed conveying property to defendant.

The jury rendered the following verdict:

1. In what amount are the defendants indebted to the plaintiffs? Answer: "$3,317.80, with interest at 5 per cent from 29 February, 1913, and $108, with interest from 8 August, 1913, at 6 per cent."

2. What amount, if any, is the defendant entitled to recover on his counterclaim set up in the answer? Answer: "$16.45."

3. What damage, if any, are defendants entitled to recover on account of breach of covenant of seizin? Answer: "Nothing."

(388) 4. Does the description in the mortgage cover the mill machinery, as alleged in the complaint? Answer: "Yes."

5. Does the land described in the complaint include the mill site referred to? Answer: "Yes."

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

*T. W. Bickett and E. E. Raper for plaintiff.*

*Walser & Walser and Phillips & Bower for defendant.*

HOKE, J., after stating the case: There is no denial in the answer as to the mortgage covering the land on which the mill is situate, and, there being no issue presented, the objections bearing on the sufficiency of the description are not properly open to defendant on the record. The position insisted on, that a stake is not sufficiently definite to be considered a beginning corner, is true as a rule, but it obtains only in cases where there are no data presented in the description from which the true location of the stake can be determined.

In this instance, while the beginning corner is said to be a "stake," its location is definitely given: "Beginning at a stake at the point in the center of the public road where it crosses the Piedmont Railway Company, runs thence east with the right of way, etc." It thus becomes a fixed point, sufficiently described and readily located, and the objection is without merit.

It was further insisted that the note is usurious on its face, but the authorities, here as elsewhere, are to the effect that interest by way of discount may be taken in advance for short periods, and that the term of one year is properly considered as coming within the rule. *Bank v. Hunter,* 12 N. C., p. 123; *Fowler v. Trust Co.,* 141 U. S., 384; *Bramblett v. Bank,* 122 Ky., 324; *McCall v. Herring,* 116 Ga., 325; *Valhberg*

*v. Keaton,* 51 Ark., 534. And it is further held that the stipulation for paying the highest legal rate per month will not be considered a violation of the usury statutes as ordinarily framed. *Meyer v. Miscatine,* 68 U. S., 385; *Goodale v. Wallace,* 19 S. D., 415; *Fowler v. Trust Co.,* 141 U. S., *supra; Hatch v. Douglass,* 48 Conn., 116; *Quinn v. Bank,* 8 Ga. App. 235.

Neither the answer nor the testimony offered by defendant are sufficient to sustain a counterclaim by reason of accounts uncollected by defendant, for it does not appear that any guarantee for collection was made. Defendant claimed, however, that the sum of $16.45 of these accounts had been paid plaintiff since transfer of same. The issue was answered to that amount in defendant's favor by consent of parties.

The position that the machinery did not pass with the deed and mortgage purporting to convey the land cannot be sustained. It (389) was placed in the usual way in such plants, and, in the language of one of the witnesses, it was "screwed down and fastened good," and, under our decisions, was conveyed by the written deeds offered in evidence and on which the rights of the parties depend. *Horne v. Smith,* 105 N. C., 322; *Latham v. Blakely,* 70 N. C., 368.

The counterclaim by reason of breach of the covenant of seizin was answered by the jury in plaintiff's favor, and we find no sufficient reason for disturbing the verdict. This breach of covenant was claimed by reason of a stipulation, appearing in the line of plaintiff's title, that the property was conveyed, "So long as said property is used for milling and manufacturing purposes. Should the said company or their heirs or assigns ever use the said property, herein described, for residential purposes or any other purpose other than herein limited, the same shall thereby revert to the grantor and his heirs in fee simple."

The covenant of seizin as ordinarily expressed in deeds is considered in North Carolina and by the weight of authority elsewhere as a covenant for an indefeasible title (*Wilson v. Forbes,* 13 N. C., 30; Rawle on Covenants, 5 Ed., sec. 60; 11 Cyc., p. 1068), and being a covenant effective *in præsenti,* it is held that, if broken, a right of action accrues at the time of conveyance made (*Eames v. Armstrong,* 146 N. C., 1; *Shankle v. Ingram,* 133 N. C., 255; *Pierce v. Deal,* 90 N. C., 290); and that, unless the paramount title has been bought in for a less amount, the rule of damages is the amount of purchase money between the original parties to the covenant where there has been an entire failure of title, and a proportionate diminution when the failure only goes to a part of the property, the purchase price being the basis of estimate and the proportion being that of value and not that of quantity.

From the facts in evidence, it appeared that plaintiffs had conveyed to defendants six-fifteenths of the property with full covenants, and that plaintiff's right of action as to four-fifteenths was barred and that the property in question was still used as a mill, and from its style, shape, and position, it was not likely to be used except as stipulated, for milling purposes, etc. And on these facts we think his Honor, confining the deliberations of the jury to the two-sixteenths and making the purchase price in the original deeds the basis of estimate, was correct in holding that there was a breach of the covenant of seizin and that the damages would be correctly measured by the impaired value of the premises arising from the stipulations for reverter. *Pierce v. Deal, supra; Hartford Ore Co. v. Miller,* 41 Conn., 112; *Guthrie v. Prigslie,* 12 N. Y., 126; Rawle on Covenants, secs. 186 and 187; 11 Cyc., p. 1161.

The matter is not further pursued, as defendant, while he presents the question in his exceptions, seems to have abandoned them in his (390) brief.

The fact that the jury, in disregard of his Honor's instructions, failed to allow defendant even nominal damages, is no longer of the substance. It would only have significance on the question of costs, and these are recovered by plaintiff by reason of the verdict on the other issues.

We find no reversible error in the record, and the judgment in plaintiff's favor is affirmed.

No error.

*Cited: Nelson v. Lineker,* 172 N.C. 281 (2c); *Currie v. Malloy,* 185 N.C. 218 (6d); *Newbern v. Hinton,* 190 N.C. 112 (6c); *Potter v. Miller,* 191 N.C. 817 (6c).

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DAVID McNEILL, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 2 December, 1914.)

**1. Railroads — Headlights — Negligence — Proximate Cause — Burden of Proof.**

In this action to recover damages of a railroad company for the negligent killing of the plaintiff's intestate while the defendant was running its train on a dark night without a headlight, there was evidence tending to show that the deceased, who had been drinking, was found dead at a place on the defendant's right of way customarily used by pedestrians, lying on the ground with his head on a cross-tie, with a large hole in his left side which afterwards caused his death, after the train of

defendant had passed the place, and also after another of defendant's trains with the required headlight, had passed, going in the opposite direction. There was allegation in the complaint that the deceased was killed while walking near the track, or attempting to cross the track of the defendant company. *Held*, upon the issue as to the defendant's negligence, the burden was on the plaintiff, not only to show that the defendant was negligent in the running of the train without the headlight or giving warnings of its approach, but that the negligence proximately caused the injury complained of, it being for the jury to determine, under the circumstances of this case, whether the deceased was killed by the train running without the headlight; and if so, whether the intestate, being drunk at the time, ran into the train after the engine had passed, or got upon the track immediately in front of the moving train, so that, notwithstanding the absence of the headlight, he would have nevertheless met his death.

**2. Trials—Instructions—Construed—Railroads—Headlights—Negligence—Expression of Opinion—Appeal and Error.**

Where there is evidence tending to show that the plaintiff's intestate was killed at night by the defendant railroad company's train running without a headlight, under circumstances requiring the plaintiff to prove that the defendant's negligent act was the proximate cause of the death of the deceased, a charge that it made no difference, upon the issue of defendant's negligence, that the train was running without a headlight, though erroneous, when standing alone, is not held for reversible error in this case as an expression of opinion by the court forbidden by statute, it appearing from construing the charge as a whole that the jury could not have been misled thereby, and the charge being otherwise correct.

**3. Trials—Instructions Construed—Railroads—Usefulness—Character of Plaintiff—Prejudice—Expression of Opinion.**

Where damages are sought of a railroad company for the negligent killing of plaintiff's intestate, a charge, construed as a whole, is not held for error as an expression of opinion forbidden by our statute which in effect instructs the jury that they should not decide the case from any sympathy or consideration for the deceased, or any admiration for his good qualities or detestation for his bad qualities, if he should have any; or consider that the defendant is a railroad, explaining the usefulness of railroads; and saying that to award damages against them except upon the law and evidence would be robbery, tending to cripple them; and that not to award damages to the plaintiff upon the law and testimony would be equal robbery; that as honest men and good jurors they, uninfluenced by moving appeals and powerful oratory, should coolly, quietly, without sympathy, passion, or prejudice, try to pass upon the evidence, and reconcile it, and answer the issues submitted.

**4. Appeal and Error—Answers to Issues—Immaterial Exceptions.**

It becomes unnecessary on plaintiff's appeal to consider his exception to the refusal of the trial court to submit an issue upon the last clear chance, in a personal injury case against a railroad company, where the jury have answered the issue as to defendant's negligence in its favor upon the evidence and under correct instructions of the law.

**5. Pleadings—Trials—Instructions—Appeal and Error.**

In an action to recover damages of a railroad company for the negligent killing of plaintiff's intestate by its train, a requested instruction as to the defendant's duty to keep a lookout was properly refused, there being no allegation in the complaint to that effect.

CLARK, C. J., dissenting.

(391) APPEAL by plaintiff from *Rountree, J.*, at March Term, 1914, of CUMBERLAND.

This is an action instituted by the plaintiff, administrator of D. A. McAllister, for the wrongful death of his intestate, alleged to have been caused by the negligence of the defendant. The allegations of negligence in the complaint are as follows:

"That on the night of 29 December, 1912, the plaintiff's intestate, while walking near the track, or attempting to cross the track of the defendant's company, and dressed only in his underclothes, was struck by a locomotive of the defendant company, near the signal station at Beard, N. C., which locomotive was drawing a freight train, and which, at the time of the accident above referred to, was being run and operated without the use of headlights of any description, and at the time herein referred to was giving no signal by bell, whistling, or otherwise, in consequence of which acts on the part of the defendant company the plaintiff's intestate was struck, wounded and bruised, from the effects of which he died on.....January, 1913.

(392) "That the injuries above referred to, and the death of plaintiff's intestate resulting therefrom, were caused by the negligence of the defendant company and its agents and employees."

It appears from the evidence that at about 2 o'clock a. m. on 29 December, 1912, D. A. McAllister was found on the right-hand side of the track of the defendant, between Wade and Beard, N. C., stations about 5 miles apart, and at a point about 150 yards from Beard station. The deceased was lying on the ground, with his head on a cross-tie, and had a large hole in his left side, caused by an injury from which he afterwards died. The deceased was drinking and dressed in his night-clothes.

It was in evidence that the right of way of the defendant company between these two stations had been used as a path for pedestrians for twenty-five or thirty years.

It also appears from the evidence that an extra freight train passed Wade station a short time before the deceased was found, which was running without a headlight, and that the only lights thereon were two small lights, one on each side, used as classification signals to indicate that the train was an extra. The witnesses McNeill and Gibson stated that this train, going southwardly, passed them as they were walking in

the same direction toward Beard station, searching for deceased; that before they reached the deceased, and while some distance from Beard, they saw a bright headlight of a train coming towards them in a northwardly direction; that they could see all the way to Beard station, and that there was no man or any other object upon the track. It is admitted that the two trains passed at a point south of Beard station, and that the track between Wade and Beard is straight all the way.

It was contended by the plaintiff that the deceased was killed by the train which had no headlight. It was contended by the defendant that if the deceased was killed by any train, it was the train going north, which had a headlight, or that if killed by the train running without a headlight, the deceased was not struck by the engine, but by some other part of the train.

The defendant offered evidence tending to prove that the engine of the freight train was equipped with an electric headlight when it left Rocky Mount; that the light went out at Dunn because the wire that clutches the carbon burned in two, and that the engineer tried to repair it and could not do so.

His Honor charged the jury, among other things, as follows: "It is my business to assist you in arriving at a correct answer to the questions which will be given you in the form of issues by calling your attention, coolly and dispassionately, to what the contentions of the parties are, and what the evidence is sustaining those contentions, and what the law is which you must apply to the facts which have been testified to, in order to enable you to answer those issues.

"You are not to decide this case from any sympathy or con- (393) sideration for the deceased man, or any admiration for his good qualities or detestation for his bad qualities, if he should have any. You are not to decide the case for or against the defendant because it is a railroad. Railroads are extremely useful things, and if property is taken, by way of a jury's verdict, from a railroad when the evidence and law does not justify it, it is robbery—nothing less than robbery, and if that sort of thing prevails to any very large extent the railroads are crippled. You can easily see that every industry, the people from whom they buy, the lumber men and the steel men, are crippled, and those in turn from whom they buy are crippled, and we have a serious catastrophe. But not to award a verdict in accordance with the law and testimony in behalf of the plaintiff would be equal robbery. So as honest men and good jurors it is your business, without regard to any moving appeals or any power of oratory, coolly and quietly, without sympathy and without prejudice and without passion, but to dispassionately try to pass on

the evidence and reconcile it and answer the questions which will be submitted to you." The plaintiff excepted.

"Now, in order to enable you to answer the first issue 'Yes,' you must find first that he was struck by a train of the defendant; that that train had no electric headlight, as required by statute, and that not having the headlight was the cause, and the proximate cause, of the injury. It does not make one particle of difference whether there was any headlight or not. That might have been negligence, and I tell you, as argued by Mr. Shaw and admitted by Mr. Rose, it was negligence for them to run a train without an electric headlight, because the statutes so require. But that would be immaterial unless the train that did not have an electric headlight hit him, and would not have hit him if it had had an electric headlight. Do you understand that?

"The proximate cause is the dominant, efficient cause—that cause without the operation of which the accident would not have happened." The plaintiff excepted.

"If you shall find, by the greater weight of the evidence, the burden of proof being upon the plaintiff to so satisfy you, that the deceased was struck by the train which was running without a headlight, and that the failure to have a headlight was the cause, and the proximate cause as I have defined it to you, of the deceased being struck and killed—that is, that the deceased would not have been struck if the train had had an electric headlight—then you will answer the first issue 'Yes.'

"But if you should not be satisfied by the greater weight of the evidence that the deceased would not have been struck if the train had had an electric headlight burning—that is to say, if you are not satisfied that Mr. McAllister would not have been struck if the light had been
(394) burning—then you will answer the first issue 'No.'" The plaintiff excepted.

"And, again, if you should find from the evidence, and by its greater weight, that the deceased was not struck by the engine, but that the engine had passed the deceased and that he was struck by some other portion of the train, or by falling against it, or otherwise, then you should answer the first issue 'No.'" The plaintiff excepted.

The jury answered the first issue as to negligence in the negative, and the plaintiff appealed from the judgment rendered in favor of the defendant.

*Shaw & McLean for plaintiff.*
*Rose & Rose for defendant.*

ALLEN, J. The exceptions chiefly relied on by the plaintiff's counsel in his carefully prepared brief are to the opening paragraph of his

Honor's charge, upon the ground that it is an argument in behalf of the defendant, and to the charge that "In order to enable you to answer the first issue 'Yes,' you must find first that he was struck by a train of the defendant; that that train had no electric headlight, as required by statute, and that not having the headlight was the cause, and the proximate cause, of the injury. It does not make one particle of difference whether there was any headlight or not. That might have been negligence, and I tell you, as argued by Mr. Shaw and admitted by Mr. Rose, it was negligence for them to run a train without an electric headlight, because the statutes so require. But that would be immaterial unless the train that did not have an electric headlight hit him, and would not have hit him if it had had an electric headlight. Do you understand that?"

The plaintiff does not except to the whole of the first paragraph of the charge. He omits from the exception the concluding sentence, which is an appeal to the jury to consider the evidence coolly and dispassionately and to answer the issues according to the law and the evidence.

The part excepted to, standing alone, might be objectionable; but when considered as a whole, as it is our duty to do, it contains no expression of opinion upon the facts, nor is it an argument in behalf of either party, and, on the contrary, it is an earnest invocation to the jury to free themselves from bias or sympathy and to decide the question submitted to them upon the evidence.

As was said by *Associate Justice Walker,* speaking for the Court in *Aman v. Lumber Co.,* 160 N. C., 374: "The criticism of the charge by defendant's counsel might be just and the exception to it well taken if it could be restricted to the detached portion thereof which is the subject of attack, as it is not quite as explicit, perhaps, as it should have been; but when these isolated sentences or extracts are construed with the other parts of the charge, and reviewing the latter in its (395) entirety and thus reading it as a whole, as we are required to do (*S. v. Exum,* 138 N. C., 599; *S. v. Lance,* 149 N. C., 551), the meaning of the judge could not well have been misunderstood by an intelligent jury. We have recently said that 'The charge is to be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous.' *Kornegay v. R. R.,* 154 N. C., 389; Thompson on Trials, sec. 2407."

We are also of opinion that it was the duty of his Honor to charge the jury as he did, that the burden was on the plaintiff to prove that the fail-

ure to have a headlight was the proximate cause of the death of the plaintiff's intestate, and that they must so find before they could answer the first issue "Yes."

The authorities fully sustain the position of the plaintiff that it is negligence to run a train without a headlight at night along a track frequented by the public; but a plaintiff cannot recover upon proof of negligence alone. He must go further and prove that the negligence complained of was the cause of his injury. *Crenshaw v. R. R.*, 144 N. C., 314; *Pritchett v. R. R.*, 157 N. C., 101; *Henderson v. Traction Co.*, 132 N. C., 784.

In the first of these cases the Court said: "The burden is always on the plaintiff to show by a preponderance of the evidence that the defendant committed a negligent act, and that it was the proximate cause of the injury. The two facts must coexist and be established by the clear weight of the evidence before a case of actionable negligence is made out. *Brewster v. Elizabeth City*, 137 N. C., 392"; in the second: "In all courts where the common law is administered it is held that one cannot recover damages upon proof of negligence alone, and that he must proceed further and show that the negligence of which he complains was the real proximate cause of the injury"; and in the last: "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."

In *Powers v. R. R.*, 166 N. C., 599, the principle was applied in an opinion written by the *Chief Justice*, and the following charge was approved: "If you should find from the evidence, by its greater weight,

(396) 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.'"

Again in *Saunders v. R. R., ante*, 375, the Court said, in an unanimous opinion: "The Federal courts and the courts of this State concur in holding that a failure to exercise the diligence and care of a person of ordinary prudence, or a failure to perform a duty due from one to another, is negligence, and that if this breach of duty is the proximate cause of an injury, it is actionable."

The phrase, "continuing negligence," used in *Stanly v. R. R.*, 120 N. C., 514, and repeated in the *Powers case* and in others, is strictly accurate when understood to mean that the negligence began anterior to

and continued up to the injury; but such negligence does not absolve the plaintiff from the duty of showing that this negligence was the proximate cause of his injury, which is to be inquired of under the first issue, nor from the duty of exercising ordinary care for his own safety, which arises in the consideration of the issue of contributory negligence, the burden of this issue being on the defendant.

It is not the absence of the headlight, nor the impact of the train, which determines liability, but the impact of the train brought about by or as the proximate result of the absence of a headlight.

To illustrate: Suppose one is at work on an overhead bridge, and without fault on his part he falls on the track 5 feet in front of a rapidly moving train, which is running at night without a headlight, and is killed. Here we have negligence in the failure to have a headlight; but there can be no recovery, because the same result would have followed if there had been a headlight, and its absence has had nothing to do with the injury.

The present case is an apt illustration of the importance of adhering to this principle.

The deceased had been drinking heavily, and was going from place to place in the night-time in his night-clothes.

The evidence as to the cause of his death is circumstantial, and is consistent with his coming on the track suddenly in front of the train, in which event the presence of the headlight would not have averted death; and that this theory is permissible is shown by reference to the complaint, which alleges that the deceased was killed "while walking near the track, or attempting to cross the track of the defendant company."

Of course, if we are in search for technical error, we can find it. We can cut up the charge and take the single sentence, "It does not make one particle of difference whether there was any headlight or not," from the middle of a paragraph and declare it to be erroneous; but to do so we must violate the principle declared in fifty cases, that a charge must be read as a whole, and not by detached portions, and we (397) will establish a precedent that will render it impossible for any charge to stand the test of an appeal.

As was said in *Revis v. Raleigh*, 150 N. C., 355: "It is the well-settled rule of all appellate courts to read and construe the entire charge of the court and deal with it as a whole. It is not permissible to make disconnected excerpts and seek to find reversible error. To do so would frequently result in new trials where it was manifest that no prejudicial error was committed or the jury misled."

When read as a whole, the objectionable sentence means that it makes no difference whether there was a headlight or not unless its absence was the cause of the death of the intestate.

We have examined the rulings upon the evidence and find no error in them.

The refusal to submit a third issue, as to the last clear chance, and the exceptions to charges upon the issues of contributory negligence and damages, need not be considered, as the jury has answered the first issue against the plaintiff.

The instruction prayed for by the plaintiff, as to the duty of defendant to keep a lookout, could not have been given, because the failure to perform this duty is not alleged in the complaint; and for the same reason the last paragraph of the charge excepted to is sustained.

The theory upon which recoveries are sustained when a person upon the track is killed or injured by a train running in the night without a headlight, although not apparently helpless, is that the absence of the headlight is negligence, and as its presence would probably give notice of the approach of the train by throwing light on the track and upon the person, the failure to have the light is some evidence of proximate cause.

If so, the principle does not apply if the injured person is not on the track or near it, and runs into the train.

No error.

CLARK, C. J., dissenting: There was evidence to show that the plaintiff's intestate was stricken by an engine running without a headlight. If so, *prima facie* the proximate cause of the death of the intestate was the impact of the engine carrying no headlight. On the first issue, as to whether the defendant was negligent or not, the response should have been in the affirmative, because the act of running an engine without a headlight is an indictable offense, and necessarily negligence *per se*. Indeed, the statute, Laws 1909, ch. 446, makes it indictable not to have an electric headlight of at least 1,500 candle-power.

On the second issue, whether the plaintiff's intestate contributed to his own death by his negligence, the statute has also prescribed (398) that the defendant must allege and prove it. This Court held otherwise in *Owens v. R. R.*, 88 N. C., 502 (*Judge Ruffin* dissenting), and the Legislature soon thereafter passed a statute in conformity with the dissenting opinion, which is now Revisal, 483. There is nothing in the plaintiff's testimony on which the court could hold, as a matter of law, that his intestate was guilty of contributory negligence.

Indeed, under well established principles, if the railroad was negligent in not using the electric headlight as the statute requires, and the intestate was killed by the engine in the absence of the headlight, being deprived of the warning which the light would have given him, and the engineer running in the dark being unable to see him, as he testified, this was a continuing negligence up to the moment of the impact, and as a

matter of law was the *causa causans* of the death. This was discussed in *Greenlee v. R. R.*, 122 N. C., 977, in which the Court held: "The failure of a railroad company to equip its freight cars with modern self-coupling devices is negligence *per se*, continuing up to the time of an injury received by an employee in coupling the cars by hand, for which the company is liable, whether such employee contributed to such injury by his own negligence or not."

*Greenlee v. R. R.*, 122 N. C., 977, has been repeatedly cited and approved since, see citations in the Anno. Ed., especially *Troxler v. R. R.*, 124 N. C., 191; *Coley v. R. R.*, 129 N. C., 415; *Elmore v. R. R.*, 132 N. C., 876, and numerous other cases. Yet in the *Greenlee case* there was no statute at that time requiring the cars to be so equipped. But the Court held that it was such a patent defect that it was a continuing negligence on the part of the defendant which lasted up to the moment of the injury, and deprived the defendant of the defense of contributory negligence on the part of the plaintiff. That case has been followed uniformly with us and has since been supplemented by both State and Federal stautes.

In the present case there is a statute requiring electric headlights, and if the plaintiff's intestate was stricken and killed by an engine running without any headlight, it was negligence *per se* under those authorities. The defendant was running in violation of law and was committing an indictable offense. If a man while committing an indictable offense kills another, it is at least manslaughter. For a stronger reason he is liable for negligence.

The judge charged as follows: "Now, in order to enable you to answer the first issue 'Yes' you must find first that he was struck by a train of the defendant; that the train had no electric headlight, as required by statute, and that not having the headlight was the cause, and the proximate cause, of the injury. *It does not make one particle of difference whether there was any headlight or not.* That might have been negligence, and I tell you, as argued by Mr. Shaw and admitted (399) by Mr. Rose, it was negligence for them to run a train without an electric headlight, because the statutes so require. But that would be immaterial unless the train that did not have an electric headlight hit him, and would not have hit him if it had had an electric headlight. Do you understand that?" If this charge is correct, it overrules every case this Court has written on the subject and repeals the statute itself. The jury were told, "It does not make a particle of difference whether there was any headlight or not." What, then, was the purpose of the Legislature, in requiring a headlight, but to protect the lives of the people from being needlessly taken? What administrator can ever prove, as the court

required this plaintiff to prove, that his intestate "would not have been hit if the engine had had a headlight"? The engineer testified he could not have seen a man 20 steps ahead of him, because of absence of the headlight. There is no evidence that the deceased negligently or willfully stepped on the track so close to the engine it could not be stopped, and the burden of such defense was on the defendant.

Even before the statute of 1909, ch. 446, it was held that it was negligence *per se* to carry no headlight. *Willis v. R. R.*, 122 N. C., 909. There is a long line of decisions which hold that it is negligence to operate a train without a headlight. *Stanly v. R. R.*, 120 N. C., 514; *Heavener v. R. R.*, 141 N. C., 245; *Brown, J.*, in *Allen v. R. R., ib.*, 340; *Walker, J.*, in *Morrow v. R. R.*, 147 N. C., 627; *Brown, J.*, in *Hammett v. R. R.*, 157 N. C., 322; *Shepherd v. R. R.*, 163 N. C., 518. As there was evidence sufficient to go to the jury that the deceased was killed by the train when it was operating without a headlight, such negligence was the proximate negligence.

The court erred in refusing to charge the jury, "If you find from the evidence that the defendant company operated its engine without a headlight, and that the deceased came to his death as the result of being struck by such engine, this was negligence *per se* or negligence of itself, on the part of the railroad company, and you should answer the first issue 'Yes.'"

In *Stanly's case, supra,* the Court said: "If this light was not furnished, 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 carry 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 the danger, and the failure was a continuing negligence and omission of duty on the part of the company, the performance of which would have enabled the defendant to have had the last clear opportunity; and this negligence was therefore the proximate cause of the injury."

(400) The Legislature thought the act amounted to something in protecting human life, or it would not have passed it. If it had, with the same view, made it indictable not to ring a bell, or blow a whistle at a crossing, could the court likewise have charged that failure to do so "makes not a particle of difference" unless the administrator could prove that the dead man would have heard the whistle and would have gotten out of the way?—which course is impossible. Yet it is much more certain that a man on the track on a dark night would see and heed a 1,500-candlepower headlight, especially as not carrying a headlight is unusual and puts him off his guard.

In *Shepherd v. R. R., supra,* the Court quotes and approves *Hoke, J.,* in *Snipes v. R. R.,* 152 N. C., 42, as follows: "It is well established that the employees of a railroad company are required to keep a careful and continuous lookout along the track; and the company is responsible for injuries resulting as the proximate consequence of their negligence in the performance of its duty." And asks, "How could this duty be performed in the night-time in the absence of a headlight?" To same effect are *Guilford v. R. R.,* 154 N. C., 607; *Hoke, J.,* in *Edge v. R. R.,* 153 N. C., 212; *Hoke, J.,* in *Sawyer v. R. R.,* 145 N. C., 24; *Arrowood v. R. R.,* 126 N. C., 629; *Pickett v. R. R.,* 117 N. C., 616.

It should be noted that the defendant's engineer, Sutton, testified: "Those lights (on the side) were not put there to light up the track. As a matter of fact they do not light up the track, and if there had been a man on the track I could not have seen him. I could not have seen a man 20 steps ahead on that night. So far as the track ahead was concerned, it was absolutely black from Dunn to Fayetteville." It was impossible, therefore, for the defendant's employees to have kept a lookout, or to give the warning required by the statute. This engineer frankly admitted that he pulled out of the side-track at Dunn without a headlight; that he side-tracked at Godwin, a station between Dunn and Wade, where he could have stopped to fix his lights, but that the train went right on through to Fayetteville and then southwardly without any headlight whatever till daylight. The telegraph operator said the only lights were two sidelights about as large as ordinary hand lanterns.

After having negligently and wantonly endangered the lives of the public in this manner and in violation of a statute, under all the authorities it was error for the court to charge that the plaintiff must prove that such negligence was the proximate cause of the injury, and that the plaintiff assumed the burden of proving that the deceased would not have been killed had the defendant complied with the law. The plaintiff had no witnesses who could testify as eye-witnesses to the killing, and usually could not of a killing in the dark, but there was evidence sufficient to go to the jury that he was killed by an (401) engine operating without a headlight, in defiance of the statute, and therefore negligently; and if there had been any contributory negligence, or if the defendant could have shown facts to exonerate it from the statutory negligence *per se,* the burden thereof was upon the defendant. Revisal, 483.

Indeed, the evidence was conclusive that the extra freight train which did not carry a headlight killed the plaintiff's intestate. There was no suggestion that his death could have been caused by any other means

than a train, and indeed the defendant's surgeon testified that the deceased, who was found dead along the track, was struck by some object more powerful than a human hand could wield. This being so, the only question on this point is as to which train killed him. The uncontradicted testimony of two witnesses is that when the extra freight had passed, and had also passed the other train, they could see the track lighted up all the way to a point south of Beard, and there was no man or object upon the track; and the telegraph operator at Beard testified he could see up the track a distance of a quarter of a mile above Beard, and there was no object thereon, except a white object which he took to be a sign-board. The deceased was found within 150 yards of Beard and within the area seen by the operator.

The evidence is therefore as conclusive as a mathematical demonstration that the deceased was struck by the extra train, which did not carry a headlight, and whose failure to do so was an indictable offense.

The court also refused to charge, though prayed, that "the employees of a railroad company in operating its trains are required to keep a careful and continuous lookout along the tracks, and the company is responsible for any injuries resulting as a proximate consequence of their negligence in their performance of this duty." The plaintiff was entitled to this charge. *Shepherd v. R. R.*, 163 N. C., 522, where many cases are cited on this point.

The court also refused to charge, as prayed: "The plaintiff's intestate had a right to suppose that the railroad company would take care to provide against injuring pedestrians on the tracks by providing proper lights and signals, and felt secure in acting upon that supposition." This prayer is quoted from *Stanly v. R. R., supra,* and often approved since, and it was error not to give it.

Nor is that all in this case upon which the plaintiff is entitled to claim a new trial. He assigns as error that the court "greatly prejudiced his cause by statements in charging the jury which amounted to an expression of opinion, and necessarily influenced the verdict of the jury."

The court told the jury: "Railroads are extremely useful things, and if property is taken by way of a jury's verdict from a railroad when the law does not justify it, it is robbery—nothing less than rob-
(402) bery; and if that sort of thing prevails to any large extent, the railroads are crippled. You can easily see that every industry, the people from whom they buy, the lumber men and the steel men, are crippled, and we have a serious catastrophe. But not to award a verdict in accordance with the law and testimony in behalf of the plaintiff would be equal robbery." The plaintiff thinks that this was not an impartial charge, but an expression of opinion. His views cannot be better given

than in the language of his counsel, Messrs. Shaw & McLean, as follows: "This, we think, was an argument by the court which appealed to the sympathies and financial interests of the jury. If the court desired to make arguments on both sides, we think it would have been just and proper for the court to have reminded the jury that Mr. McAlister was a very fine and useful man; that unless the verdict was in favor of the plaintiff the hopes of the widowed sisters and those dependent upon the deceased would be blighted; that his estate and his fine business at Wade station would be ruined; that the farmers dependent upon his business for credit would be helpless, and that every party with whom Mr. McAlister had dealt would be seriously injured. His Honor might then have added, in order to rebut it, 'But not to award a verdict in accordance with the law and testimony in behalf of the defendant would be equal robbery.' "

Again, the court charged the jury: "A railroad train is bound to run on its track. It cannot run out in the woods and go around people." The plaintiff's counsel again say: "It would have been just as proper for his Honor to have charged the jury that the defendant is bound to see out of his eyes, and that the eye is so constituted that it cannot see a light which is not burning." They further say the attitude of the court below is also manifested by his statement: "You have not got the right to say, 'Well, he was the finest kind of a man, and I will give him $25,000 or $10,000 or any other sum!' You would not be doing your duty if you did that." The plaintiff's counsel say the court might just as fairly have added, "You haven't got the right to say, 'Well, this man got on sprees occasionally and was a sorry fellow anyway, and therefore I will not give him anything.' You would not be doing your duty if you did that."

They contend that the court, in effect, told the jury that "The railroad is an extremely useful thing, and a verdict against it will cripple the lumber men and the steel men and injure commerce. But when you come to consider the rights of the estate of the deceased, the court positively forbids you to consider anything relating to his good qualities, nor shall you even consider that he has lost the most precious thing of all—his life."

Counsel further quote the language of the court: "No damage (403) can be recovered for sentimental reasons or because there was much suffering, pain, agony, or anything of that sort. In an action for death it is a cold-blooded proposition of how much money did the estate of the deceased man lose by his death." Counsel say, making a legitimate argument in alleging a violation of the statute by the court, as follows: "Thus charged the court as to suffering, and life, and death; but it

seemed fair to the same court that the verdict of the jury should be influenced by the commercial welfare of the railroad and its connections. When considering the railroad side, use one rule, and remember the benefits to be derived from a successful railroad company. Consider carefully what a financial loss to it might mean. But when you consider the plaintiff's side, who has merely lost a human life, divest yourself of all sympathies and base your verdict upon the rigid rules of the law. Such was his Honor's charge in effect." Counsel then add: "We submit that the litigants should have been fed out of the same spoon, or, more properly, that the law should have been laid down impartially."

In excepting that this charge was not impartial, and in comparing its expressions in regard to the opposing litigants, counsel were within their rights and doing what has been done in many instances, some of which have been held ground for new trial by this Court.

At common law the judges were not forbidden to express an opinion upon the facts in issue. But the Legislature of this State as far back as 1796, ch. 452, now Revisal, 535, provided: "The judge to explain the law but express no opinion upon the facts. No judge in giving a charge to the petit jury, in either a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon."

This statute has been repeatedly brought to the attention of this Court by parties who have thought that the judge had infringed the rule, and did not confine himself to the law of the case, but intimated his opinion upon the facts. Why the General Assembly of North Carolina saw fit to pass this statute is not before us. It may be that they thought that when on one side there might be an influential litigant, employing able and numerous counsel, and on the other side an humble litigant without means and most often employing counsel on credit, the judge might be overpersuaded and intimate his views to the jury. With that jealous determination to secure impartial trials in all cases the Legislature passed and has retained this statute. They did not thereby charge that the judges would be improperly influenced, but they meant to say, and did say, that in the determination of the issues of fact by a jury the judges had no part, and should "keep out."

(404) The plaintiff thinks that in the paragraphs of the charge above the judge unconsciously, doubtless, intimated to the jury his opinion that the defendant ought to have their verdict, and that he did this in such a way that the average juror could not misunderstand him.

The court also charged the jury that "the defendant had made a very strong argument that the deceased was a trespasser," and the judge did not deny the correctness of this construction. Under the law, the deceased was not a trespasser, but a licensee, for the undisputed evidence is that the defendant had allowed this part of its track to be used as a pathway for twenty-five or thirty years.

There are other exceptions pointing out other errors prejudicial to the plaintiff in this trial, but what has been above set forth should be sufficient.

The judge ought not to have told the jury that the failure of the railroad to observe a statute requiring, for the protection of human life, a headlight at night "makes not a bit of difference." A more deadly instrument of death and destruction cannot be devised than one of these powerful engines rushing across the country on a dark night at 20 to 70 miles an hour without giving warning by a headlight. The judge ought to have told the jury that if they found that the deceased was killed by an engine running at night without a headlight, the plaintiff was entitled to a verdict unless the deceased stepped on the track so near the engine that the engineer, even if he had a legal headlight, could not have seen him in time to avoid killing him, and that the statute put the burden of proving this on the defendant. The judge disregarded both of these statutes, and told the jury that if the deceased was killed by an engine running at night without a headlight, the absence of the headlight "made not a bit of difference" and the railroad was entitled to their verdict unless the plaintiff should further satisfy the jury that even if there had been a headlight the deceased would not have been killed anyway, which no mortal man could prove, and the "law is made of none effect." Besides, even with a headlight the defendant might have been negligent, and the plaintiff is called on to disprove even that.

Of course, the plaintiff must show that his intestate was killed by a locomotive running at night without a headlight, but that fact of itself is evidence of proximate negligence entitling the plaintiff to a verdict unless the defendant shows in defense that the killing was unavoidable and without any fault on the part of the defendant.

*Cited: Buchanan v. Lumber Co.*, 168 N.C. 46 (1c); *Shepard v. R.R.*, 169 N.C. 240 (1c); *Montgomery v. R.R.*, 169 N.C. 249 (2c); *Treadwell v. R.R.*, 169 N.C. 701 (1c); *Lloyd v. Bowen*, 170 N.C. 220 (2c); *Paul v. R.R.*, 170 N.C. 231 (1c); *McCurry v. Purgason*, 170 N.C. 467 (2c); *Horne v. R.R.*, 170 N.C. 649 (1p); *Horne v. R.R.*, 170 N.C. 658, 662 (1j); *S. v. Cooper*, 170 N.C. 725 (2c); *Lassiter v. R.R.*, 171 N.C. 286 (1c); *S. v. Killian*, 173 N.C. 795 (2c); *Dunn v. R.R.*, 174 N.C. 259

(1c); *Chancey v. R.R.*, 174 N.C. 352 (1c); *Talley v. Granite Quarries Co.*, 174 N.C. 447 (4c); *Lea v. Utilities Co.*, 175 N.C. 465 (1c); *Goodrich v. Matthews*, 177 N.C. 199 (1c); *Mfg. Co. v. Hester*, 177 N.C. 613 (1c); *Jones v. Taylor*, 179 N.C. 297 (1c); *Stone v. Texas Co.*, 180 N.C. 559 (1p); *Parker v. R.R.*, 181 N.C. 102 (1c); *Vann v. R.R.*, 182 N.C. 570 (1c); *Davis v. Long*, 189 N.C. 134 (1c); *Albritton v. Hill*, 190 N.C. 430 (1c); *Campbell v. Laundry*, 190 N.C. 654 (1c); *Milling Co. v. Highway Com.*, 190 N.C. 697 (2c); *Burke v. Coach Co.*, 198 N.C. 13 (1c); *S. v. Hairston*, 222 N.C. 462 (2c).

(405)

MARGARET PHIFER ET ALS v. S. W. MULLIS.

(Filed 25 November, 1914.)

**1. Deeds and Conveyances—Legal Significance — Caveat — Wills — Parol Evidence.**

Where a paper-writing sought to be probated as a will gives unmistakable evidence of its legal character as a deed, *i. e.*, passes a present irrevocable interest, though not necessarily the immediate possession, and made upon a valuable consideration, parol evidence is inadmissible to show a contrary intent, that it was to operate as the will of the maker.

**2. Deeds and Conveyances—Caveat—Wills—Consideration of Services—Equitable Fee—Registration—Delivery—Presumptive Evidence.**

A paper-writing made by a man and his wife, agreeing to convey to their granddaughter certain described lands, and stating that she shall have the same in consideration of taking care of the makers, that is, she shall well and truly take care of them during their natural lives, etc., and that the conditions of the agreement are such that if the said granddaughter should die before said parties of the first part, then the property belonging to the said parties of the first part at their death shall descend to their lawful heirs and assigns as the law directs: *Held*, the granddaughter, in consideration of the services to be performed, and conditioned upon the consideration of her performing them, took, upon her accepting the deed, an equitable fee *in præsenti* in the lands described, the enjoyment of which was postponed until after the death of the grantors, and then vested absolutely if she had performed the conditions; and it is *Further held*, that the registration of the deed after the death of one of its makers, and found in the possession of the grantee, is evidence of its delivery.

**3. Deeds and Conveyances—Equitable Estates—Estates in Fee—Limitation—Uses and Trusts—Contingent Uses.**

While at common law an estate in fee cannot be made to cease as to one and to take effect as to another by way of limitation, depending upon a contingent event, it may do so under the doctrine of springing and shift-

ing uses, or conditional limitations; and construing this deed in this case to effectuate the clear intention of the grantors without regard to the severely technical rules of the common law, it is held that the grantors intended to reserve the legal title to the land in themselves for life and to convey an equitable fee therein to the grantee, subject to the life estate of the grantors, to be divested in case she does not survive them, or fails to perform, during their lives, the conditions therein named, and if these conditions are not fulfilled, then the limitations to the makers' heirs shall take effect.

**4. Wills—Caveat—Issues—Deeds and Conveyances—Execution.**

Upon proceedings to caveat a paper-writing sought to be established as a will, the issue should only relate to the question of *devisavit vel non*, and where it is established from the legal character of the paper offered that it is not a will, but a deed, the courts in that proceeding will not pass upon the validity of its execution.

APPEAL by caveators from *Lane, J.*, at August Term, 1914, of (406) UNION.

This is an issue of *devisavit vel non*. These issues were submitted to the jury:

1. Is the paper-writing offered in evidence, and every part thereof, the last will and testament of W. L. and M. S. Griffin, or either of them? Answer: "Yes."

2. If not, did the said W. L. and M. S. Griffin sign the said paper-writing? Answer: "Yes."

3. Has Julia Mullis complied with the conditions expressed in said paper-writing? Answer: "Yes."

The following is the paper-writing offered for probate as a will:

STATE OF NORTH CAROLINA—Union County.

This agreement, entered into this the 18th day of September, A. D. 1903, by and between W. L. Griffin and wife, Mary S. Griffin, of the county aforesaid, of the first part, and Julie Ellen Hill (their granddaughter), of the county and State aforesaid, of the second part, witnesseth: That for and in consideration of the care of the said parties of the first part by the said Julia Ellen Hill during their natural lives, that is to say, if the said Julia Ellen Hill shall well and truly take care of the said W. L. Griffin and wife, Mary S. Griffin, during their natural lives, by providing for them good, wholesome, substantial board, shelter, etc., suitable to their comfort and pleasure, according to her means, and live peaceably with the said parties of the first part, then upon the performance of these conditions the said parties of the first part covenant and agree with the said Julia Ellen Hill to convey to her and that she shall have a certain tract or parcel of land in Union County on the waters of Lanes Creek and bounded as follows, viz.: Beginning at a

stake by a pine and runs S. 23 W. 25 50/100 chains to a stake in a path; thence N. 80 E. 1 60/100 chains to a stake by four post oaks; thence S. 84 E. 5 chains to a stake by two post oaks in the old line; thence N. 23 E. 28 chains to a stake in the line of the dower; thence with said line N. 85 W. 5 chains to corner of the dower in a road; thence S. 85 W. 12 50/100 chains to a pine by a fence; then due west 2 chains to the beginning, containing fifty-six (56) acres, more or less, together with all woods, ways, waters, and all appurtenances thereunto belonging, to the said Julia Ellen Hill, her bodily heirs and assigns forever.

The said parties of the first part doth furthermore covenant and agree that upon the fulfillment of the above conditions mentioned, that they will give and convey unto the said Julia Ellen Hill all other property which they may possess, both real and personal, at their death. The conditions of the above agreement are such as that if the said
(407) Julia Ellen Hill should die before the said parties of the first part, then the said property herein described, including both real and personal, belonging to the said parties of the first part at their death shall descend to their lawful heirs and assigns as the law directs.

Now, the conditions of this agreement are such also as that if the said Julia Ellen Hill shall well and truly perform these conditions mentioned, then immediately at our death she is to have and shall have the above described land, together with all the personal property of every description which we may at our death have. But, on the other hand, if the said party of the second part shall fail to execute the above conditions, then this agreement is to be null and void; otherwise, in full force and effect.

Given under our hands and seals this 18th day of September, 1903.

W. L. GRIFFIN, [SEAL]

Her

MARY S. × GRIFFIN. [SEAL]

mark.

Witness:

H. W. LITTLE.

W. A. HELMS.

The instrument was duly proven as a deed at the instance of Julia Hill before the clerk of the Superior Court on 1 December, 1904, and registered the same day.

From the judgment rendered, the caveators appealed.

*Adams, Armfield & Adams for the caveators.*

*Stack & Parker for the propounders.*

BROWN, J. Parol evidence was received and excepted to for the purpose of proving that the paper offered was intended by W. L. Griffin as a will.

Where the instrument itself suggests uncertainty as to its character, parol evidence of facts and circumstances, as well as instructions given the draftsman, is competent to shed light upon the purpose of the maker. But such evidence is incompetent where the instrument upon its face gives unmistakable evidence as to its legal character, as we think the instrument before us does.

The line of separation between what constitutes a deed and a will is sometimes so shadowy as to make it extremely doubtful whether the instrument is the one or the other. There are certain tests which the text-writers and courts have laid down to determine the character of the instrument, the intention of the maker, to be gathered from the whole instrument, being the controlling rule in determining the question. The courts do not regard the form of the instrument, except so (408) far as its formal words and declarations may throw light upon the intention of the maker of it.

In order to constitute a will, there must be apparent in the instrument an *animus testandi,* and to determine this, two tests are resorted to; (*a*) whether it operates to create any interest in the grantee prior to the death of the maker, (*b*) whether it is revocable by the maker.

If the grantor intended that the title to the property described in it should pass *eo instanti* upon execution to the grantee, it is a deed, although the interest conveyed or the enjoyment of it is postponed until after the death of the grantor. If the grantor intended that no interests whatever should vest until after his death, it is a will, for a deed cannot be ambulatory in character. Gardner on Wills, p. 15, 9 A. and E. Enc., 91.

An instrument in the form of a deed is declared to be testamentary if it conveys no interest *in præsenti,* is revocable at pleasure, and is not to take effect until the death of the maker. *Peacock v. Monk,* 1 Ves., 127; 30 A. and E. Enc., 576.

In *Allison v. Allison,* 11 N. C., 171, *Chief Justice Taylor* states the distinction as follows: "The difference between a deed and a will is this: the former must take place upon its execution, or never; not by passing an immediate interest in possession, for that is not essential; but it must operate as passing that interest when the deed is executed. Thus, where a father covenants to stand seized to the use of his son, reserving a life estate to himself, the deed takes effect at once, by passing an interest to the son."

The instrument under consideration has all the characteristics of a deed and but few, if any, of a will. It is in form a deed. It does not

purport to be the individual will of either one of the signers; there are no testamentary words in the paper, nor is any executor appointed, although this is not essential. As we construe it, it conveys to the grantee a present interest in the property described, although the enjoyment of it is postponed until after the death of the grantors.

An instrument, in form a deed, is declared to be such although it contains these words: "It is hereby distinctly understood and stipulated that this deed shall take and be in full force and effect immediately after the grantor shall depart this life, and not sooner." *Launch v. Logan,* 45 W. Va., 251.

An instrument, in form a deed, executed by a husband and wife, purporting to convey an interest in their property to their son, was adjudged to be a deed, although it was expressly provided therein that it should not take effect until the death of the grantors. *Martin v. Faries,* 22 Texas Civ. App., 539.

(409) In Gardner on Wills, p. 22, a number of cases are cited where instruments have been declared to be deeds, although the enjoyment of the property described therein was postponed until after the death of the grantors.

The consideration upon which this agreement was entered into is stated to be the personal services and the support and care which the grantee was to give to the grantors during their lifetime. They evidently intended it to be a definite contract and agreement, and when the grantee accepted it, she became personally bound, both morally and legally, to render those services.

Again, there is evidence that the grantors parted with the possession of this deed, for it was found in the possession of the grantee before the death of Mary S. Griffin, one of the grantors. It was taken to the clerk of the Superior Court, probated and registered during her life by the grantee, Julia Hill, from which registration the presumption of delivery arises.

Again, the grantors did not undertake to revoke it, and upon its face it is irrevocable, as it is founded upon a valuable consideration, and passes to the grantee an equitable interest in the property, which may vest absolutely *in futuro* upon the performance of the conditions expressed in the instrument.

It is contended that the paper-writing cannot operate as a deed in fee because a fee simple cannot be made to take effect *in futuro,* and that, therefore, it must operate as a will or not at all. It is true that at common law an estate in fee cannot be made to cease as to one and to take effect as to another by way of limitation, dependent upon a contingent event. But it is settled that limitations of that kind may take effect by way of use. Out of this arose the doctrine of springing and shifting

uses, or conditional limitations. An illuminating opinion on this subject is that of *Mr. Justice Ashe* in *Smith v. Brisson,* 90 N. C., 285.

In construing this paper-writing as a deed, we must take it as a whole and endeavor to deduce the clear intention of the grantors without regard to the severely technical rules of the common law. *Triplett v. Williams,* 149 N. C., 394; *Beacon v. Amos,* 161 N. C., 365.

So construing this deed, it is manifest that the grantors intended to preserve in themselves the legal title to said property during their lives; that they then intended to convey the fee to Julia Hill upon condition, first, that she survived the grantors, and, second, that she fulfilled the other condition, as to the support and care of the grantors.

The operative clauses of the deed are that "the said parties of the first part covenant and agree with said Julia E. Hill to convey to her and that she shall have a certain tract of land (describing it), with the appurtenances thereto belonging, to the said Julia Ellen Hill, her bodily heirs and assigns forever."

We are of opinion that the effect of this instrument is to convey (410) to Julia Hill an equitable fee in the property therein described, subject to the life estate of the grantors, to be divested in case she does not survive the grantors or fails to perform during their lives the other condition set out therein.

In case these conditions are not fulfilled, then the limitations over to the heirs at law take effect. That a conveyance of this character may be made, we think finds support in the reasoning and principles laid down in *Smith v. Brisson, supra.*

It is alleged in the caveat that the property described in the deed is the property of the wife, Mary S. Griffin, and that the deed has not been executed according to law, there being no privy examination. We will not in this proceeding pass upon the validity of the execution of the deed, or as to which one of the grantors owned the property described in it. The execution of the deed and the rights of parties claiming under it will be more properly adjudicated when the grantee asserts her rights under it. In this proceeding we have commented upon and examined the context of and construed the instrument to demonstrate that it is a deed and not a will.

The paper was proved in common form before the clerk as a will. The effect of the caveat is to require the paper-writing to be proved again in solemn form in term-time and before a jury of the Superior Court, and no other issue is raised or is appropriate in such proceeding except that of *devisavit vel non,* which is the first issue, *supra.*

In *Wood v. Sawyer,* 61 N. C., 268, it is stated: "The uniform practice, when a paper-writing is offered for probate as a will, has been to prove the execution of the paper and obtain an order that it be recorded

without consideration of its contents, except so far as to see that it purports to be a will. And where the validity of the will is questioned, and it is submitted to a jury, the jury is restricted to the same inquiries.

"Where there is no objection, the court passes upon the validity of the paper, and where there is objection, the jury passes upon it; and in either case the proceeding is *in rem*. The probate passes upon the rights of no one under the will, but only establishes it as a will, leaving the rights of the parties to be ascertained thereafter."

To the same effect is *Murray's will*, 141 N. C., 591. When it is determined that the paper-writing offered is not a will, probate is refused, and that ends the proceeding.

We have considered the cases cited by the propounders, and do not think that they are authoritative here. *In re Will of Belcher*, 66 N. C., 51, is a case where a paper-writing, in form a deed, was probated as a will. It was the individual instrument of Belcher and not joined in by his wife. It was not based upon a valuable consideration, but (411) upon natural love and affection, and passed no interest whatever in the property described to the grantee until after Belcher's death. There is a radical difference between the two cases.

*Tilley v. King*, 109 N. C., 461, is equally valueless as a precedent. That was not an issue of *devisavit vel non*, but involved only the construction of a will which had already been admitted to probate as such. There was no controversy that it was not a will, and that point was not considered.

Upon a review of the whole case, we are of opinion that his Honor erred in holding that the paper-writing was a will. The judgment of the Superior Court is

Reversed.

*Cited: In re Southerland*, 188 N.C. 328 (1c); *In re Campbell*, 191 N.C. 570 (4c); *Fawcett v. Fawcett*, 191 N.C. 681 (4p); *Beck v. Blanchard*, 210 N.C. 277 (4p).

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McKINNON, CURRIE & CO., INC., v. FANNIE CAULK.

(Filed 25 November, 1914.)

**Husband and Wife—Estates by Entireties—Divorce—Tenants in Common—Statutes.**

Under our Constitution and the later statutes, as formerly, husband and wife hold lands conveyed to them in entireties with the right of survivorship, this estate in its essential features and attributes being made depend-

ent upon their oneness of persons in legal contemplation. Therefore, when this unity of person is entirely severed by divorce absolute, the peculiar features of the estate arising out of such unity, and made dependent upon it, should also disappear, and the owners, having acquired the estate subject to this principle, thereafter hold as tenants in common, subject to partition in proceedings regularly brought for that purpose by them or the grantees of their interests. Revisal, secs. 2109, 2110, deals with the rights of husband and wife growing out of the marriage relation, such as dower, curtesy, and the like, and has no application to estate by entireties.

APPEAL by plaintiff from *Rountree, J.*, at February Term, 1914, of ROBESON.

Petition for partition of a tract of land, heard on appeal from the clerk.

On the hearing it was properly made to appear that J. W. Caulk and his then wife, Fannie, the present defendant, were seized and possessed of an estate by entireties in the land, and that the husband, J. W. Caulk, obtained an absolute divorce by decree of the court, on account of the adultery of the wife. Subsequently to this decree said J. W. Caulk, by deed duly executed, conveyed all his right, title, and interest in the land to plaintiff, and, holding this deed, plaintiff instituted the present proceedings to obtain partition of the land on the ground that plaintiff and defendant are tenants in common therein. The court, (412) being of opinion that the estate by entireties was not affected by the decree of divorce, dismissed the proceedings, and plaintiff excepted and appealed.

*B. F. McLean, S. B. McLean, and H. A. McKinnon for plaintiff.*
*McLean, Varser & McLean and McNeill & McNeill for defendant.*

HOKE, J., after stating the case: It has been held in several well considered decisions of this Court that our Constitution and the later statutes relative to the property and rights of married women have not thus far destroyed or altered the nature of this estate by entireties, a "conveyance to a husband and wife." *Jones v. Smith,* 149 N. C., 318; *West v. R. R.,* 140 N. C., 620; *Bynum v. Wicker,* 141 N. C., 95; *Bruce v. Nicholson,* 109 N. C., 205; *Ray v. Long,* 132 N. C., 891. A perusal of these and other authorities on the subject will disclose that the estate in its essential features and attributes is made dependent on the oneness of person of the husband and wife. Thus, in *Ray v. Long, Associate Justice Douglas,* speaking to such an estate, said: "This estate is fully recognized by our law, and has not been impaired by section 6 of Article X of the Constitution. Whether it arises directly from the marital relation or from a presumption of intention is immaterial, so long as it

exists. In *Motley v. Whitmore,* 19 N. C., 537, it is said (by *Gaston, J.*): "When lands are conveyed to husband and wife, they have not a joint estate, but they hold by entireties. Being in law but one person, they have each the whole estate as one person; and on the death of either of them the whole estate continues in the survivor. This was settled at least as far back as the reign of Edward III., as appears from the case on the petition of John Hawkins, as the heir of John Ocle, quoted by Lord Coke, 1 Inst., 187a." And *Merrimon, J.,* in *Bruce v. Nicholson, supra,* said: "The unity of the husband and wife as one person and the ownership of the estate of that person prevent the disposition of it otherwise than jointly. As a consequence, neither the interest of the husband nor that of the wife can be sold under execution so as to pass away title during their joint lives or as against the survivor after the death of one of them. Indeed, it seems that the estate is not that of the husband nor of the wife; it belongs to that third person recognized by the law, the husband *and* the wife." And, in *West v. R. R.,* 140 N. C., *supra,* the present *Chief Justice* refers to certain incidents of the estate as existent "during coverture"; and this being the recognized position, it follows as the reasonable and necessary deduction that where this unity of person is entirely severed, whether by death or divorce absolute, the incidents of the estate arising out of such unity and dependent upon it should also disappear, and, our statute having abolished all survivorship in
(413) fee-simple estates except this and the estate of trustees without beneficial interests (Revisal, secs. 1579-1580), the owners should thereafter hold as tenants in common. It is not a satisfactory answer to this position that, the right of survivorship having attached at the creation of the estate, it could not be divested by a decree of divorce subsequently granted. The very question presented is whether this right of survivorship did attach as an inseparable incident of ownership, or was it dependent upon the unity of person between the two, and our conclusion on this question, drawn from the history and nature of the estate, is, we think, in accord with right reason and the great weight of authority. *Stelz v. Shreck,* 128 N. Y., 263; *Enyeart v. Kepler,* 118 Ind., 34; *Jœrger v. Jœrger,* 193 Mo., 534; *Russell v. Russell,* 122 Mo., 235; *Hopson v. Fowlkes,* 92 Tenn., 697; *Harrer v. Walner,* 80 Ill., 197; *Hays v. Horton,* 46 Ore., 597.

In *Stelz v. Shreck, supra, Peckham, J.,* speaking to the nature of the estate and its incidents, said: "At common law, husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. . . . They were thus seized of the whole because they were legally one person. . . . Being founded on the marital relations and upon the legal theory of the absolute oneness

of the husband and the wife, when that unity is broken not by death, but by a divorce *a vinculo,* it stands to reason that such termination of the marriage tie must have some effect upon the estate which requires the marriage relation to support its creation. The claim on the part of counsel is that it is only necessary the parties should stand in the relation of husband and wife at the time of the conveyance, and at that time the estate vests and no subsequent divorce can affect an estate which is already vested. But the very question presented is, What is the character of the estate which became vested by the conveyance? If it were of such kind that nothing but the termination of the marriage by the death of one of the parties could affect it, then of course the claim of counsel is made out; but it is an assumption of the whole case to say that the estate was of that character. When the idea upon which the creation of an estate by entireties depends is considered, it seems much more logical as well as plausible to say that the estate is founded on the unity of the husband and the wife, and anything that terminates the legal fiction of unity ought to have an effect on the estate whose creation depended upon such unity. It would seem as if the continued existence of the estate would naturally depend on the continued legal unity of the two persons to whom the conveyance was made. . . . An absolute divorce terminates the marriage and unity of persons just as completely as death itself, only instead of one, as in case of death, there are, in case of divorce, two survivors of the marriage and two living persons in whom the title still remains. It seems to me that the natural and logical outcome of such a state of facts is that the tenancy by entirety is (414) severed, and, this having taken place, each takes his or her proportionate share as tenant in common without survivorship." And again, p. 268: "We do not at all question the contention of defendant's counsel that a decree of divorce in this State only operates for the future, and has no retroactive or any other effect than that given by the statute; but we hold that the character of the estate conveyed was such in its creation that it depended for its own continuance upon the continuance of the marital relation, and when that relation is severed, as well by absolute divorce as by death, the condition necessary to support the continuance of the original estate has ceased, and the character of the estate has for that reason changed."

In *Hays v. Horton, supra, Bean, J.,* delivering the opinion, said: "There is some conflict in the decisions as to the effect of a divorce upon estates by entirety, but the weight of authority is that it destroys the unity of husband and wife and severs such estate, making them thereafter tenants in common. 2 Bishop Mar. and Div. (5 Ed.), sec. 716; Freeman Cotenancy (2 Ed.), sec. 76; *Stelz v. Shreck,* 128 N. Y., 263

(28 N. E., 510; 13 L. R. A., 325; 26 Am. St. Rep., 475); *Russell v. Russell,* 122 Mo., 235 (26 S. W., 677; 43 Am. St. Rep., 581); *Hopson v. Fowlkes,* 92 Tenn., 697 (23 S. W., 55; 23 L. R. A., 805; 36 Am. St. Rep., 120). At common law, husband and wife were regarded as one person, and a conveyance to them by name was in effect a conveyance to a single person. By such a conveyance two real persons took the whole of the estate between them, and each was seized of the whole, and not of any undivided portion. When the unity was destroyed by death, the survivor took the whole of the estate, because he or she had always been seized of the whole thereof and the other had no interest which was divisible. But when the unity is destroyed by a decree of divorce, leaving both spouses surviving, the only logical conclusion is that they thereafter become tenants in common of the property, because there are two living persons in whom the title rests."

And the principle is correctly and succinctly stated in a note to *Jœger's case,* in 5 A. and E. Anno. Cases, p. 536, as follows: "Tenancy by entirety originated in the idea of the unity of the husband and wife, rendering them but one person in law. The continuance of such tenancy in a given case depends upon the marital unity. Hence the general rule is as stated in the reported case, that the dissolution by divorce whereby two actual persons are restored to their natural severalty operates to divide equally between them the title to the estate formerly held by them by entirety, making them tenants in common thereof."

The courts of Michigan and Pennsylvania seem to have made a different decision on this question (*Appeal of Lewis,* 85 Mich., 340, (415) *Alles v. Lyon,* 216 Pa. St., 614), but the reasoning of these cases is, to our minds, far from satisfactory, and the conclusion is not approved.

We have not been inadvertent to defendant's suggestion that our legislation in reference to the property rights of the parties, Revisal, secs. 2109-10, in cases of absolute divorce, makes no reference to this estate by entireties. But this legislation is intended and purports to deal only with the rights that either may have in the property of the other growing out of the marriage relation, as of dower, curtesy, and the like, and does not, therefore, refer to this estate, which, on divorce, is property which each holds in his own right and by the nature of the estate as originally created.

There is error in the judgment of the court, and on the facts of record as they now appear, the plaintiff is entitled to partition.

This opinion and decision is to be without prejudice to any other defenses which may not be open to defendant on this record.

Error.

*Cited: Finch v. Cecil,* 170 N.C. 75 (p); *Freeman v. Belfer,* 173 N.C. 582 (l); *Freeman v. Belfer,* 173 N.C. 586 (j); *Gooch v. Bank,* 176 N.C. 216 (p); *Moore v. Trust Co.,* 178 N.C. 126 (p); *Moore v. Trust Co.,* 178 N.C. 128 (j); *Turlington v. Lucas,* 186 N.C. 285 (p); *Holton v. Holton,* 186 N.C. 362 (p); *Davis v. Bass,* 188 N.C. 204, 208 (p); *Johnson v. Leavitt,* 188 N.C. 684 (p); *Potts v. Payne,* 200 N.C. 249 (c); *Bank v. Hall,* 201 N.C. 789 (p); *Willis v. Willis,* 203 N.C. 520 (c); *Fisher v. Fisher,* 217 NC.. 76 (c); *Hatcher v. Allen,* 220 N.C. 409 (p); *Wilson v. Ervin,* 227 N.C. 399 (p).

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ELVY EVANS, ADMINISTRATRIX, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 2 December, 1914.)

**Evidence — Motions — Inspection and Copy of Papers — Interpretation of Statutes—Court's Discretion.**

Upon motion to allow inspection or copy of books, papers, etc., before trial (Revisal, 1656), it must be made to appear that the instrument in question relates to the merits of the action or is pertinent to the issue; or the motion should be denied; and when it is of the character authorized by the statute to be copied or inspected, etc., it is expressly left within the discretion of the trial judge whether or not he will make the order sought; and should he refuse to do so, it still rests within his discretion to compel the production of the writing later, or upon trial, when its competency and pertinency as evidence bearing on the issue may be better determined.

APPEAL by plaintiff from *Lane, J.,* at October Term, 1914, of ANSON.

Appeal from the refusal of the trial judge to order inspection, etc., of a paper-writing upon motion made under section 1656 of the Revisal.

Upon affidavit, the plaintiff moved under section 1656 of the Revisal for the production of a certain paper-writing, alleged to be in the possession of the defendant, described in the affidavit as a written report known as Form No. 408. His Honor denied the motion. The plaintiff appealed.

*Lockhart & Dunlap for plaintiffs.* (416)
*Walter E. Brock, McIntyre, Lawrence & Proctor for defendant.*

BROWN, J. This motion is made under the following statute:

"SECTION 1656. *Inspection Before Trial.* The court before which an action is pending, or a judge thereof, may in their discretion and

upon due notice order either party to give to the other within a specified time an inspection and a copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court on motion may exclude the paper from being given in evidence, or punish the party refusing, or both."

The power of the court to order the production of a paper under this statute is indisputable; but it must be a paper which contains evidence pertinent to the issue. *Whitten v. Tel. Co.,* 141 N. C., 363. If the paper-writing sought to be produced is not of a kind which is pertinent to the issue, the court has no power to order its production. If it is a paper-writing which is pertinent to the issue, then the matter of ordering its production is confided by the statute to the sound discretion of the judge of the Superior Court, and his ruling will not be reviewed here.

As to whether a paper-writing comes within the description of the statute is a question of law. It would seem that the affidavit in this case is not a sufficient description of the paper to justify the court in ordering its production. "A mere statement that an examination is material and necessary is not sufficient. This is nothing more than the statement of the applicant's opinion. The facts showing the materiality and necessity must be stated positively and not argumentatively or inferentially." 14 Cyc., 346.

Again, it is said that "A party cannot obtain a roving commission for the inspection or production of books or papers in order that he may ransack them for evidence to make out his case. He is entitled to production or inspection only when the same is material and necessary to establish his cause of action." 14 Cyc., 370.

Assuming, however, that the affidavit is sufficient to justify granting the order, it is then within the discretion of the judge as to whether he will grant it or not.

In *Bank v. Newton,* 165 N. C., 363, *Mr. Justice Hoke* in discussing this statute, says: "A perusal of the statute will disclose that the question rests in the sound legal discretion of the court, and as we find no abuse of such discretion on the part of his Honor as to raise a legal question for our decision, the judgment is affirmed."

(417) Under the authority of that case, we deem it proper to say that when this case is tried it will still be competent for the judge in his sound discretion to compel the production of this Form 408 when its competency and pertinency as evidence bearing upon the issue may the better be determined.

Affirmed.

*Cited: LeRoy v. Saliba,* 180 N.C. 17 (c); *R.R. v. Power Co.,* 180 N.C. 423 (c); *Mica Co. v. Express Co.,* 182 N.C. 672 (c); *Bell v. Bank,* 196 N.C. 236 (c); *Dunlap v. Guaranty Co.,* 202 N.C. 654, 655 (c); *Patterson v. R.R.,* 219 N.C. 25 (c); *Gudger v. Robinson Bros. Contractors,* 219 N.C. 254 (c); *Flanner v. St. Joseph Home,* 227 N.C. 345 (c).

MRS. EMMA V. GREEN, ADMINISTRATRIX, v. A. C. BIGGS.

(Filed 25 November, 1914.)

**1. Sanitariums for Profit—Negligence of Employees.**

The owner of a private sanitarium receiving sick persons for treatment with the expectation and hope of gain and profit is held to the duty of ordinary care and protection of those intrusted to him, the rule not obtaining in such instances which applies to charitable institutions, for the latter are held responsible only for the exercise of due care in the selection of employees, and not for injuries resulting from their negligence.

**2. Pleadings—Interpretation—Cause Stated.**

A complaint will be liberally construed in plaintiff's favor to ascertain if the facts presented are sufficient to state a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, however inartificially it may have been drawn; and in this action to recover damages for the wrongful death of plaintiff's intestate, who had been received for treatment in defendant's sanitarium, allegations of the complaint are held sufficient, that the intestate was so received by the defendant for hire, when he was in a helpless condition; that he was placed in the upper room of a wooden building, heated by furnace from the basement; that the windows of the room were closed and the health of the intestate was such as to render his exit from the room impossible; that the employee of defendant, whose duty it was to watch the furnace, had been permitted by the defendant to leave the premises without putting another in his place, and in his absence a fire started near the furnace which destroyed the building and burnt the intestate to death.

**3. Pleadings—Variance—Appeal and Error—Objections and Exceptions—Trials—Instructions.**

The objection by the defendant that there has been a variance between the allegations of the complaint and the proof of the plaintiff, in his action, and that recovery has been permitted him upon evidence of an entirely distinct and independent theory than that alleged, must be taken to the evidence when it is offered, and when no objection is then made, an exception to the charge of the trial judge because he stated that phase of the plaintiff's contention is untenable on appeal.

**4. Pleadings—Variance—Evidence—Impeachment—Appeal and Error.**

Where the defendant has not excepted to plaintiff's evidence claimed to be at variance with the allegations of the complaint upon the measure

of damages, but has introduced the paragraph of the complaint relating thereto as substantive evidence for the purpose of impeachment, he will not be permitted on appeal to rely upon the variance between the allegation and proof for the purposes of obtaining another trial.

(418) APPEAL by defendant from *Lyon, J.*, at March Term, 1914, of ALAMANCE.

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, who is the proprietor of a private sanitarium. The allegations of negligence in the complaint are as follows:

"Second. That plaintiff's intestate, who was her husband, came to his death by the wrongful act, neglect, and default of the defendant on..... March, 1909, under the following circumstances, towit: The intestate on.....February, 1909, placed himself under the care and treatment of the defendant, who held himself out and advertised to the public as an expert physician and doctor, at his sanitarium in the town of Greensboro, Guilford County and State of North Carolina. That the defendant, on.....February, 1909, received the said J. W. Green, plaintiff's intestate, into his care, custody, and control in his said sanitarium in Greensboro, Guilford County and State of North Carolina, and placed him in an upper room in the building used and occupied by the defendant as a sanitarium, and treated him from day to day for the disease with which the said J. W. Green, plaintiff's intestate, was afflicted, until .....March, 1909, and the defendant was paid for all of the services rendered and was paid $30 in advance for each week's service. The last payment of $30 was paid either on 9 or 10 March, 1909. That plaintiff's intestate was an invalid and unable to wait upon and attend to his personal wants and necessities, and was placed by the defendant in a room upstairs, as aforesaid, and with no one in the room as nurse, attendant, or otherwise. That some time during the night of 10 March, 1909, the building in which the defendant carried on his business as a sanitarium, and in which plaintiff's intestate was placed, was burned and destroyed and plaintiff's intestate was burned to death therein. That the building was heated, as plaintiff is informed and believes, and so alleges, on the night of the fire and before the night for a long time, by fire kept in a furnace in the basement of the building, and the fire was kept burning day and night in order to keep a certain temperature in said building. That this furnace was attended to by a man employed by the defendant, and on the night the plaintiff's intestate was killed by the burning of said building, the defendant expressly permitted the fireman to leave his place of business and his duties there in attending to the furnace and go entirely off the premises of the said sanitarium.

That at the time of the fire and on that night there was no one in or about the said building except some ladies and children and the plaintiff's intestate. That the fireman's duty was to keep the (419) furnace fires up and act as a watchman to the safety of said sanitarium premises. That the fire which destroyed said sanitarium and burned to death plaintiff's intestate started, as plaintiff is informed and believes, and so alleges, at or near the said furnace, and there being no one there at the time to give the necessary alarm or to extinguish the flames, the wooden building burned rapidly and plaintiff's intestate was burned to death as aforesaid.

"Third. That it was gross negligence on the part of the defendant to place the intestate of the plaintiff, a helpless and invalid man, in an upstairs room, in a wooden building, with a furnace underneath thereof with fire burning therein sufficient to warm a two-story building, with no person to look after it and attend to the said furnace and with no suitable person or nurse to remove the plaintiff's intestate. That the building was a two-story building, with a basement underneath where the furnace was located, and the building had ten or more rooms in it. That the windows of the room in which plaintiff's intestate was placed by the defendant, as plaintiff is informed and believes, and so alleges, were so fixed by screens or other appliances that plaintiff's intestate, in his feeble condition, could not open said screens or appliances and escape the flames; and the door in the room in which plaintiff's intestate had been placed by defendant opened, as plaintiff is informed and believes, and so alleges, into the hallway of the house, and there was no chance of escape that way for one in the feeble condition such as plaintiff's intestate, unless assisted by either nurse or attendant in time. This plaintiff, therefore, alleges that her intestate came to the horrible death of being burned to death by the negligence, wrongful act, and default of the defendant, to plaintiff's damage $10,000."

The defendant demurred to the complaint *ore tenus* upon the ground that it did not state a cause of action. The demurrer was overruled, and the defendant excepted.

The defendant failed to answer, and judgment by default and inquiry was entered against him.

At the succeeding term of court the inquiry of damages was had.

The plaintiff offered evidence tending to prove that the deceased was 64 years old at the time of his death. That he was industrious and of temperate habits, and previous to the time when he went to Greensboro to the sanitarium for treatment, that his health was as good as that of the average man of his age; that previous to that time he did the work on his farm in the way of hoeing, cutting, and any other kind of work;

that he had been afflicted with facial neuralgia; that he was taken during the Christmas holidays; that his earning capacity was $300 a year, and his personal expenses were $100 a year; that he was economical, (420) and did the light farm work himself; that he was suffering from a nerve trouble in his face, something like neuralgia, but that he was up and went to Greensboro alone; that he had had slight attacks of this neuralgia before this time; that outside of this neuralgia in his face, his health was good, and that he was able to attend to his farm and other interests.

There was no objection to this evidence.

The defendant introduced the second paragraph of the complaint.

His Honor charged the jury, among other things:

"The plaintiff contends that her intestate, John W. Green, was 64 years old at the time of his death; that he had been in good health, and that his general health and condition was good at that time, with the exception of neuralgia of the face; contends that his habits of life were good, that he was industrious and temperate, and that his life expectancy was 11.1 years. The mortuary tables have been referred to, which give the life expectancy of a man 64 years old at 11.1 years; but you are not bound by the mortuary tables. In passing upon what his expectancy was, you will take into consideration his life, his habits, his health, and his manner of living, and all the surroundings, and say how long he would have lived but for the accident that caused his death." The defendant excepted.

"The plaintiff further contended that his earning capacity was from $300 to $700 a year; contends that he was the owner of three farms, two of which he rented out, and one he worked himself with the exception of some hired labor that he had in the busy season of the year.

"The defendant contends that the plaintiff's intestate was not in good health; that he was at the time of his death in the hospital, and that according to the plaintiff's complaint in this action he was in a feeble condition and unable to care for himself, and that his life expectancy was not as much as 11.1 years; that owing to his physical condition he could not have expected to live as long as that."

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

*No counsel for plaintiff.*

*E. S. Parker, Jr., for defendant.*

ALLEN, J., after stating the case: Two questions are presented by the appeal:

1. Does the complaint state a cause of action?

The principle seems to be generally recognized that a private charitable institution, which has exercised due care in the selection of its employees, cannot be held liable for injuries resulting from their negligence, and the rule is not affected by the fact that some patients or beneficiaries of the institution contribute towards the expense (421) of their care, where the amounts so received are not devoted to private gain, but more effectually to carry out the purposes of the charity.

The rule is otherwise where fees are charged with the expectation and hope of securing gain and profit and the proprietors of institutions of this class are held to the duty of ordinary care in the treatment and protection of those intrusted to them, and are responsible for injuries resulting from failure to perform this duty.

The cases in support of these propositions will be found in the note to *Duncan v. Nebraska Sanatorium Assn.*, A. and E. Anno. Cases, 1913, E 1129.

The defendant is the proprietor of a private institution, maintained for gain and profit, and the sufficiency of the complaint depends, therefore, on whether it alleges actionable negligence.

In passing upon the complaint we must construe it liberally, and "If it can be seen from its general scope that a party has a cause of action or defense, though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken against him as to deprive him of it. . . . If any portion of it, or to any extent it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements; for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient." *Brewer v. Wynne*, 154 N. C., 467.

When so considered and construed, we are of opinion the complaint states a cause of action.

It alleges that the intestate of the defendant was received into the institution of the defendant for hire; that he was old and helpless; that he was placed in an upper room of a wooden building; that the windows of his room were closed and he could not open them; that the only exit from his room was on the hall; that there was no attendant near him; that the defendant maintained a fire in a furnace under the house, night and day; that he had a watchman employed whose duty it was to watch

the fires and protect the premises; that the defendant permitted the watchman to leave the premises and put no one in his place; that the fire which caused his death started at or near the furnace, and there was no one present to extinguish it or to give the alarm; and with these facts admitted, as they are by the demurrer, the jury would have been warranted upon an issue submitted to them in finding that the defendant did not exercise the care of a person of ordinary prudence, and that this was the cause of death.

(422) 2. Is the part of the charge copied in the statement of the case objectionable?

The position of the defendant is that the complaint alleges that the deceased was helpless, and that the plaintiff has been permitted to recover damages upon evidence tending to prove that he was of average health.

It is true that a complaint proceeding upon one theory will not authorize recovery upon another entirely distinct and independent theory (*Morse v. R. R.*, 122 N. C., 892), and that proof without allegation is as unavailing as allegation without proof (*McCoy v. R. R.*, 142 N. C., 387); but it is clear from the record that there was no contention in the Superior Court that there was a variance between the allegations and the proof.

The defendant raised no objection to the evidence that the deceased was of average health, and being in and material, it became the duty of the court to state the contentions of the parties arising thereon.

Not only was there no objection, but it also appears that the defendant introduced the second paragraph of the complaint, alleging that the deceased was helpless, as substantive evidence of his physical condition and for purposes of impeachment.

The court was justified in assuming, in the absence of objection and after the defendant introduced the complaint, that the defendant, instead of relying upon the exception to the evidence upon the ground of a variance, preferred to place the plaintiff before the jury under the charge of alleging a cause of action based upon the helplessness of the deceased, and of demanding large damages upon the ground that he was in good health except for neuralgia, and this was doubtless the stronger position; and having had advantage of it, he ought not to be allowed now to change front.

It will also be noted that the evidence of good health related to a period anterior to the time the deceased entered the sanitarium of the defendant.

We find

No error.

*Cited: Talley v. Granite Quarries Co.*, 174 N.C. 447 (3d, 4d); *S. v. Hawley*, 186 N.C. 438 (3j, 4j); *S. v. George*, 188 N.C. 612 (3p, 4p); *Bullard v. Ins. Co.*, 189 N.C. 39 (3c, 4c); *Morgan v. Bank*, 190 N.C. 214 (3p, 4p); *Pangle v. Appalachian Hall*, 190 N.C. 835 (1c); *Stone v. Milling Co.*, 192 N.C. 587 (3p, 4p); *Smith v. Cook*, 196 N.C. 559 (3p, 4p); *Johnson v. Hospital*, 196 N.C. 612 (1c); *Cowans v. Hospitals*, 197 N.C. 41 (1d); *Penland v. Hospital*, 199 N.C. 319 (1c); *Herndon v. Massey*, 217 N.C. 613, 616 (1c); *Hospital v. Guilford County*, 218 N.C. 379 (1p); *Rose v. Patterson*, 220 N.C. 61 (3p, 4p); *Whichard v. Lipe*, 221 N.C. 54 (3p, 4p); *McCullen v. Durham*, 229 N.C. 426 (3p, 4p).

(423)

## DAVIDSON HARDWARE COMPANY v. DELKER BUGGY COMPANY.

(Filed 25 November, 1914.)

**Contracts—Sale of Goods—Loss of Profits—Measure of Damages—Trials—Questions for Jury.**

Loss of profits on goods which the vendor contracted to deliver, but wrongfully failed to do, may be recovered by the purchaser as damages for the breach of the contract, when they were in reasonable contemplation of the parties and contract, and are ascertainable with a reasonable degree of certainty; and it is accordingly held, where the contract thus broken by the vendor was for the sale of thirty-six buggies, that evidence tending to show that the purchaser, a dealer, being unable to supply himself elsewhere in time for his trade, had lost the sale of thirty or more buggies based upon his last year's business, and the demand of his trade for the present season, at an average profit of $15 each, is competent to be submitted to the jury for their determination in fixing the amount of the plaintiff's recovery for the breach of the contract.

APPEAL by plaintiff from *Lane, J.*, at May Term, 1914, of DAVIDSON.

Civil action. There was evidence on part of plaintiff tending to show that defendant company contracted and agreed with plaintiff to ship plaintiff thirty-six vehicles in two minimum car-load lots, the first to be delivered not later than 1 February, 1913, and the second, 1 May, 1913, upon specifications set forth in a written order and agreement between the parties; that defendant company wrongfully failed to deliver said buggies, and plaintiff, who was engaged in the general hardware business, and ready and able to dispose of buggies at a profit, lost the sale of some thirty or forty of the buggies, and the profit on each was $15.

On the question of the amount of damages, the plaintiff offered witnesses who testified as follows:

"I was president of Davidson Hardware Company, and it was, at the times mentioned and had been for some years prior to 1 February, 1913, engaged in general hardware business, farm implements, and buggies; had been selling buggies since February, 1910, I believe; had handled buggies manufactured by defendant company during year of 1912. On 1 February, 1913, we had warehouse in rear of store and had same force employed to handle buggies. Mr. Young was salesman at the time. Plaintiff did not get any of the buggies from defendant under the contract; first notice we got of refusal to ship was some time in February, 1913. The effect of our failure to get these buggies was a loss of the sale of probably thirty or forty buggies. We bought the buggies to sell at a profit."

Q. "How many buggies, in the ordinary course of business, would you sell in the spring trade?" A. "Judging from the prior year to that, and from this year, forty to fifty. Our best buggy trade during the (424) year is in March, April, and May. The buggies under contract were runabouts, open buggies, general buggies. We sold such buggies at a profit of about $15 each."

Q. "How much were you damaged, if at all, by the failure to receive these car-loads or shipments of buggies?" A. "$15 a job figures up $540."

Cross-examination: "Do not know positively how many applications had for buggies from that time till first of May. Do not know how much would have made on any particular buggy, in any particular trade, only on the average the year, this year and the prior year."

Baxter Young, for plaintiff, testified: "Was secretary and treasurer of plaintiff. The first notice we got that defendant would not ship the buggies under this contract was about the middle of February, 1913. It took us till 4 May or 5 May, 1913, to get other buggies to supply the demand for buggies in our business. In the meantime we were unable to supply the demand for buggies in our business."

Q. "What profits were made on sale of buggies, these buggies, buggies of this kind?" A. "Generally made $15 a buggy."

Q. "In ordinary course of business how many buggies could you have sold?" A. "According to this year and last year, we sold forty or fifty After we failed to get buggies of defendant, handled Rock Hill buggies had handled Delker Bros. buggies one year. It was a good selling buggy Had not contracted with any purchaser to sell any of the buggies."

Redirect examination: Q. "State, in the course of business, what was your manner of selling buggies, whether you took orders or sold a man a buggy." A. "Sold them retail, the same as you would shoes or groceries or anything a man comes in to buy and you sell him if you can."

The court charged the jury that, on the evidence, if they believed this defendant had broken the contract, but there were no facts in evidence

o justify more than nominal damages of 5 cents, and plaintiff excepted nd appealed.

*E. E. Raper for plaintiff.*
*Walser & Walser for defendant.*

HOKE, J., after stating the case: It is sometimes said that loss of profits to arise from a good bargain may not be considered in estimating he damages from breach of an executory contract; but, on examination, he position will be found to obtain only where, in a given instance, from he uncertainties of trade, the fluctuations of prices, or the like, these nticipated profits present too many elements of uncertainty to be made he basis of a satisfactory business adjustment. This, however, is not ecause they are profits, but by reason of their uncertainty; and where t appears that such profits were in reasonable contemplation of he parties and the contract and evidence relevant to the inquiry (425) fford data from which the amount may be ascertained with a easonable degree of certainty, the profits to arise from a good bargain ay be recovered.

The position is very well stated by *Selden, J.*, in *Griffin v. Colver*, 16 N. Y., pp. 489, 491, as follows: "It is a well established rule of the ommon law that damages recoverable for a breach of contract must be hown with certainty, and not left to speculation or conjecture; and it s under this rule that profits are excluded from the estimate of damages n such cases, and not because there is anything in their nature which hould *per se* prevent their allowance. Profits which would certainly ave been realized but for the defendant's fault are recoverable; those hich are speculative and contingent are not. The broad general rule n such cases is that the party injured is entitled to recover all his damges, including gains prevented as well as losses sustained; and this rule s subject to but two conditions: The damages must be such as may airly be supposed to have entered into the contemplation of the parties hen they made the contract, that is, must be such as might naturally e expected to follow its violation; and they must be certain, both in eir nature and in respect to the cause from which they proceed." And, s shown by further reference to the authorities, this certainty referred o by the learned judge does not mean "mathematical accuracy," but a easonable certainty. Sutherland on Damages; Hall on Damages, pp. 0-71.

In this last citation the author says: "A difficulty arises, however, hen compensation is claimed for prospective losses in the nature of ains prevented; but absolute certainty is not required. Compensation

for prospective losses may be recovered when they are such as in the ordinary course of things are reasonably certain to ensue. Reasonable means reasonable probability. When the losses claimed are contingent, speculative, or merely possible, they cannot be allowed."

The distinction here adverted to is very well brought out in *Machine Co. v. Tobacco Co.*, 141 N. C., 284, *Associate Justice Walker* delivering the opinion. In that case plaintiff, manufacturer of a cigarette machine, sued defendant for a breach of contract in failing to exhibit plaintiff's machine at the St. Louis Exposition, and claimed, as an element of his damages, the loss of profits incident to the sales he might have made if his machine had been exhibited according to the contract, and there being no data afforded either by the contract or evidence relevant thereto from which profits could be ascertained, this source of damages was disallowed, and it was thereupon held:

"1. Where one violates his contract he is liable for such damages, including gains prevented as well as losses sustained, as may fairly be supposed to have entered into the contemplation of the parties (426) when they made the contract, that is, such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.

"2. The law seeks to give full compensation in damages for breach of contract, and in pursuit of this end it allows profits to be considered when the contract itself, or any rule of law, or any other element in the case, furnishes a standard by which their amount may be determined with sufficient certainty.

"3. In an action for damages for a breach of contract, in the absence of some standard fixed by the parties when they made their contract, the law will not permit mere profits, depending upon the chances of business and other contingent circumstances, and which are perhaps merely fanciful, to be considered by the jury as part of the compensation."

While profits were rejected as an element of damages in this instance there being no data whatever from which they could be estimated, the right of recovery where same could be ascertained with reasonable certainty is clearly recognized, and the principle has been frequently approved in decisions of this Court. Thus, in the recent case of *Steel Co v. Copeland,* 159 N. C., 556, plaintiff was allowed to recover for profits on a car-load of fertilizer, ordered for the trade. True, in that case the Court referred to the fact that the selling price of this guano was fixed but this was only as affording the greater facility for ascertaining the amount of damages, and not at all as controlling on the question. A like principle is fully recognized in *Wilkinson v. Dunbar,* 149 N. C., 20 and other cases.

In the present instance there was evidence offered tending to show that plaintiff, doing a general hardware business, including the purchase and sale of vehicles, had contracted with the defendant for the delivery for his spring trade, in 1913, of thirty-six buggies, two minimum car-load lots, and which defendant wrongfully failed to deliver; that plaintiff had handled the buggy the previous year and found it to be a good selling buggy; that if they had been delivered he could have sold to his trade thirty or forty buggies and at a profit of not less than $15; that he was not able to obtain other buggies till late in the season, and could not procure enough then to supply the demand in his trade, and, applying the principles as heretofore stated, we are of opinion that the plaintiff should have been allowed to present his case to the jury on the question of substantial damages, and that his testimony as to profits should be considered by the jury and allowed such weight and effect as it should properly receive.

While we have treated this case as a question of profits to arise out of sales to be made by the purchaser, because the parties have so presented it and the principles applicable are substantially the same, as a matter of fact, this is only a method of arriving at the pecuniary (427) value of the principal contract to plaintiff which defendant has broken, and this value plaintiff is always entitled to recover to the extent that it was in the reasonable contemplation of the parties and capable of ascertaining with a reasonable degree of certainty. *Wilkinson v. Dunbar, supra; Masterton v. Mayor,* 7 Hill, 61.

For the error indicated, the plaintiff is entitled to a new trial of the cause, and it is so ordered.

New trial.

*Cited: Gardner v. Telegraph Co.,* 171 N.C. 407, 408 (c); *Hardware Co. v. Machine Co.,* 174 N.C. 483 (d); *Nance v. Telegraph Co.,* 177 N.C. 317 (c); *Cotton Mills v. R.R.,* 178 N.C. 220 (d); *Storey v. Stokes,* 178 N.C. 415, 416 (c); *Cary v. Harris,* 178 N.C. 628 (c); *Sprout v. Ward,* 181 N.C. 373 (d); *Johnson v. R.R.,* 184 N.C. 105 (d); *Erskine v. Motors Co.,* 185 N.C. 489 (c); *Troitino v. Goodman,* 225 N.C. 412 (c).

LEXINGTON GROCERY COMPANY v. F. S. VERNOY.

(Filed 25 September, 1914.)

**1. Contracts, Breach of—Issues.**

In an action to recover damages arising from a breach of warranty, two issues should be submitted to the jury: one relating to the warranty and the other to the damages.

**2. Contracts—Sale of Goods by Name—Implied Warranty—Trials—Evidence.**

There is an implied warranty in the sale of goods under a certain name indicating kind or quality, that they shall be merchantable and salable as the name implies, whether the defect may be hidden or might possibly be discovered by inspection; and in an action upon the implied warranty in the sale of a car-load of red-marrow beans, there being evidence tending to show that beans by this name are readily salable for table use exclusively, cook easily, and will not keep over summer without rotting, it is competent for the plaintiff to show, by his evidence, that the beans in question could not be cooked soft so as to be edible, remained hard for several years, contrary to the characteristics of the beans of the kind purchased.

CLARK, C. J., dissenting.

APPEAL by defendant from *Devin, J.*, at Fall Term, 1914, of DAVIDSON.

Civil action tried upon this issue:

Is defendant indebted to the plaintiff, and if so, in what amount? Answer: "Yes; $350."

From the judgment rendered, defendant appealed.

*Emery E. Raper, McCrary & McCrary for plaintiff.*

*L. M. Swink, Walser & Walser for defendant.*

BROWN, J. We do not altogether approve of the form of the issue in this case, although it is not excepted to. The action is brought to (428) recover damages for a breach of warranty in the sale of a lot of red-marrow beans. In such cases it is better to have two issues: one relating to the warranty and the other to the damages.

The evidence for the plaintiff tends to prove that he purchased from the defendant and paid for in November, 1912, a car-load of red-marrow beans; that on arrival he inspected them and found them to be apparently in good condition so far as could be ascertained on the outside.

The plaintiff sold seventy-seven bags of the beans out of the whole shipment of one hundred and fifty bags. The merchants to whom he sold these beans returned them with the complaint that they were not salable. There is evidence tending to prove that the red-marrow bean is a fine

salable vegetable, used exclusively for table use, with a soft texture, and cooks easily; will not keep as well during the summer as some beans.

The evidence tends to prove that while this shipment of beans looked hard and natural, they could not be cooked, and after being cooked for four or five hours, remained as hard as before, so much so that they would "rattle in the plate," and that these beans now, after the lapse of years, are still hard, contrary to their nature; that the seasons have had no effect on them; whereas the normal and perfect red-marrow bean in its natural state cannot be carried over summer without becoming rotten.

The defendant excepts to evidence tending to prove that good red-marrow beans would mold and rot and get wormy over summer when kept from one season to the other, and that these particular beans had not been affected that way, but still remained very hard and looked natural.

We think this evidence was competent to show that the beans sold the plaintiff were not of an edible quality and were not the kind of beans which he purchased from the defendant.

The only other assignment of error relates to the refusal to nonsuit the plaintiff, upon the ground that there is no implied warranty. This contention cannot be maintained. It is well settled by repeated decisions that on a sale of goods by name, there is a condition implied that they shall be merchantable and salable under that name; and it is of no consequence whether the seller is the manufacturer or not, or whether the defect is hidden or might possibly be discoverable by inspection. *Grocery Co. v. Bentley,* 101 N. E., 147. This is a Massachusetts case, involving the sale of a lot of sardines, and is very similar to the one at bar. The same principle has been announced by this Court in *Main v. Field,* 144 N. C., 311; *Mfg. Co. v. Davis,* 147 N. C., 267; *Medicine Co. v. Davenport,* 163 N. C., 294; *Ashford v. Schrader, ante,* 45. See, also, Cyc., 35, 393, and 410; 35 L. R. A. (N. S.), 509 (n); *Turner v. Crompton,* A. and E. Anno. Cases, 1913, C. 1015.

There is abundant evidence that the beans could not be cooked, (429) and, therefore, they were unfit for food. As they could not be cooked, they were not merchantable, because not fit for the purposes for which red-marrow beans are bought and sold. The doctrine of implied warranty plainly applies to a case like this.

The judgment of the Superior Court is

Affirmed.

CLARK, C. J., dissenting: This is an action to recover damages for defective quality in the sale of a lot of "red-marrow beans." The evidence of the plaintiff is that the beans were "in good condition so far as

could be seen on inspection; that they looked hard and natural, but that after being cooked for four or five hours they still remained hard." There was no evidence that these beans, if cooked for four or five hours, would ordinarily be made fit for use. There was therefore no defect shown in the beans, and a nonsuit should have been ordered.

As a matter of fact, these beans are well known as the famous "Boston Baked Beans," and when perfectly fresh, it is said, can be cooked in six hours. But when matured, as these were, they are required to be soaked in water for twelve hours and then cooked from six to twelve before they are edible. However this may be, there was an absence of all evidence showing any defect in these beans or that they should have been cooked in five hours.

*Cited: Furniture Co. v. Mfg. Co.,* 169 N.C. 45 (2c); *Register Co. v. Gradshaw,* 174 N.C. 416 (2c); *Hunsucker v. Corbitt,* 187 N.C. 503 (2p); *Swift v. Etheridge,* 190 N.C. 165 (2c); *Poovey v. Sugar Co.,* 191 N.C. 725 (2c); *Swift & Co. v. Aydlett,* 192 N.C. 335 (2c); *Aldridge Motors v. Alexander,* 217 N.C. 754, 755, 756 (2c).

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ZILLA T. GANN v. W. T. SPENCER.

(Filed 2 December, 1914.)

**Married Women—Contracts to Convey—Privy Examination—Color of Title —Betterments—Interpretation of Statutes.**

A paper-writing not under seal and signed by a *feme covert* without her privy examination, reading, "Received of W. T. S. $10, to be applied on the purchase of Z. G. land," adjoining certain other tracts of land, is construed as a contract to convey the land, and constitutes color of title thereto; and while the defendant, who was put into possession under the plaintiff's title, may not enforce specific performance because of the defective execution and probate, he is entitled to recover for the betterments he has made upon the lands, in the plaintiff's action for the possession, when he has made them in good faith, believing his title to be good, etc. Revisal, sec. 652 *et seq.*

APPEAL by defendant from *Lane, J.,* at Spring Term, 1914, of STOKES.

Civil action to recover the possession of a tract of land. There was a verdict and judgment for the plaintiff, and the defendant appealed.

(430) *C. C. McMichael and N. O. Petree for plaintiff.*

*J. W. Hall and E. B. Jones for defendant.*

BROWN, J. It is admitted in the case on appeal that the plaintiff has a fee-simple title to the land described in the complaint, and that the defendant is in possession. The fourth issue tendered by the defendant and refused by the court presents the question as to whether the defendant is entitled to betterments under our statute. The court below held that he was not, and in this we think there was error. The defendant purchased the land in controversy from the plaintiff, who is a *feme covert,* and received from her the following paper-writing, towit:

Received of W. T. Spencer ($10) ten dollars, to be applied as a credit on the purchase of Zilla Gann land, adjoining the lands of Sam Nelson, William Spencer, Henry Williams, and others.

This 30 August, 1909. ZILLA GANN.

It is undoubtedly true, as contended by the plaintiff, that under the law as laid down in *Scott v. Battle,* 85 N. C., 184, the defendant would not be entitled to betterments, being a married woman, and her contract to sell the land or bond for title without privy examination being void.

At the date of that decision the statute, Battle's Revisal (1873), ch. 17, sec. 262 *et seq.,* enacted that "Where any person or those under whom he claims, while holding the premises under a title believed by him, or them, to be good, have made permanent improvements thereon, they may be allowed for the same over and above the value of the use and occupation of the land," and it provides the machinery for ascertaining and enforcing payment of the amount. *Scott v. Battle* was decided when this act was in force; but in 1883, by The Code, after the case was published, the Legislature changed the wording of the law so as to meet the decision and remove this objectionable construction of the law and the injustice flowing therefrom.

The Code provided, and it was brought forward in the Revisal of 1905, sec. 652 *et seq.,* that it should be sufficient to entitle such a person to the value of his betterments, or rather to the amount by which they had enhanced the value of the land, if he had "held the premises *under a color of title* believed by him to be good."

We have held from the earliest period that a married woman's deed defectively executed or acknowledged or without proper privy examination, while a nullity as to her, is nevertheless good color of title. *Pearse v. Owens,* 3 N. C., 234; *Ellington v. Ellington,* 103 N. C., 58; *Perry v. Perry,* 99 N. C., 273; *Smith v. Allen,* 112 N. C., 226, citing *Perry v. Perry, supra; Greenleaf v. Bartlett,* 146 N. C., 495, where *Justice Connor* reviews the authorities and holds such a deed to be color of title, approving *Pearse v. Owens* and *Perry v. Perry.* It also falls (431) clearly within the principles and definition of color established in

*Tate v. Southard,* 10 N. C., 121; *Dobson v. Murphy,* 18 N. C., 586; *Smith v. Proctor,* 139 N. C., 324; *Avent v. Arrington,* 105 N. C., 390; *Keener v. Goodson,* 89 N. C., 273, and many other cases to the like effect.

At this term, in *Norwood v. Totten,* 166 N. C., 648, we have expressly decided that such a deed, while not binding upon the *feme,* is nevertheless valid as color of title, and that case was an extreme one, as the deed there was made by the wife to the husband without privy examination. The conclusion is inevitable that the paper in this case is color of title, and, therefore, comes within the very words of the present statute. It is so very just and right it should be so that if there were any substantial doubt about it our minds should incline to that construction of the law which would prevent so great a wrong.

We said in *Burns v. McGregor,* 90 N. C., 222, at marg. p. 224: "The wife having obtained the title to the land she desired to own, availing herself of her disabilities as a married woman, refused to pay the difference in price of the two tracts, or to execute the mortgage to secure it, as she agreed to do. Having gotten the title, she seeks to avoid paying a part of what she justly owes and agreed to pay for it. She repudiates her contract and desires to obtain the fruit of so much of it as is beneficial to herself. This the law will not tolerate.

"The Constitution and the statute wisely extend large and careful protection and safeguards to married women in respect to their rights and property, but it is no part of their purpose to permit, much less help, one of them perpetrate a fraud, if by possibility, under some sinister influence, she should attempt to do so. It would be a reproach upon the law if such a thing could happen."

And again, at marg. p. 225: "The wife may, under an engagement not legally binding upon her, refuse to pay her debt; but if she does so, she cannot keep the property for which the debt was contracted. It would contravene the plainest principles of justice to allow a married woman to get possession of property under an engagement not binding upon her and let her repudiate her contract and keep the property. She must observe and keep her engagement, or else return the property; if she will not, the creditor may pursue and recover it by proper action in her hands," citing, among others, *Atkinson v. Richardson,* 74 N. C., 455; *Bunting v. Jones,* 78 N. C., 242; *Newhardt v. Peters,* 80 N. C., 166; *Hall v. Short,* 81 N. C., 273; *Johnson v. Cockran,* 84 N. C., 446.

*Smith, C. J.,* speaking of this statute, says, in *Justice v. Baxter,* 93 N. C., at p. 409: "To apply the artificial rule in equity laid down by the Court to a case like the present would be, in our opinion, to emasculate the statute of all its virtue and render it meaningless. For if he (432) who improves land must see to it, in order to reap its benefits,

that his title is not defective, he would not need its aid; and if he cannot be compensated for his outlay, if it is defective, it would be wholly useless and unnecessary.

"It is just such contingencies, when the ameliorating work has been done *bona fide* and under the honest belief of having title, that the statute interposes and says to the true owner, You are entitled to your land, but it is inequitable for you with it to take the enhanced value of the expenditure and labor of another honestly put upon it."

And again: "The beneficent provisions of the statute would be defeated by a construction which charges the *bona fide* claimant under a deed in form and purpose purporting to convey a perfect title with a knowledge of imperfections which might be met with in the deduction of his own title. It was not so extended, and if the petitioner's case, as he presents it, is not embraced in its terms, it is a useless encumbrance up the statute-books."

Referring to *Merritt v. Scott,* 81 N. C., 385, the case of a life tenant making improvements, and distinguishing it, he further says: " 'But the owner of land,' as the Court in the opinion remarks, 'has no just claim to anything but the land itself, and a fair compensation for being kept out of possession; and if it has been enhanced in value by improvements made under the belief that he was the owner, the increased value he ought not to take without some compensation to the other. This obvious equity is established by the act.' "

It is in evidence that the plaintiff put the defendant in possession of this land under a contract to sell him the same, and at the same time received from him a part of the purchase money and gave him the paper-writing *supra.* Being in possession under this paper-writing, it is color of title within the meaning of the statute for the rights and interest which the defendant claims in the land.

It purports on its face to be a contract for the sale of the land, in effect a bond for title, and the only reason the defendant cannot enforce the specific performance of it is because the plaintiff is a *feme covert* and her privy examination was not taken.

But that does not deprive it of its character as color of title, accompanied by the possession of the land under it. A bond for title is color of title; a paper-writing not under seal is color. *Avent v. Arrington,* 105 N. C., 377.

As we have before stated, privy examination is not necessary in order to constitute color. For these reasons we are of opinion that his Honor erred in holding that under our statute the defendant was not entitled to betterments.

The defendant will be allowed to file an amendment to his (433) answer or a petition under the statute, setting forth the character

of the betterments and the value of them, and such other matters as are pertinent to a claim under the statute for betterments.

New trial.

*Cited: Knight v. Lumber Co.*, 168 N.C. 454 (p); *Kivett v. Gardner*, 169 N.C. 80 (p); *Boyett v. Bank*, 204 N.C. 646 (c).

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MAGGIE GRAY, ADMINISTRATRIX OF K. L. GRAY, v. SOUTHERN RAILWAY COMPANY.

(Filed 23 December, 1914.)

1. **Railroads—Master and Servant—Federal Act—Issues as to Damages—Negligence—Contributory Negligence—Diminution of Damages.**

It is not required in an action brought under the Federal Employers' Liability Act that damages be assessed under separate issues, one as to the full amount sustained and the other as to the amount to be deducted therefrom by the answer to the issue of contributory negligence; and where the trial judge has correctly charged the jury in this respect, under the one issue of damages, it will not be held as erroneous.

2. **Railroads—Negligence—Evidence—Curve—Unobstructed View.**

Where the plaintiff's intestate has been killed by the defendant railroad's train, it is competent for a witness to testify that a curve near the place of the injury did not interfere with the engineer's view from his engine at a certain point north of the place, when such is relevant to the inquiry as to whether the engineer saw, or by keeping a proper lookout could have seen, the danger of the intestate in time to have avoided killing him.

3. **Trials—Nonsuit—Evidence—How Construed.**

In this case it is held that there was sufficient evidence to take the case to the jury, viewing it in the light most favorable to the plaintiff, and defendant's motion to nonsuit was properly disallowed.

4. **Railroads—Federal Employers' Liability Act—Master and Servant—Negligence—Common Law—Last Clear Chance—Trials—Instructions—Appeal and Error.**

The Federal Employers' Liability Act was passed for the benefit of railroad employees, to afford them a recovery of damages when under the common law their contributory negligence would have totally deprived them of the right; and where there is evidence that an employee of the defendant has placed himself in a position of danger on the track in front of an approaching train, but that the injury complained of would not have been sustained, had the employees on defendant's train kept a proper lookout ahead and had performed the duties required of them under the circumstances in stopping the train, the common-law doctrine of the last clear chance is applicable; and a requested instruction to the effect that the

defendant would not be liable if it did all it reasonably could to stop the train in time, after seeing the intestate's danger, is properly refused.

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

APPEAL by defendant from *Adams, J.*, at July Term, 1914, of (434) RANDOLPH.

*John A. Barringer for plaintiff.*
*John T. Brittain and Manly, Hendren & Womble for defendant.*

CLARK, C. J. This is an action for the wrongful killing of the plaintiff's intestate, under the United States Employers' Liability act, ch. 149, 35 Statutes at Large, 65, amended ch. 143, Statutes at Large.

Exceptions 1 and 2 are that issues as to the amount of damages by reason of the negligence of the defendant and of plaintiff's contributory negligence were not submitted to the jury as separate and distinct issues. But the statute does not require this. The court instructed the jury, in accordance with the statute, to assess the damages by reason of the death of the intestate, if they found it was due to negligence on the part of the defendant, and to assess the amount of diminution on account of the contributory negligence of the deceased, and the difference, if any, would be their verdict.

The death of the intestate occurred in Virginia, but it was admitted that the defendant was engaged in interstate commerce and that the intestate was employed by the defendant in such commerce at the time of his death. The judge read the Federal act on the subject and carefully explained it to the jury. He told them that it required that the damages "shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. This means that the damages shall be diminished in proportion to the amount of the employee's negligence, as compared with the combined negligence of himself and the defendant, . . . and that where the causal negligence, that is, the negligence causing the death, is partly attributable to the employee and partly to the carrier, the employee shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both, the purpose being to abrogate the common-law rule exonerating the carrier from liability in such cases, and to substitute a new rule confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee."

The court submitted only the two issues, "Whether the intestate of the plaintiff was killed by the negligence of the defendant, as alleged

(435) in the complaint," and "What damage, if any, is the plaintiff entitled to recover?" But with this instruction the whole matter in dispute was fairly submitted to the jury, and it was not error not to submit separate issues as to how much was assessed by the jury as the total damages and how much was deducted for the contributory negligence. Where the issues submitted fully cover the disputed points it is not error to refuse to submit other issues. *Hendricks v. Ireland,* 162 N. C., 523, and cases there cited; *R. R. v. Earnest,* 229 U. S., 114.

Exception 3 is to the admissibility of the testimony of S. W. Jones, that the curve did not interfere with the view at the point 38 rails north of the place of the accident. The testimony was admissible, and the defendant's brief argues merely the weight to be given such testimony, which was a matter for the jury.

Exception 4 is abandoned, as it does not appear in the defendant's brief. Rule 34.

Exception 6 was to the refusal to permit the witness Hippert to testify whether, taking into consideration the curve of the track and the other natural objects there, he could have seen the body beside the track before he did see it. This would have been an expression of opinion which the jury should have drawn from the facts in evidence, and not the witness. It would be better to admit such evidence, but its admission or rejection can rarely be of sufficient importance to affect the result or justify a new trial.

Exceptions 5, 7, and 8 are to the refusal of the motion to nonsuit and to charge the jury to answer the first issue "No." There was sufficient evidence to go to the jury, and these exceptions need not be discussed. On such motion the evidence must be considered in the most favorable light to the plaintiff. *Hodges v. Wilson,* 165 N. C., 323; *Walters v. Lumber Co., ib.,* 388. This is familiar learning.

Exceptions 9, 10, 11, 12, 13, 14, and 15 are to the charge of the court, and rest upon the idea that the defendant owed the intestate no duty whatever until the peril of the deceased was discovered by the engineer. This would destroy the entire doctrine of "the last clear chance" in cases of negligence. This is not the intent of the employers' liability statute, which is in the interest of the party injured, by making contributory negligence when it exists concurrently with negligence on the part of the defendant, not a complete bar to recovery, as heretofore, but only a matter in abatement in proportion to the comparative negligence of the party injured. The common-law doctrine of negligence still applies, in the construction of the statute, as to the negligence of the defendant. It was the duty of the engineer and fireman to have kept a proper lookout on the track, and if they could not do so, it was the duty of the de-

fendant to have had still another person on the lookout to pre- (436) vent any avoidable accident. *Arrowood v. R. R.*, 126 N. C., 629. If the defendant could by reasonable diligence have discovered the critical condition of the deceased in time to have averted the injury, it is liable, notwithstanding the negligence of the deceased. 3 Labatt M. and S. (2 Ed.), 3390, Note 5; *R. R. v. Ives*, 144 U. S., 408.

It is not necessary to discuss more fully the facts in the case, as they are fully presented in the careful charge of the court, with the correct application of the law. The distance at which the body of the deceased could have been seen was entirely a question for the jury upon the evidence, as well as the distance within which the train could have been stopped.

The deceased had put his red light in the middle of the track as a danger signal and had gone to sleep, lying beside the track with a white light by him. The engineer testified that he knew that this flagman should be there and that these lights were a danger signal; that he did not undertake to slacken his speed till he got within 300 feet or less, when he blew the signal, and the deceased waking and rising up, his head was struck by an iron step, which killed him; that if he had blown the signal sooner the sleeper would probably have gotten up in time to have avoided being struck. There was evidence tending to show that the engineer and fireman were not keeping a proper lookout on the track, if any, until they got within 50 yards of the sleeper. *Dallago v. R. R.*, 165 N. C., 269.

The whole subject is fully discussed in a late case, *Draper v. R. R.*, 161 N. C., 310, in which *Allen, J.*, states the law as follows: "In an action for damages for the negligent killing of plaintiff's intestate, who was down and helpless on the track and was run over by the defendant's train, involving the question whether the engineer by the exercise of ordinary care could have stopped the train in time to have avoided the killing, the jury are not bound by the opinions of the witnesses, as to the distance within which the train could be stopped, but may consider the evidence as to the condition of the track, the grade, the length and weight of the train, the speed, and other relevant circumstances, and upon the whole evidence determine within what distance it could have been stopped."

It is not sufficient defense of the negligence of the defendant that the engineer could not have stopped the train in time to avoid the death of the plaintiff's intestate after he perceived him on the track. The question is whether the engineer could have stopped the train in time to have avoided killing the deceased after he could have perceived the danger of the deceased, had the engineer and fireman been in the exercise of

(437) proper diligence on the lookout. *Ray v. R. R.*, 141 N. C., 87; *Farris v. R. R.*, 151 N. C., 491; *Edge v. R. R.*, 153 N. C., 216; *R. R. v. Ives*, 144 U. S., 408.

No error.

BROWN, J., dissenting: I am of opinion that the court below erred in refusing the defendant's prayer for instruction, and in applying the decisions of this Court instead of following those of the Federal courts, inasmuch as it is admitted that the action was brought under the Federal employers' liability act. All the evidence tends to prove that plaintiff's intestate, Kenneth L. Gray, was a brakeman on a freight train running between Spencer, N. C., and Munroe, Va. The freight train was stopped and cut in two for shifting purposes. Gray was sent forward to flag No. 37, a fast mail, due to pass in about 10 minutes.

It was Gray's duty to go up the track eighteen telegraph poles, place one torpedo on the engineer's side, then go nine telegraph poles further, place two torpedoes on the engineer's side, and then return to the place where he had placed the one torpedo, and wait with his lanterns until the train arrived.

Gray did not place any torpedoes on the track, but he went up the track about three-quarters of a mile, placed his white lantern on the end of a tie, his red lantern on the rail, and lay down with his head on the end of another tie, with his body on the outside of the track, and went to sleep.

Approaching the point of the accident on the morning of 30 August, No. 37 was four minutes late, and was running 55 to 60 miles an hour. Just before rounding the curve in the cut, the engineer had blown the station blow for Dry Fork station. The engineer was in his seat, keeping a proper lookout ahead, when he emerged from the cut, and while rounding the right-hand curve he saw the lanterns sitting on the track ahead of him. He recognized it as a flagman's signal, and answered the signal with two blasts of the whistle. About the time he had finished answering the signal, he reached the point where the track straightens, his headlight fell upon the track in front of him, and he saw an object lying beside the track that he thought was a man. He was then about 500 feet from the point of the accident. He immediately applied his brakes in emergency, shut off his engine, and stopped his train as quickly as he could.

Gray's head, being on the cross-tie, came in contact with the step of the tender as it passed, and he was killed. There is not a scintilla of evidence that the engineer of No. 37 saw Gray, or discovered his condition, in time to stop.

The court instructed the jury that if the engineer in charge of (438) the approaching train saw, or by the exercise of ordinary care could have seen, the perilous situation and could have averted the injury by any available means in his power, reasonably consistent with the safety of the train and the passengers, and failed to do so, then they should find that the defendant was negligent.

In administering the Federal liability act the State courts are bound by the construction and decisions of the Federal courts. Since Congress has taken possession of the field of employers' liability to employees in interstate transportation by rail, all State laws upon the subject are superseded. *Seaboard Air Line Ry. v. Horton,* 223 U. S., 402; *Mondou v. Ry. Co.,* 223 U. S., 1.

Not only have State statutes been made inapplicable, but the common law as well, where a construction has been placed upon it by the State courts differing from that of the Federal courts. *South Covington R. Co. v. Finan,* 153 Ky., 340; *W. U. Tel. Co. v. Milling Co.,* 218 U. S., 406. This subject is elaborately and ably discussed by *Mr. Justice Myers* of the Supreme Court of Indiana in the recent case of *So. Ry. v. Howerton,* 105 N. E. Rep., 1026, where all the authorities are collected.

Under the law as applied by the Federal courts, the defendant is liable if it could have avoided the injury by the exercise of ordinary care, only after actually discovering the perilous situation. *Little Rock R. and E. Co. v. Billings,* 173 Fed., 903; Note 55, L. R. A., p. 424; *Coasting Co. v. Tolman,* 139 U. S., 551; *Newport News and M. V. Co. v. Howe,* 52 Fed., 362; *Buckworth v. Grand Trunk Western Ry.,* 127 Fed., 307; *N. Y., C. and H. R. v. Kelly,* 93 Fed., 745; *Smith v. R. R. Co.,* 210 Fed., 414.

In *Newport News and M. V. Co. v. Howe, supra,* the plaintiff was a brakeman on a freight train; the train parted and the engine with the forward section of the train ran some distance ahead before the accident was discovered. The conductor on the rear portion of the train sent Howe ahead with a lantern to signal the engine and to give the engineer information as to the whereabouts of the rear cars. Howe went forward several hundred yards, sat down on the end of a tie, put his light down near him, and went to sleep with his arm thrown over the rail.

The engineer, after running about 5 miles, discovered the parting, and started back with his engine and tender to take up the rest of the train. The fireman testified that when within a distance of between 100 and 200 feet from the point where Howe lay, he saw the reflection of the light from Howe's lamp. He called to the engineer: "Look out! there they are," meaning the rear portion of the train.

He looked again and saw on the other side of the track an object which he took to be the brakeman waiting to step on the engine. He

crossed to the engineer's side and then saw the prostrate man only
(439) 10 or 15 feet from the approaching engine. He signaled the engineer, who applied the brake, but was unable to stop before the wheels had passed over Howe's arm and cut it off.

A witness, McGuire, testified that the engineer did not look out of the cab window, and that if he had looked out he would have seen Howe and could have stopped the engine in time to avoid the accident. The rules of the company required the engineer, under these conditions, to signal his return by blowing his whistle at certain intervals, and not to run at a higher speed than 4 miles per hour. Both of these rules were being violated. *Judge Taft,* writing the opinion, says: "While an engineer who fails to keep a sharp lookout upon the track is wanting in due care to passengers and lawful travelers, because of the probability of danger to each from such failure, such conduct is not a want of due care with respect to a man asleep on the track, because of the presumption on which the engineer has a right to rely, that no one would be so grossly negligent in courting death. As applied to cases like the present, therefore, we believe the rule relied on by the counsel of plaintiff below should be construed to mean that the negligence of the plaintiff will be no defense, if the defendant, *after he knew the peril of the plaintiff,* did not use due care to avoid it."

This case cites *Coasting Co. v. Tolson,* 139 U. S., 551, and referring to that case, *Judge Taft* says: "This would seem to show that, in the opinion of the Supreme Court, knowledge of plaintiff's peril was required to make the rule applicable."

In *Little Rock R. and E. Co. v. Billings, supra,* the Court, composed of *Justices Sanborn, Pollock,* and *Van Devanter,* the latter of whom is now a justice of the Supreme Court of the United States, said: "As deduced from the foregoing authorities, and many others that might be cited, this qualification may be stated as follows: A., who by his own negligent act or conduct has placed himself in a position of imminent peril, of which he is either unconscious or from which he is unable to extricate himself if conscious, may not be carelessly, recklessly, or wantonly injured by B., who, after he has discovered and knows the helpless and perilous condition of A., has it within his power to avoid doing him an injury by the exercise of reasonable care and diligence in the use of such instrumentalities as he can command; and the failure to exercise such reasonable care and diligence on the part of B. under such circumstances will constitute actionable negligence, rendering him liable in damages to A., notwithstanding the prior negligent act of A. in placing himself in position to receive the injury."

To my mind, it is quite plain that in charging the jury upon the measure of the engineer's duty the trial judge should have followed the Federal and not the State rule.

Testing this case by our own State decisions, notably the unanimous opinion of the Court in *Holland v. R. R.*, 143 N.C. 435, the plaintiff should not be permitted to recover. (440)

MR. JUSTICE WALKER concurs in this dissenting opinion.

Reversed 241 U.S. 333.

*Cited: Treadwell v. R.R.*, 169 N.C. 701 (2c); *Kerner v. R.R.*, 170 N.C. 97 (2d); *Hopkins v. R.R.*, 170 N.C. 486 (2c); *Hopkins v. R.R.*, 170 N.C. 487 (3c); *Smith v. Comrs.*, 176 N.C. 470 (2d); *Brewer v. Ring & Valk*, 177 N.C. 485 (p); *Cauble v. Express Co.*, 182 N.C. 451 (p); *Rierson v. Iron Co.*, 184 N.C. 370 (p); *S. v. Carr*, 196 N.C. 132 (2d); *Hamilton v. R.R.*, 200 N.C. 554 (2d).

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HARRY M. GILMORE v. W. M. SMATHERS.

(Filed 23 December, 1914.)

**1. Courts—Findings of Fact—Consent—Evidence—Appeal and Error.**

Findings of fact by a court, under an agreement of the parties, supported by competent evidence, or evidence to the admission of which no objection has been duly made, are conclusive on appeal.

**2. Corporations—Subscriptions to Stock—Principal and Agent.**

Subscriptions to the shares of stock in a prospective corporation may be made by an individual through his duly authorized agent, and also by a partnership in like manner, and the same agent, when duly empowered, may act for any number or all of the subscribers.

**3. Corporations — Capital Stock — Trusts and Trustees — Subscribers to Stock.**

The capital stock of a corporation is a trust fund for the benefit of the creditor of the corporation and its stockholders, and its directors or other governing officers cannot release an original subscriber to its capital stock, or make any arrangement with him by which the company, its creditors, or the State shall lose any of the rightful benefits of his subscription.

**4. Corporation—Authorized Capital — Subscribers to Stock — Parol Evidence—Corporate Action—Stockholders' Liability.**

Where a corporation commences business with a capital stock authorized by its charter which has been paid in cash by its subscribers, accord-

ing to their subscriptions thereto, and thereafter becomes bankrupt, there can be no further liability upon its stockholders by reason of the fact that the charter authorized a larger capitalization, when there has been no corporate action taken in conformity with the charter or general law to increase the capital stock beyond that with which the business had been started; and the liability of the stockholders, therefore, depending solely upon whether they have paid in accordance with their subscription, the principles relating to varying a written contract by parol does not apply. Although the stock was issued to two sets of subscribers, it was all embraced by the original subscription to the authorized capital.

**5. Corporations—Subscribers' Liability—Tender—Interest—Court Costs.**

In this action against certain stockholders of a bankrupt corporation, brought by its trustees, to recover the balance alleged to be due upon their original subscription to the stock, it appearing that they were obligated to only a certain sum, which they tendered and plaintiffs refused to accept, it is held that a judgment of the trial court was proper that they pay the amount ascertained without interest or court cost from the date of the tender.

(441) APPEAL by plaintiff from *Carter, J.*, at May Term, 1914, of HAYWOOD.

These are three actions brought by the plaintiff, as trustee in bankruptcy of the Canton Coöperative Company, against W. M. Smathers, M. V. Moore, and George J. Williamson, severally and respectively, to recover the amount of the subscription made by each of them to the said company. It was agreed that they should be heard together, and "any necessary and pertinent facts which are not expressed in the stipulation between the parties shall be found by the court without a jury." The stipulation mentioned above is as follows: "It is admitted that at the time of the adjudication in bankruptcy, the Canton Coöperative Company owed the sum of $8,045.39, and that the entire assets of the said company were sold by the trustee in bankruptcy on 10 February, 1912, for the sum of $5,387.13; that M. V. Moore & Co. paid the said Canton Coöperative Company the sum of $5,100 for 510 shares of the capital stock of said company, said payment being made in cash." The case came on to be heard before his Honor, Judge Frank Carter, and much testimony was taken, whereupon the judge found the following facts and entered judgment thereon:

"The above three causes coming on to be heard by the court, the same having been consolidated by consent of parties hereto and tried together, and the parties hereto having agreed on certain facts as set forth in an agreement of writing filed herein, and having agreed that the court should find the additional facts raised by the pleadings from the testimony offered by the plaintiff and the defendants; and the plaintiff having offered in evidence certain documentary testimony, and both plain-

tiff and defendants having introduced and examined certain witnesses in their behalf, and after due consideration thereof, the court finds the facts as follows:

"1. That the plaintiff is the duly qualified and acting trustee of the Canton Coöperative Company, a North Carolina corporation, which became bankrupt and was so adjudicated on or about 5 December, 1911, upon the petition of certain of its creditors, and the debts of said corporation exceed its assets by $2,658.17.

"2. That the only parties named as incorporators and subscribers to the capital stock of the Canton Coöperative Company in its certificate of incorporation were M. V. Moore, who is named therein as a subscriber for 510 shares of the par value of $10 each, and that he signed said articles of incorporation for that number of shares; W. M. Smathers, who is named therein as a subscriber for 250 shares of the par value of $10 each, and that he signed said articles of incorpora- (442) tion for that number of shares; and George J. Williamson, who is named therein as a subscriber for 240 shares of the par value of $10 each, and that he signed said articles of incorporation for that number of shares.

"3. That the certificate of incorporation or letters patent of the Canton Coöperative Company bear date April, 1910.

"4. That in appearing as subscribers as above named, said Moore, Smathers, and Williamson were representing, as a matter of convenience, M. V. Moore & Co., a partnership of Asheville, who had agreed to take 51 per cent of the capital stock of said corporation, and were also representing Clark, Daley, Champion Fiber Company, and others at Canton, who had agreed to take 49 per cent of said stock, the agreements aforesaid having been entered into prior to said subscriptions. Said agreement was not, however, incorporated nor referred to in any of the minutes, records, or proceedings of said corporation, nor any notice thereof given to any creditor. That no record transfer of said subscriptions or their interest therein was ever made by said M. V. Moore, W. M. Smathers, and George J. Williamson.

"5. That the amount of stock to be subscribed before said corporation could begin business was $10,000, and the amount named as its authorized capital stock was $25,000; that M. V. Moore & Co. paid into the treasury of Canton Coöperative Company the sum of $5,100 in cash on account of the subscription of Moore, Smathers, and Williamson above mentioned, and the Canton parties above mentioned caused and procured parties at Canton to pay into the treasury of said corporation the sum of $4,700, all the aforesaid payments being made in pursuance of the agreements set out in the fourth finding above.

"6. That neither the board of directors nor stockholders of said Canton Coöperative Company ever attempted to issue stock on any other account or in excess of $10,000.

"7. That all the money called for in the subscriptions above mentioned have been paid in cash into the treasury of Canton Coöperative Company, except the sum of $200.

"8. That Moore, Williamson, and Smathers, and M. V. Moore & Co. offered in writing to submit to judgment on 6 May for the sum of $200, with interest and costs, as shown in said tender, but plaintiff declined said offer.

"Upon the foregoing findings of fact the court concludes as a matter of law that the defendants William M. Smathers, M. V. Moore, and George J. Williamson are only liable to the plaintiffs for the unpaid subscription of $200 of the $10,000 subscribed, together with interest on the sum of $200 from 20 April, 1910, and the cost of this action up to 6 May, 1914; and it is therefore considered, adjudged, ordered,
(443) and decreed by the court that the plaintiff, Harry M. Gilmore, trustee, have and recover judgment against the defendants William M. Smathers, M. V. Moore, and George J. Williamson for the sum of $200, with interest thereon from 20 April, 1910, together with the cost of this action up to and including 6 May, 1914, and that the plaintiff pay the cost of this action accrued since 6 May, 1914, to be taxed by the clerk."

Plaintiff having duly excepted to the findings and judgment, brought this case here by appeal.

*Merrimon, Adams & Adams for plaintiff.*

*Bourne, Parker & Morrison, Smathers & Ward, and Morgan & Ward for defendants.*

WALKER, J., after stating the case: It may be said, *imprimis,* that we are concluded by the findings of the judge as to the facts, and can only review his conclusions of law therefrom, there being evidence to support the findings of fact, and no incompetent evidence, duly objected to, having been heard. *Branton v. O'Briant,* 93 N. C., 99; *Shoaf v. Frost,* 127 N. C., 306; *Travers v. Deaton,* 107 N. C., 500; *Matthews v. Fry,* 143 N. C., 384.

It seems to us that the findings of fact are a complete answer to the plaintiff's contentions. The proposition cannot be gainsaid that M. V. Moore & Co. had the right to subscribe for 51 shares of the capital stock through M. V. Moore, W. M. Smathers, and George J. Williamson, if the latter were authorized to make the subscription for that

copartnership, for what a man can do by himself he may generally do through an agent, if so minded; and what he does through another, as his agent, is just as binding as if he had performed the act in person. And so it follows that Joseph Clark, M. R. Daley, M. A. Dudley, the Champion Fiber Company, and others could subscribe for the stock of the company through the same parties. "A contract of subscription, like any other contract, may be made by one person as agent for another, if he has authority, and the subscription being accepted, and the shares being apportioned to the agent for the principal, or to the principal, the latter becomes a stockholder as fully as if he had subscribed for himself." Clark on Corporations, p. 292. When the subscriptions were thus validly made, certificates issued and the stock paid for, these stockholders were discharged from any further liability to the company and its creditors on their subscriptions, because they had done all that they had contracted to do. If a person has subscribed for stock, he is liable to the corporation and its creditors upon his subscription, and he cannot be relieved of this liability until he has paid for the stock taken by him.

The following principles were declared in *Foundry Co. v. Killian,* 99 N. C., 501:

1. The capital stock, including unpaid subscriptions therefor, (444) of a corporation constitutes a trust fund for the benefit of creditors of the corporation, and the creditors have a right to examine into the affairs of the corporation, to ascertain if the subscriptions of stock have been paid, and how.

2. Each subscriber for stock in a corporation thereby becomes liable for the amount of stock subscribed by him, and he can only be discharged by paying money or money's worth in the manner provided by the charter and by-laws.

3. A subscriber cannot discharge his liability as against creditors for his subscription by substituting shares paid up by another subscriber.

4. Parol evidence will not be received to vary the terms of subscription or to show a discharge from liability on the part of a stockholder, in any other way than that prescribed by the charter and by-laws.

That decision was largely based upon the principles announced, or rather reiterated, in *Sawyer v. Hoag,* 17 Wall. (U. S.), p. 620, by *Mr. Justice Miller;* in *Burke v. Smith,* 16 Wall., 390, and *New Albany v. Burke,* 11 Wall., 96, where it was substantially said that though it be a doctrine of modern date, it is now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund to be secured and administered for the benefit of the general creditors of the corporation, subject, of course, to the claims of lienors entitled to priority.

If we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen. The governing officers of a corporation cannot, by agreement or other transaction with the stockholders, release the latter from their obligation to pay, to the prejudice of creditors, except by fair and honest dealing and for a valuable consideration. Such conduct is characterized as a fraud upon the public, who were expected to deal with them. This equitable principle has been as firmly rooted in our jurisprudence as any we now recall, and with good reason, as it is eminently fair and just. *Heggie v. B. and L. Assn.*, 107 N. C., 581; *Clayton v. Ore Knob Co.*, 109 N. C., 389; *Bain v. B. and L. Assn.*, 112 N. C., 253; *Hill v. Lumber Co.*, 113 N. C., 176; *Cotton Mills v. Burns*, 114 N. C., 355; *Bank v. Cotton Mills*, 115 N. C., 513; *Cooper v. Security Co.*, 122 N. C., 464; *Smathers v. Bank*, 135 N. C., 413, and *McIver v. Hardware Co.*, 144 N. C., 484, where the subject was exhaustively examined by us and the doctrine applied to dealings between two corporations, whereby the one sold, or pretended to sell, its entire assets to the other, upon a considera-
(445) tion beneficial to the directors and stockholders of the selling company and to the prejudice of its creditors. We declared the dicker void in law because, on its face, it manifestly contravened this time-honored principle, that the creditor must engross the first thoughts of the corporate authorities and be cared for before they can look after their own interests. Self-interest having no place in such a transaction, the creditors' rights must not be sacrificed or impaired for their personal benefit. In *Clayton's case, supra,* it was said that the stock, in order to exempt its holder from the claims of creditors, must be paid for in money or its equivalent in property at a fair and honest valuation, and in *Higgins v. B. and L. Assn., supra,* the Court held it to be well settled, at least in this country, that the capital stock of a corporation is a trust fund, to be preserved for the benefit of corporate creditors, and no agreement or arrangement between a corporation and its stockholders, whereby the latter are to be released from indebtedness on their subscriptions, will be valid or of any force as against creditors, citing Waterman on Corporations, 126 *et seq.;* Cook on Stock and Stockholders, sec. 42; *Foundry Co. v. Killian, supra.* The stock subscribed is the capital of the company, its means for performing its duty to the Commonwealth, and to those who deal with it. Accordingly, it has been settled by very numerous decisions that the directors or trustees or other governing officers of a company are incompetent to release an original subscriber to its capital

stock, or to make any arrangement with him by which the company, its creditors, or the State shall lose any of the benefit of his subscription. Every such arrangement is regarded in equity, not merely as *ultra vires*, but as fraud upon the other stockholders, upon the public, and upon the creditors of the company. *Burge v. Smith*, 16 Wall. (U. S.), 390; *Upton v. Tribilcock*, 91 U. S., 45; *Poots v. Wallace*, 146 U. S., 689; *Hernold v. Upton*, 154 U. S., 624; *Sawyer v. Hoag, supra.* The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away. They are bound to call in what is unpaid, and carefully to husband it when received, for the benefit of shareholders and creditors. *Upton v. Tribilcock, supra; Sawyer v. Hoag, supra.* This fund is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. *Sanger v. Upton*, 91 U. S., 56; *Clark v. Bever*, 139 U. S., 96. Transactions between stockholders and the corporation must be closely scrutinized in the interest of creditors, lest they contravene these principles. Corporate stock is supposed to represent so much money or money's worth received by the corporation therefor, and the creditors of the corporation have the right to insist that this representation be made good, so far as necessary to pay their legal claims against the corporation. *Richardson v.* (446) *Greer*, 133 U. S., 30; *Scovill v. Thayer*, 105 U. S., 143; *Handley v. Stutz*, 139 U. S., 417. All the cases agree that creditors of a corporation may compel payment of the stock subscribed, so far as it is necessary for the satisfaction of the debts due by the company. *Hawkins v. Glenn*, 131 U. S., 319. The number of shares and the amount of capital cannot be increased, except in the manner expressly authorized by the charter or articles of association. *Railway Co. v. Allerton*, 18 Wall., 233; *Spring Co. v. Knowlton*, 103 U. S., 49. The amount authorized cannot be increased without proper legal authority. If there be losses which impair it, there can be no formal reduction without the like sanction. No power to increase or diminish it belongs inherently to the corporation. *Farrington v. Tennessee*, 95 U. S., 679. Even in such case, however, prudent and fair directors would prefer to have the sanction of the stockholders to their acts. *Railway Co. v. Allerton, supra.*

But while we fully recognize the doctrine as thus established, and now relied on by the plaintiff, we do not perceive its application to the findings of fact in this case, for here there was no unpaid subscription. The transaction was a simple one, as described by the court in its findings. The authorized capital was $25,000, and by this charter of the company it was forbidden to start in business until 1,000 shares of the par value

of $10,000 had been subscribed *and paid for*. This was done, as appears, because Moore, Smathers, and Williamson subscribed for 510 shares as agents of M. V. Moore & Co., and Joseph Clark, M. R. Daley, Champion Fiber Company, and others, of Canton, known as the Canton subscribers, took the remainder of the subscription, or 490 shares of the par value of $4,900, which, with the former amount taken by Moore & Co., completed the subscription which had been authorized to that date. And all this stock was paid for in full. It is not, therefore, the case of creditors against stockholders (who are seeking to be discharged from a subscription, which has not been satisfied by payment, upon the ground of a parol understanding or agreement that they should not be liable, or by reason of some negotiation between them and the corporate authorities, not known to the creditors at the time the corporate debts were contracted, and expressly or impliedly assented to by them), whereby the stockholders were to be released. There is no attempt to change the form of the subscription or to vary the contract with the company by parol evidence, or to show that what appears did not in fact exist, but merely to show that the subscription really made and admitted had been paid for in the manner we have indicated. There can be no question of good faith or honest dealing involved, for the stock was not paid for in property or money's worth, the real value of which may be in dispute,
but in money itself. The creditors have everything they can ask
(447) for, reasonably or unreasonably; and they are, therefore, seeking, unconsciously of course, to recover something to which they are not in law or in equity justly entitled.

There is one other consideration which requires some slight attention. The company, by its duly constituted authorities, has never authorized the issue of more stock than 1,000 shares of the total value of $10,000, $10 being the par value of each share. It was not bound to issue stock to the full limit of its authorized capital, but was left free to increase it from time to time as its necessities and the exigencies of business might suggest as wise and expedient to place and maintain its affairs upon a successful and prosperous basis. "Corporations are usually given authority to begin business when a certain sum has been subscribed to the capital stock, with power to increase the amount to a definite limit. In such cases, being a fundamental change, the directors cannot make such an increase; it must be done by the stockholders." Womack's Law of Corporations, par. 186, p. 99. The number of shares and the amount of capital cannot be increased, except in the manner expressly authorized by the charter or articles of association. *Railway Co. v. Allerton,* 18 Wall., 233, 235; *Spring Co. v. Knowlton,* 103 U. S., 49, 57.

As we have seen, the amount authorized cannot be increased without proper legal authority. If there be losses which impair it, there can be

no formal diminution of it, so that the capital stock and the assets do not correspond or the amount of stock is in excess of their real value, without the like sanction. No power to increase or diminish it belongs inherently to the corporation, but any material change in it must be accomplished by proper corporate action in conformity with the charter or the general law.

The plaintiff has proceeded upon the theory that the 490 shares subscribed for by the Canton people through Moore, Smathers, and Williamson were additional to those taken by the same parties apparently for themselves, but really for M. V. Moore & Co. and the Canton subscribers; but this has been shown to be a mistake, there having been only one subscription of 1,000 shares for all, the certificates issued to Clark, Daley, Champion Fiber Company, and others of Canton representing the subscription for the 4,900 shares taken for them by their agents, M. V. Moore and the others above named. This transaction, therefore, was a lawful one. *Burke v. Smith,* 16 Wall. (U. S.), 390.

The case needs no further elaboration. It depends more upon a clear understanding of the facts, which have been so well stated by *Judge Carter,* than upon the application of any special principle of law, which is not perfectly familiar to all of us. Defendants admit their liability for the 20 shares not paid for, or $200.

We have found no error in the case, and therefore affirm the judgment. Affirmed.

*Cited: Drug Co. v. Drug Co.,* 173 N.C. 507 (3c); *Drug Co. v. Drug Co.,* 173 N.C. 508, 511, 514 (4c); *Thompson v. Shepherd,* 203 N.C. 314 (2p).

(448)

M. L. FLOWE, LAURA J. WILLIAMS AND HUSBAND, M. A. WILLIAMS, B. B. FLOWE, AND H. P. FLOWE v. D. B. HARTWICK.

(Filed 23 December, 1914.)

**1. Contracts—Equity—Specific Performance—Subscribed by Party—Interpretation of Statutes—Statute of Frauds.**

The courts of our State will enforce specific performance of a binding and definite contract to convey lands in the absence of fraud, mistake, undue influence, or oppression, and under our statute, Revisal, sec. 976, requiring that such contracts or some memorandum or note thereof shall be put in writing and signed by the party to be charged therewith, etc., it is unnecessary that the writing be subscribed, if the writing in express terms or by reasonable intendment contains a promise to convey on the part of the owner, and his signature, evincing a purpose to come under such obligation, appears anywhere in the instrument.

**2. Contracts—Statute of Frauds—Principal and Agent—Parol Authority.**

The requirement to make a binding and valid writing to convey lands, that the instrument shall be signed by the party or his agent thereunto lawfully authorized, does not extend to a written authority from the principal to the agent, for such authority is sufficient if given by parol.

**3. Contracts to Convey Lands—Defects of Title—Specific Performance—Diminution in Price—Damages.**

When a vendor's title to lands proves to be defective in some particulars, or his estate is different from that which he agreed to convey, unless the defects are of a kind and extent to change the nature of the entire agreement and affect its validity, the vendee may, at his election, compel a conveyance of such title or interests as the vendor may have and recover a pecuniary compensation or abatement of the price proportioned to the amount and value of the defect in title and deficiency in the subject-matter: a principle which usually prevails where the defects existed at the time of making the contract, but which, at times, extends to such as arise later.

**4. Contracts to Convey—Statute of Frauds—Deeds and Conveyances—Delivery—Evidence—Extraneous Matters—Parol Evidence.**

While it has been decided that an undelivered deed, substantially containing the contract to convey lands, will be allowed the effect of a written memorandum, within the meaning of the statute of frauds, the doctrine only obtains when the writing in the deed sufficiently expresses the contract, and the right of the grantee to demand its delivery does not depend upon extraneous matters resting in parol.

**5. Contracts to Convey—Deeds and Conveyances—Principal and Agent—Ratification.**

When an unauthorized contract has been made for an alleged principal, who is sought to be bound thereby, it is necessary that the agent must have contracted or professed to have contracted for the principal, and the latter must have signified his assent or intent to ratify, either by word or conduct. Hence, where the tenant for life in lands has executed a written contract to convey the lands upon condition, resting in parol, that all the remaindermen should convey their interest therein, and a deed was signed by the parties, but was left undelivered in the hands of a party in interest, a minor and remainderman, who destroyed the deed after coming of age, it is *Held*, that the contract is not enforcible, there being no evidence that the life tenant assumed to act as the agent of the remaindermen or that they had ratified his acts.

(449) APPEAL by defendant from *Long, J.*, at August Term, 1913, and from *Harding, J.*, at April Term, 1914, of CABARRUS.

Civil action to recover possession of a tract of land and to remove a cloud from title to same, arising by reason of a certain memorandum or contract in writing, signed by Mrs. M. L. Flowe, in terms as follows:

HICKORY, N. C., 2 October, 1909.

Received of Baker Hartwick ($1) one dollar, as part payment on the farm this day purchased of me, adjoining the lands of himself, Linker,

and others, and known as the John Means place. It is understood and agreed that all wood now cut on the land belongs to M. L. Flowe, and she has the right to move same whenever it is convenient for her.

MRS. M. L. FLOWE,
*By* C. L. WHITNER.
*Attorney for Mrs. M. L. Flowe.*
(Signed) M. L. FLOWE. [SEAL]

The complaint alleged that this memorandum was only to become a binding contract on condition that her coplaintiffs should concur and join therein.

Defendant answered, denying plaintiff's right to recover, and alleged that in October, 1909, they had contracted to sell defendant the land in controversy at the price of $3,300, and plaintiff M. L. Flowe had signed and executed the written contract above set out, and that all the plaintiffs concurred in the agreement and were bound by same.

Defendant further set up a claim for betterments by reason of improvements put upon the land which he held under the contract, etc.

On the trial it appeared that plaintiff M. L. Flowe, who signed the contract, had a life estate therein, and the remainder was owned by her children, coplaintiffs, Mrs. Laura Williams and B. B. and H. P. Flowe; that the contract was made and signed by M. L. Flowe, the mother, and was not authorized by the children, nor were they at the time cognizant of the same so far as appears from the testimony; that subsequently a deed conveying the land was prepared and signed by the children, but the same was never delivered; that upon being signed by Mrs. Laura Williams and B. B. Flowe, it was then handed to H. P. Flowe, who was at the time a minor, and the parties conferred together as to the propriety of instituting proceedings to enable them to pass a (450) perfect title, and meantime H. P. Flowe, having come of age, destroyed this deed and, as stated, same was never delivered.

There was allegation with evidence for plaintiff tending to show that the deed was not signed by the children with intent to ratify their mother's contract, and that M. A. Williams, husband of Laura, had not signed the deed, nor was the privy examination of the wife taken; and allegation and evidence *contra* for defendant.

On the trial before *Judge Long,* August Term, 1913, the jury rendered the following verdict:

1. Did the plaintiff M. L. Flowe agree in writing to convey the land in controversy to D. B. Hartwick, agreeably to the terms of the paper-writing of 2 October, 1909, and set forth in the first paragraph of the further answer? Answer: "Yes, but agreeably to the terms set forth in Exhibit G in the evidence."

2. Did the defendant Hartwick afterwards cause to be prepared a deed purporting to convey the land referred to in the memorandum set out in the first issue, and was said deed signed by the plaintiffs or any of them, and if so, which ones of them signed the deed? Answer: "All of them."

3. In your answer to the second issue, if it is found that the plaintiffs or any of them other than Mrs. Flowe signed the said deed, did they do so with the purpose to ratify and carry out the contract alleged to have been made by Mrs. M. L. Flowe with the defendant? Answer: "Yes."

4. If the deed above named was signed by the plaintiffs or any of them, was same ever delivered to the defendant? Answer: "No."

5. If said deed was signed, did it ever pass from the control of those who signed it before it was destroyed? Answer: "It never passed to control of defendant. It was left in care of Homer Flowe, who destroyed it."

6. If Laura Williams and her husband, M. A. Williams, signed the said deed, was privy examination of said Laura J. Williams taken after her signature? Answer: "Yes."

7. Did the defendant tender to the plaintiffs, and if so, to which of them, $3,299 in money, in payment of the purchase money for the land, and was the same refused and declined, as alleged in the answer? Answer: "Yes; all of them, through Mrs. Flowe."

8. What actual permanent improvement in amount and value has the defendant put upon the land tending to enhance the value of the same since 2 October, 1909? Answer: "$150."

9. Since the defendant has been in possession of the land, what has been the actual rental value of the said land annually during his occupancy? Answer: "$250."

(451) On the rendition of the verdict the court set aside the answer to the sixth issue, that as to the signature by Laura Williams and her husband, and the cause being continued at April Term, 1914, before his Honor, *Harding, judge,* and as to responsibility of Laura Williams, the jury rendered a further verdict as follows:

1. Did the plaintiff M. A. Williams sign the deed caused to be prepared by defendant Hartwick? Answer: "No."

2. If Laura J. Williams and her husband, M. A. Williams, signed the deed, was privy examination of said Laura J. Williams taken after her signature? Answer: "No."

On the verdict, defendant having tendered the contract price, insisted on conveyance on the part of M. L., B. B., and H. P. Flowe.

Judgment was entered that they convey their title and interest and that the judgment be effective as a deed for same.

Plaintiff, having assigned errors, appealed from the judgment directing conveyance of title by the parties other than Laura Williams, and defendant appealed, assigning errors in the disposition of the case by which Laura Williams was relieved.

*W. G. Means, Self & Bagby, and Tillett & Guthrie for plaintiffs.*

*H. S. Williams, T. D. Maness, and L. T. Hartsell for defendant.*

HOKE, J., after stating the case: It is established in this jurisdiction that in the absence of fraud, mistake, undue influence, or oppression, a binding contract to convey land will be specifically enforced by the courts, and that our statute on the subject, Revisal 1905, sec. 976, requiring that such contracts or some memorandum or note thereof shall be put in writing and signed by the party to be charged therewith or by some other person thereto lawfully authorized, is satisfied when the writing, in express terms or by reasonable intendment, contains a promise to convey on the part of the owner, and his signature, evincing a purpose to come under such obligation, appears anywhere in the instrument, the statute not using the word "subscribe"; and further, that a written contract to convey, signed by an agent, will bind, though the authority be given by parol. *Burrus v. Starr,* 165 N. C., 657; *Combes v. Adams,* 150 N. C., 64.

Our authorities also sustain the position, very generally recognized, that when the vendor's title proves to be defective in some particular or his estate is different from that which he agreed to convey, unless the defects are of a kind and extent to change the nature of the entire agreement and affect its validity, the vendee may, at his election, compel a conveyance of such title or interests as the vendor may have and allow the vendee a pecuniary compensation or abatement of the price proportioned to the amount and value of the defect in title or (452) deficiency in the subject-matter (*Lumber Co. v. Wilson,* 151 N. C., 154; *Tillery v. Land Co.,* 136 N. C., 537; *Rodman v. Robinson,* 134 N. C., 503; Pomeroy on Contracts, sec. 434), a principle usually prevailing where the defects existed at the time of making the contract, but which is at times extended to such as arise later. *Sutton v. Davis,* 143 N. C., p. 474.

In applying the principles embodied in these and other cases, most or all of them relevant to the facts presented, there are many decisions which hold that where a written deed purporting to convey land has been delivered and the instrument, by reason of some informality, is ineffective to presently pass the title, it may be treated as a contract to convey within the meaning of the statute and enforced accordingly. *Blacknall*

*v. Parish,* 59 N. C., 70. And it has been also held that a parol contract to convey realty may be constituted a binding agreement within the meaning of the statute when a written deed substantially embodying the contract has been signed by the parties, though not delivered.

While this has been said to be against the great weight of authority (see *Hallsell v. Renfrow,* 202 U. S., 286; 50 L. Ed., p. 1032; *Morrow v. Moore,* 98 Maine, 373; 20 Cyc., p. 257), our own Court, in *Magee v. Blankenship,* 95 N. C., 563, seems to have approved the position.

But while this and some other cases have allowed to an undelivered deed, substantially containing the contract, the effect of a written memorandum, within the meaning of the statute of frauds, neither this nor any other decision, so far as examined, will sustain the position that such a deed may both create the obligation and supply the written evidence of the contract.

In *Magee v. Blankenship* there was a definite contract for an exchange of lands between the parties and the undelivered deed was allowed as written evidence of the same satisfying the requirements of the statute. In *Parill v. McKinley,* 50 Va., 1, to which we were cited, the headnote is: "On a contract for the exchange of land, a deed executed by one of the parties and undelivered is a sufficient memorandum, etc."

In *Bowles v. Woodson,* 47 Va., 78, the bill commences by alleging that plaintiff "verbally, in the presence of several witnesses, *contracted* with the defendant for the purchase of land, etc."

In *Johnston v. Jones,* 85 Alabama, the bill states: "The terms of sale having been agreed upon, deeds were subsequently prepared, etc."

From the facts in evidence it appears that the remainder in the property was owned by Mrs. Flowe's children, her coplaintiffs, and before they can be compelled to convey their property it must be shown that a contract to do so has been made by them or by some one they have authorized to make it, or that they have ratified a contract made or professing to be made for them. There is no testimony in this record that
(453) they have ever agreed to convey their interest to any one, and on careful perusal of the facts we fail to find any evidence showing that they have ever legally ratified a contract to that effect.

It is well understood that in order to a valid ratification, when an unauthorized contract has been made for alleged principal, the agent must have contracted or professed to contract for a principal and the latter must signify his assent or his intent to ratify, either by words or by conduct. *Rawlings v. Neal,* 126 N. C., 275; 2 Page on Contracts, sec. 972; Clark on Contracts, p. 502; 2 Mechem on Agency, secs. 477, 478; 1 A. and E. Enc., sec. 1187.

In the present case there is nothing on the face of the contract to indicate that Mrs. Flowe acted or professed to act for her children, and while the evidence *ultra* may permit the inference that she intended to act for them, there was nothing which signified or was designed to signify to defendant that the children assented to, ratified, or intended to ratify their mother's contract.

It is true that while conferring together about it they signed this undelivered deed (Homer Flowe was under 20 at the time and could not assent); it was, no doubt, in the language of the issue, their purpose to ratify the contract, but they did not carry out their purpose, but destroyed the deed before delivery, and have never signified in any way that they assented to or ratified the agreement. The position is presented in different ways by plaintiffs' exceptions entered during the progress of the trial, and, on the facts in evidence, we are of opinion that plaintiffs were entitled to the instruction that they were under no binding agreement to convey their interest in the property.

For the error indicated, we hold that plaintiffs are entitled to a new trial, and it is so ordered.

New trial.

DEFENDANT'S APPEAL

HOKE, J. As heretofore shown, the defendant appealed from judgment on the verdict by which Mr. and Mrs. Williams were relieved from any and all obligation under the agreement of Mrs. Flowe.

Having decided, on plaintiff's appeal, that there were no facts in evidence tending to show that any of the children were under a binding obligation to convey their interest in the property, the errors, if any, incident to the trial and determination of disputed questions as to Mrs. Williams, by reason of her being a married woman, are no longer of importance, and the judgment relieving her from obligation is therefore affirmed.

No error.

*Cited: Vinson v. Pugh,* 173 N.C. 192 (4c); *Pope v. McPhail,* 173 N.C. 240 (4c); *Vaught v. Williams,* 177 N.C. 85 (4c); *Harper v. Battle,* 180 N.C. 376 (4c); *Clegg v. Bishop,* 188 N.C. 565 (2d, 4d); *Crawford v. Allen,* 189 N.C. 442 (1c); *Oxendine v. Stephenson,* 195 N.C. 239 (4c); *Austin v. McCollum,* 210 N.C. 818 (4c); *Smith v. Joyce,* 214 N.C. 605 (5c).

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N. A. REYNOLDS v. WILLIAM PALMER ET AL.

(Filed 16 December, 1914.)

**1. Limitation of Actions—Adverse Possession—Color of Title—Instructions—Charge, How Construed—Appeal and Error—Harmless Error.**

Where adverse possession under color of title is relied upon by a defendant in an action to recover lands, a charge of the trial judge upon relevant evidence will not be held as reversible error because he did not, in exact terms, instruct the jury that "possession is making the use of the land to which it is best suited," when it appears that he immediately after the charge given on this phase and in the same connection explained the meaning of that expression to the jury, so that they could not have misunderstood him, and the entire charge upon the question was a correct application of the law to the evidence. The principles of law applicable to the question of adverse possession defined by WALKER, J.

**2. Limitations of Actions—Adverse Possession—Trials—Mixed Law and Fact—Questions for Jury—Instructions.**

In this action to recover possession of lands by virtue of a claim of adverse possession under color of title, it is held that the issues raised mixed questions of law and fact, to be determined by the jury under proper instructions from the court.

APPEAL by defendant from *Connor, J.*, at April Term, 1914, of BUNCOMBE.

Action to recover the possession of land. There was a verdict for the plaintiff, and from the judgment thereon defendant appealed.

*Bernard & Johnston for plaintiff.*
*R. S. McCall and Zeb. F. Curtis for defendant.*

WALKER, J. The only question in the case arises upon the exceptions to the charge upon the adverse possession of the defendants under their color of title. If there is any inexact or inaccurate expression of the court, when read by itself, we think the charge, when taken and construed as a whole, each part being given its proper connection and its relation to the other parts, would be perfectly understood by an intelligent jury. We are not authorized to construe it disconnectedly, but must give a fair and reasonable interpretation to the context. Sackett Instructions to Juries (2 Ed.), secs. 23 and 24; *Hodges v. Wilson,* 165 N. C., 323; *Aman v. Lumber Co.,* 160 N. C., 369. When thus considered the charge fully explained to the jury, with proper reference to the evidence, the law in regard to adverse possession. The jury were told that the possession must be open and notorious and under a claim of right; that it must be continuous and not consist merely in an occasional act of tres-

pass, and that it must be adverse or hostile in its character; and further, the court said substantially that possession of land is denoted by the exercise of acts of dominion over it, in making the ordinary (455) use and taking the ordinary profits of which it is susceptible, such acts to be so repeated as to show that they are done in the character of owner and not of an occasional trespasser. That is the definition of possession given by *Judge Gaston,* for the Court, in *Williams v. Buchanan,* 23 N. C., 537, and has generally been followed since that case was decided in 1841. *Baum v. Shooting Club,* 96 N. C., 310; *Mobley v. Griffin,* 104 N. C., 115; *Gilchrist v. Middleton,* 107 N. C., 680; *Hamilton v. Ichard,* 114 N. C., 538; *Currie v. Gilchrist,* 147 N. C., 648; *Berry v. McPherson,* 153 N. C., 4; *Coxe v. Carpenter,* 157 N. C., 559; *Locklear v. Savage,* 159 N. C., 238. While the judge did say that "possession is making that use of the land to which it is best suited," he immediately and in the same connection explained fully to the jury, what was meant by that expression, and finally brought his words within the definition, as given above, so that the jury could not have been misled as to what was necessary to ripen defendant's title under color.

It was entirely proper for the court to submit the conflicting evidence to the jury, so that the fact as to the adverse possession might be found under proper instructions of the court. It was not a question of law for him to decide, but a mixed question of fact and law. *Hoilman v. Johnson,* 164 N. C., 268; *Coxe v. Carpenter, supra.*

There was no error in the trial of the cause that we have been able to discover. The jury simply found the fact, upon the evidence, that defendant's possession was not of the kind required by the law to divest plaintiffs of the true title and vest the same in defendants.

No error.

*Cited: Patrick v. Ins. Co.,* 176 N.C. 666 (1c); *Alexander v. Cedar Works,* 177 N.C. 146 (1c).

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E. A. HIGDON v. ALDEN HOWELL ET AL.

(Filed 23 December, 1914.)

**Deeds and Conveyances—Indefiniteness of Description—Void Conveyances.**

A conveyance of land as an undivided half interest of a tract of land containing 200 acres, more or less, lying and being in a certain county on the waters of a certain creek, and covered by a certain State grant, is too indefinite of description to permit of parol evidence of identification,

it appearing that the grant referred to was a 640-acre tract and that the land described in the conveyance was an indefinite part of this tract.

APPEAL by defendants from *Carter, J.*, at Spring Term, 1914, of JACKSON.

*Henry G. Robertson for plaintiff.*
*Coleman C. Cowan for defendants.*

(456) CLARK, C. J. The plaintiff alleged that she is the owner of an undivided one-half interest in the tract of land described in the complaint; that the defendants wrongfully hold possession thereof, and have cut and removed valuable timber from said land. The defendants deny all the allegations of the complaint, alleging ownership in themselves. The plaintiff claims under Grant No. 737, issued in 1861, and the defendants under a prior Grant No. 504, issued in 1857, upon an entry in 1853, this last containing 640 acres, and it is alleged that the 200-acre tract claimed by the plaintiff lies within the 640-acre grant, under which the defendants claim. The plaintiff failed to show any possession by her or by those under whom she claims.

The plaintiff undertook to connect herself with Grant No. 504 by a deed from one W. L. Love, administrator of William Tatham, to J. R. Buchanan (one of the mesne conveyances to her), bearing date 15 May, 1873, and insisted that this deed covered the land described in the complaint. The defendants insisted that the description in this deed was too indefinite and did not describe the land set forth in the complaint. This deed contains no recital of the authority of W. L. Love, administrator, to convey; did not recite a bond for title from William Tatham to J. R. Buchanan, and none was introduced; this deed was signed simply "William Love, administrator of William Tatham." The defendants objected both that no authority was shown in the administrator to convey and that it did not describe the lands sought to be recovered. We need not consider the evidence as to the authority nor the other exceptions in the case, for we are of opinion that the description of the land in this deed is too indefinite to amount to a conveyance.

The description in said deed is as follows: "undivided half interest in and to a certain piece, tract, or parcel of land lying and being in the county (of Jackson) aforesaid, on the waters of Savannah Creek, being that covered by State Grant No. 504, containing 200 acres, more or less." There was no further description nor any description by metes and bounds. Grant No. 504 was a 640-acre tract, and it does not appear what 200 acres of the 640-acre tract were intended to be conveyed by this deed. This is not a conveyance of a whole tract of land, mistaking the

quantity of land stated therein, but it is an attempt to convey an undivided half interest in an uncertain 200-acre tract lying somewhere within the bounds of said Grant No. 504, which was for 640 acres. The attempted conveyance is therefore void for uncertainty, even if it were valid in other respects. *Cathey v. Lumber Co.*, 151 N. C., 592, and cases there cited.

This description does not measure up to the rule laid down in *Farmer v. Batts*, 83 N. C., 387, where the subject is fully discussed with citation of authorities. See, also, citations to that case in the (457) Anno. Ed. This case clearly falls into the class of cases where the words of description have been held too indefinite to admit parol testimony. *Johnston v. Mfg. Co.*, 165 N. C., 105.

The plaintiff relies upon *Smathers v. Gilmer*, 126 N. C., 759, but that case is not in point. In that case there was no question as to the identity of the tract, but it appeared that when the plaintiff purchased he believed there were 500 acres in the tract, as recited in the deed. When the survey was run it appeared that there were only 262 acres. It was held that as the purchaser did not protect himself by a proper warranty as to the number of acres, and there was no false representation as to the number of acres, and both parties had equal means of information, the plaintiff could not recover damages for the shortage. That case has been cited since with approval in several cases quoted in *Bethell v. McKinney*, 164 N. C., 78. It has no bearing upon this case, where the conveyance is void for indefiniteness in conveying an interest in an undefined, unlocated 200 acres within a 640-acre grant.

The motion for nonsuit should have been allowed.

Reversed.

*Cited: Bartlett v. Lumber Co.*, 168 N.C. 284 (d); *Watford v. Pierce*, 188 N.C. 433 (c); *Bryson v. McCoy*, 194 N.C. 96 (c); *Johnston County v. Stewart*, 217 N.C. 336 (c); *Hodges v. Stewart*, 218 N.C. 291 (c); *Thomas v. Hipp*, 223 N.C. 519 (c).

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J. P. EMBLER, ADMINISTRATOR, AND B. F. STATON, ADMINISTRATOR, v. GLOUCESTER LUMBER COMPANY.

(Filed 23 December, 1914.)

**1. Contracts—Independent Contractor — Pleadings — Issues — Burden of Proof.**

When the defense of independent contractor is relied upon, it must be alleged in the answer, with the burden of proof upon the defendant.

**2. Contracts—Parol — Independent Contractor — Evidence, Conflicting — Trials—Questions for Jury.**

Where the entire contract is in writing, the question of independent contractor is a question of law arising from the interpretation of its terms; but where the contract relied on rests in parol, and the evidence of its terms is conflicting in that respect, the question of independent contractor is one for the determination of the jury, under proper instructions from the court.

**3. Same—Burden of Proof—Supervision by Owner.**

The defendant corporation contracted by parol for the erection of a dry-kiln, and in an action to recover damages for an injury received by an employee from a wall thereof upon which he was at work falling upon him, there was evidence tending to show that it resulted from an improper foundation; that the blue-prints furnished the contractor showed that the foundations were to have been made of concrete, but were changed to brick by the order of the defendant under objection by the contractor that it would be dangerous, with further evidence that the officers of the defendant frequently inspected the work and gave occasional orders respecting it. There was evidence on the defendant's behalf that the erection of the dry-kiln was to be done by an independent contractor. *Held*, the burden of proof was on the defendant to show that the work was to have been done under an independent contract, which could not be passed upon by the court under the conflicting evidence, but was for the determination of the jury. The term "independent contractor" defined by WALKER, J.

**4. Contracts—Independent Contractor—Dangerous Work—Defenses.**

The defense of independent contractor cannot be made available when the work to be done under the terms of the contract is so intrinsically or inherently dangerous that it will necessarily or probably cause injury to others.

**5. Contracts — Independent Contractor — Acts of Owner — Negligence — Proximate Cause.**

Where the defendant has contracted with another for the erection of a dry-kiln with a concrete foundation, and, under his orders, the employer has changed the foundation to brick, which change has caused the wall thereof to fall and injure plaintiff, while engaged in laying brick in its erection, the defense of independent contractor is not available, for the negligent act of the owner, in causing the change to be made, was the proximate cause of the injury, for which he is directly liable.

**6. Measure of Damages—Trials—Instructions.**

The charge of the court upon the measure of damages for a personal injury received by the plaintiff is approved upon the facts in this case under authority of *Johnston v. R. R.*, 163 N. C., 451, and that line of cases.

(458) APPEAL by defendant from *Webb, J.*, at October Term, 1914, of HENDERSON.

These were civil actions consolidated and tried by consent at September Term, 1914, of the Superior Court of Henderson County. The actions were brought for the purpose of recovering damages for the

alleged negligent killing of plaintiff's intestates, which was caused by the falling of the wall of a dry-kiln of the defendant. It was admitted in the answer and also upon the trial that the intestates were killed by the falling of the wall. The defendant denied the allegations of negligence, pleaded assumption of risks, and alleged that the intestates were employees of Jesse V. Allen, an independent contractor. The following is the verdict of the jury:

1. Were the plaintiffs' intestates, Fred Embler and Carlton Miller, in the employ of J. V. Allen, an independent contractor, as alleged by the defendant's answer? Answer: "No."

2. Were the plaintiffs' intestates, Fred Embler and Carlton Miller, in the employ of the defendant Gloucester Lumber Company at the time alleged in the complaint? Answer: "Yes."

3. Were the plaintiffs' intestates, Fred Embler and Carlton (459) Miller, killed by the negligence of the defendant Gloucester Lumber Company, as alleged in the complaint? Answer: "Yes."

4. What damage, if any, is the plaintiff J. P. Embler, administrator of Fred Embler, entitled to recover of the defendant Gloucester Lumber Company? Answer: "$3,645.83."

5. What damage, if any, is the plaintiff B. R. Staton, administrator of Carlton Miller, entitled to recover of the defendant Gloucester Lumber Company? Answer: "$3,253.43."

Judgment for the plaintiffs was entered thereon, and defendant appealed to this Court.

*Staton & Rector and Smith & Shipman for plaintiffs.*

*Martin, Rollins & Wright for defendant.*

WALKER, J., after stating the case: The real and essential question in this case is whether Jesse V. Allen, at the time of the accident which caused the death of plaintiffs' intestates, was an independent contractor and chargeable with sole responsibility therefor.

The defendant requested that several instructions be given to the jury which in substance were equivalent to a motion to nonsuit or a peremptory direction to find for the defendant. We will so consider them, without reproducing them severally here. If there was evidence that Jesse V. Allen was not an independent contractor, the instructions should not have been given, and, therefore, were properly refused by the court.

The evidence of both parties tended to show that Jesse V. Allen entered into a verbal contract with the defendant, through J. S. Silverstein, its president and general manager, to lay the brick in the walls of the dry-kiln at either $3.25 or $2.75 per thousand, the evidence as to the

amount being conflicting. Allen was to look after the employment of hands to work on the job, the wages paid them to be deducted from the contract price for laying the brick. The defendant was to furnish all of the material for the construction of the walls. It was also shown by the evidence of both parties that the defendant turned over to Allen a blue-print containing plans and specifications for the construction of the walls of the kiln. These plans and specifications provided, among other things, for a concrete foundation for the walls of said kiln, the same to be 24 inches wide and 18 inches high, but did not provide for pilasters to be put on the walls.

Plaintiffs' witness J. V. Allen testified that the base was to be of concrete, under the ground, but was built of brick under the orders of Silverstein. He told Silverstein that he noticed on the blue-print that it was to be a concrete base, and that it ought to go in under the building, and he, Silverstein, said, "Put in brick." He also testified that
(460) Silverstein ordered him to put up some pilasters on the sides of the walls. That Silverstein, or defendant's superintendent, were around looking after the work a number of times. Mr. Bowman, who was employed by the defendant and had charge of its office, was around two or three times every day. That in paying the hands they signed Mr. Silverstein's payroll, and the witness gave some orders. That the blue-print showed the bricks were to be laid on a cement foundation, but Mr. Silverstein changed the foundation and decided to put in a brick foundation instead, and ordered Allen to do so. That Silverstein was present a number of times and gave orders in regard to the construction of the walls.

Herbert Allen, a witness for plaintiffs, testified: When they went there to work, Mr. Silverstein stated to them to go ahead and put in a brick foundation instead of concrete. Witness's brother told Mr. Silverstein that the concrete base ought to go in. Mr. Silverstein said the brick would do, and Jesse said, "You are the doctor; we will put it in that way if you say so." That while he was at work in this building, he saw Mr. Bowman there every day, once or twice a day. Mr. Bowman was giving orders about one thing and another. He laid out some work there; placed off the rods that were elevated for the track to go through the dry-kiln; that he followed his directions. He saw Mr. Silverstein there several times during the progress of the work. He came to see how it was getting along and gave orders; that he got his pay by signing Mr. Silverstein's pay-roll, and was paid off in checks of the Gloucester Lumber Company; that the other laborers got their pay in the same manner."

Sibley Allen, a witness for the plaintiffs, testified: "I heard a conversation between Mr. Silverstein and Mr. Bowman and my brother; he

would come around and discuss what to do and tell him to go ahead and put it in like he said."

As the intestates were killed by the falling of the walls of the kiln which was then being constructed for the defendant, it would be liable in damages to the plaintiffs, provided there was negligence which proximately caused the wall to fall. If there is anything, then, that relieves the defendant of this liability, it is, under the ordinary rule of law, incumbent upon it to so allege and prove, as this is entirely defensive matter. It follows that, as to the defense that the work was being done by an independent contractor, the burden was upon the defendant to show that fact. 26 Cyc., pp. 1573-4; *Midgett v. Mfg. Co.,* 150 N. C., 333; *Sutton v. Lyon,* 156 N. C., 3; *Mitchell v. Whitlock,* 121 N. C., 166; *Cook v. Guirkin,* 119 N. C., 13.

This Court has held that in the trial of causes in which the defendant seeks to avoid liability upon the ground that the party in charge of the work is an independent contractor, it is proper "to submit the question raised by the contention of the defendant in this respect (461) to the jury in a separate issue or question. *Young v. Lumber Co.,* 147 N. C., 35. As this issue is raised by the defendant in its answers, the burden is upon it to sustain its allegation by the greater weight of the evidence. It is elementary that the burden of proof rests upon the party having the affirmative of the issue, and if a defendant, in cases of this kind, alleges an independent contract, the facts pertaining thereto being peculiarly within his knowledge, the law and justice require that he establish the alleged contract to the satisfaction of the jury by the greater weight of the evidence. It would be unfair, and work a hardship, if the burden should be put upon the plaintiff of disproving an alleged contract to which he is an entire stranger.

It is well settled that when the court is asked to give a peremptory instruction to the jury, requiring them to find for one of the parties, the other is entitled to have the evidence considered in the light most favorable to him (*Hodges v. R. R.,* 122 N. C., 992; *Board of Education v. Makeley,* 139 N. C., 31), which principle has been approved in many subsequent cases. *Denny v. Burlington,* 155 N. C., 33 (an independent contractor case).

Whether Jesse V. Allen was an independent contractor, for whose negligence the defendant was not responsible to the plaintiffs, presented an issue of fact which was properly left to the jury for decision, as the court could not, in the state of the evidence, pass upon this question as one of law. There was conflicting evidence which clearly made a case for the jury. If the terms of the contract had been admitted or otherwise established, their meaning would become a question of law; but as

this contract was in parol and its terms were not settled, and there was conflicting evidence as to what was said and done, it was naturally and legally the function of the jury to draw the necessary deductions therefrom, under proper instructions from the court as to what would constitute Jesse V. Allen an independent contractor, for whose acts of negligence defendant would not be responsible, with reference, of course, to the peculiar circumstances. An independent contractor is said to be one who, exercising an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer, except as to the result of the work, and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what the laborers shall do as it progresses. 1 Bouvier's Law Dict., p. 1011; *Casement v. Brown,* 148 U. S., 615 (37 L. Ed., 582). The rule, however, is subject to this qualification: "Where an obstruction or defect which occasions an injury results directly from the acts which an independent contractor (462) agreed and was authorized to do, the person who employs the contractor and authorizes him to do these acts is liable to the injured party; but where the obstruction or defect caused or created is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable, and in such case the contractor will be liable for his own negligent acts." We thus defined the relation in *Craft v. Lumber Co.,* 132 N. C., at p. 158. "Where the contract is for something that may lawfully be done, and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it, and no general control is reserved either in respect to the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work and not in the several steps as it progresses, the latter is not liable to third persons for the negligence of the contractor as his master. Cooley on Torts (2 Ed.), sec. 548, p. 646. The principle as thus stated, and which we believe to be the correct one, has been approved and applied by this Court in *Waters v. Lumber Co.,* 115 N. C., 652." But that was said with strict reference to the particular facts of the case then being decided, and we had no occasion to state the rule where the work to be done is intrinsically or inherently dangerous. An employer, of course, cannot authorize a dangerous piece of work to be done, or work the doing of which according to the contract of employment will necessarily or probably be dangerous and injurious to others, for this would be to participate in the commission of the tort, or to

authorize the doing of it. The employer is, therefore, liable if injury results from work as he has authorized it to be done. *Robbins v. Chicago,* 4 Wall. (U. S.), 657, 679 (18 L. Ed., 527); *Water Co. v. Ware,* 16 Wall., 566, 576 (21 L. Ed., 485); *Ph. etc., R. Co. v. Ph., etc., Steam Towboat Co.,* 23 *How.* (U. S.), 209 (16 L. Ed., 433); *Chicago v. Robbins,* 2 Black (U. S.), 418 (17 L. Ed., 298). In *Davis v. Summerfield,* 133 N. C., 325, this principle was applied, citing and quoting from *R. R. v. Moore,* 88 Md., 352: "Even if the relation of principal and agent or master and servant does not, strictly speaking, exist, yet the person for whom the work is done may still be liable if the injury is such as might have been anticipated by him as a probable consequence of the work let out to the contractor, or if it be of such character as must result in creating a nuisance, or if he owes a duty to third persons or the public in the execution of the work." When one contracts to do and delivers certain specific work, which is not unlawful, and the manner of doing of which, including the employment, payment, and control of the labor, is left entirely to him, he is an independent contractor, for whose acts and omissions in the execution of such contract the other contracting party is not liable, since the doctrine of *respondeat superior* has no application where the employee represents the employer only as (463) to the lawful purpose of the contract, but does not represent him in the means by which that purpose is to be accomplished. The accepted doctrine is that in cases where the essential object of an agreement is the performance of work, the relation of master and servant will not be predicated, as between the party for whose benefit the work is to be done, and the party who is to do the work, unless the former has retained the right to exercise control over the latter in respect to the manner in which the work is to be executed. The proprietor may make himself liable by retaining the right to direct and control the time and manner of executing the work or by interfering with the contractor and assuming control of the work, or of some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference. But merely taking steps to see that the contractor carries out his agreement, as having the work supervised by an architect or superintendent, does not make the employer liable, nor does reserving the right to dismiss incompetent workmen. The following authorities sustain these propositions: *Denny v. Burlington,* 155 N. C., 33; *Robineux v. Herbert,* 118 La., 1089 (12 L. R. A. (N. S.), 632); *Richmond v. Sitterding,* 101 Va., 354 (65 L. R. A., 447, and notes); 1 Lawson Rights, Remedies, and Practice, sec. 299. The last cited authority states, in an excellent note upon this subject, that if the owner of a building deals with the contractors, with reference to the manner of doing the work, in

such a way "that in doing any particular act they are obeying the directions of the owner, if that act is negligent and damage ensues, he is liable. In such a case it is his duty to see that what is done under his special orders is not negligently done," citing *Hefferman v. Benkard,* 1 Robt., 436. The act of the defendant in interfering with the work and causing the substitution of brick for cement, which had been specified as the proper material, brings it under the condemnation of the law just stated. If we read the verdict in connection with the evidence, and the charge, which was free from error, we see that the jury have found that defendant was guilty of this interference, and to this extent, at least, he took personal charge of the work and thereby weakened the foundation of the wall, so that it fell and killed the intestate. This conduct on his part made him the master and Jesse V. Allen his servant, and for the acts of the latter in this respect he has become responsible. But the case is still stronger against it, for by thus reserving, and actually assuming, control and causing to be done this negligent act, the injury is directly traceable to it, and the law refers the injury to the wrongful act or tort of the defendant as the direct, efficient, and proximate cause thereof.

Its responsibility is so clear that if there was any error in regard
(464) to the application of the principle *res ispa loquitur,* it would be harmless and unprejudicial, as it could not have affected the result.

There are several other exceptions, but they all converge to this one point, Was Jesse V. Allen an independent contractor? If not, the jury were manifestly right, upon the evidence, when they found that defendant is liable for the falling of the wall. This really covers the entire case, and it would be idle to give the other exceptions a separate study and discussion.

The charge as to damages was correct. *Mendenhall v. R. R.,* 123 N. C., 275; *Carter v. R. R.,* 139 N. C., 499; *Poe v. R. R.,* 141 N. C., 525; *Gerringer v. R. R.,* 146 N. C., 32; *Fry v. R. R.,* 159 N. C., 357, 362; *Johnson v. R. R.,* 163 N. C., 431, 451.

After a careful review of the whole case, no error has been discovered.

No error.

*Cited: Scales v. Lewellyn,* 172 N.C. 498 (4d); *Gadsden v. Craft,* 173 N.C. 420 (3c); *Simmons v. Lumber Co.,* 174 N.C. 227 (3c, 4c); *In re Will of Deyton,* 177 N.C. 503 (3p); *Aderholt v. Condon,* 189 N.C. 756, 757 (3c); *Greer v. Construction Co.,* 190 N.C. 635 (3c); *Lumber Co. v. Motor Co.,* 192 N.C. 381 (2c, 3c); *Lilley v. Cooperage Co.,* 194 N.C. 252 (3c); *Teague v. R. R.,* 212 N.C. 34 (2c, 3c); *Wiley v. Olmsted,* 212 N.C. 99 (3p); *Bass v. Wholesale Corp.,* 212 N.C. 253 (2c); *Lassiter v. Cline,* 222 N.C. 274 (3c); *Hayes v. Elon College,* 224 N.C. 15, 19 (3c).

CAROLINA AND YADKIN RIVER RAILROAD v. J. L. AND DION ARMFIELD.

(Filed 23 December, 1914.)

**1. Railroads—Easements—Measure of Damages.**

In awarding compensation to the owner of lands for an easement acquired by a railroad company thereon, recovery may be had for the impaired value, including, as a rule, the market value of the land actually taken or covered by the right of way, with damages to the remainder of the tract or portions of the land used by the owner as one tract, deducting from the estimate the pecuniary benefits or advantages which are special or peculiar to the tract in question, but not those which are shared by the owner in common with other owners in the same vicinity.

**2. Same—Incidental Depreciation—Smoke, Etc.—Sentimental and Speculative Damages.**

In awarding damages to the owner of land in condemnation proceedings brought by a railroad company to acquire a right of way through them, it is proper, in ascertaining the amount, to consider, among other things, the inconvenience and annoyance likely to arise in the orderly exercise of the easement which interfere with the use and proper enjoyment of the property by the owner and which sensibly impair its value, including the injury and annoyance from jarring, noise, smoke, cinders, etc., from the operating of trains, to the extent it exists from close proximity of the property and not attributable to the defendant's negligence; excluding, however, consideration of sentiment or personal annoyance detached from any effect on the pecuniary value of the property or allowance of damages of a purely speculative character. *R. R. v. Mfg. Co.*, 166 N. C., 168, cited and distinguished.

APPEAL by plaintiff from *Lane, J.*, at May Term, 1914, of (465) DAVIDSON.

Proceedings to condemn land for railroad right of way, heard on transfer from clerk of Superior Court.

The evidence tended to show that the proposed right of way would lie over a tract of land owned by defendant in the town of Thomasville, N. C., suitable for building lots, the evidence of defendant being to the effect that the injury to the property arising from land actually required for the right of way, 2.13 acres, and the impaired value to the remainder of the tract would amount to from $10,000 to $19,000.

The evidence on the part of plaintiff was to the effect that the damages recoverable would not exceed $2,500, the estimate of plaintiff's witnesses being from $1,500 to $2,500.

The plaintiff excepted to a portion of his Honor's charge in which he permitted the jury to consider, as an element of damages to the portion of the property not actually taken, the "annoyance, noise, dirt, smoke, cinders, and like discomforts necessarily attendant on the operating of

a steam railway through the property," plaintiff insisting that these considerations on the question of damages was disapproved by a recent decision of this Court in *R. R. v. Mfg. Co.*, 166 N. C., 168.

There was verdict assessing damages at $6,400. Judgment, and plaintiff excepted and appealed.

*Jerome & Price for plaintiff.*

*Phillips & Bower, E. E. Raper, Walser & Walser, and McCreery & McCreery for defendant.*

HOKE, J., after stating the case: It is the recognized rule in this State that in awarding compensation on condemnation of a railroad right of way, recovery may be had for the impaired value of the property by reason of the easement acquired; this, as a rule, to include the market value of the land actually taken or covered by the right of way and the "damages done to the remainder of the tract or portions of the land used by the owner as one tract, deducting from the estimate the pecuniary benefits or advantages which are special or peculiar to the tract in question, but not those which are shared by him in common with other owners of land of like kind in the same vicinity." *R. R. v. McLean*, 158 N. C., 498; *Lambeth v. Power Co.*, 152 N. C., 371; *Abernethy v. R. R.*, 150 N. C., 97; *Thomason v. R. R.*, 142 N. C., pp. 300 and 318; *Brown v. Power Co.*, 140 N. C., 333; *R. R. v. Land Co.*, 137 N. C., pp. 330-335; Elliott on Railroads, sec. 995.

In ascertaining the market value as a basis of estimate, it is said in Lewis on Eminent Domain, sec. 706 (3 Ed.), formerly sec. 478: "In estimating the value of property taken for public use, it is the market value of property that is to be considered. The market value of
(466) property is the price which it will bring when it is offered for sale by one who desires but is not obliged to sell it, and is bought by one who is under no necessity of having it. In estimating the value, all the capabilities of the property and all the uses to which it may be applied or for which it is adapted are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner." Speaking to this same question, in Pierce on Railroads, p. 217, the author says: "The particular use to which the land is applied at the time of the taking is not the test of its value, but its availability for any valuable or beneficial uses to which it would likely be put by men of ordinary prudence should be taken into account. It has been well said that the compensation 'is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may reasonably be

expected in the immediate future.' But merely possible or imaginary uses, or the speculative schemes of its proprietor, are to be excluded."

The general principle embodied in these statements was approved in the well considered case of *Brown v. Power Co., supra,* and in the subsequent case of *Land Co. v. Traction Co.,* 162 N.C. 503, it was held for the correct application that the position as to prospective uses should be restricted to those for which the land was naturally adapted or which would likely arise in the ordinary course of things, and could not be properly extended to fanciful uses which might be in contemplation by the owner, and which, being more or less in the nature of an experiment, would render the damages to arise from such conditions too uncertain and remote.

In some of the cases involving claims for damages by the operation of railroad trains, it has been said that the damages to be allowed must arise from some "physical interference with the property or of some right appurtenant to the property."

This position was stated with approval and was one of the points decided in *Austin v. Terminal Co.,* 108 Ga., 671, reported in 47 L. R. A., 755, a suit by adjoining proprietor for damages alleged to be done plaintiff's property by the noise and other inconveniences arising from the operation of defendant's trains. Plaintiff insisted on his right to recover by reason of a provision of the Georgia Constitution: "Private property should not be taken or *damaged* for public purposes without just and adequate compensation being first paid." The Court held that the use of this word damage did not confer a right of action except when there had been some "physical interference with claimant's property or right appurtenant to the property."

The rule for awarding damages in condemnation proceedings was not involved in the decision, and, on this question, *Simmons, C. J.,* delivering the opinion, said: "In such a proceeding the effect of (467) smoke and noise in the operation of trains are properly to be considered in so far as they tend to impair the value of the property"; and referring to and distinguishing a former decision of the Georgia Court, he further said: "In our own case of *Steiner v. R. R.,* 44 Ga., 546, the tracks were in the street, immediately in front of plaintiff's residence, physically invading his right of way and thereby giving him a cause of action. When there has been this physical interference, there is a 'damage' in connection with the taking of private property, consisting of an easement or right of way, and the plaintiff, being thus damaged, is allowed to show all the elements of damages. The effect of smoke and noise are considered, not as an independent element of damage, but as tending to prove the value after the railroad has taken or damaged property or some right appurtenant."

It is true that this expression that we are discussing was sustained as a general proposition or not directly disapproved in *Waste Co. v. R. R., ante,* 340, and was used also in a cause decided at last term, *R. R. v. Mfg. Co.,* 166 N. C., 168, both of them being cases involving the award of damages for a railroad right of way; but in these and all other cases where this question of condemning a right of way is substantially presented, the principle, as stated, is only intended to exclude considerations of sentiment or personal annoyance detached from any effect on the pecuniary value of the property or the allowance of damages purely of a speculative character, and accordingly it is held here and in well considered cases elsewhere that in awarding damages for a railroad right of way plaintiff shall be allowed to recover the market value of the property actually included, and for the impairment of value done to the remainder, and that in ascertaining the amount it is proper, among other things, to consider the inconvenience and annoyances likely to arise in the orderly exercise of the easement which interfere with the use and proper enjoyment of the property by the owner and which sensibly impair its value, and in this may be included the injury and annoyance from the jarring, noise, smoke, cinders, etc., from the operating of trains and also damage from fires to the extent that it exists from close proximity of the property and not attributable to defendant's negligence. *McLean v. R. R., supra; Brown v. Power Co., supra; Chicago v. Taylor,* 125 U. S., 161; *Gainsville R. R. v. Hall,* reported in 9 L. R. A., 209; 78 Tex., 169; *Telegraph Co. v. Darst,* 192 Ill., 47, reported in 85 Am. Rep., 288; Lewis on Eminent Domain (3 Ed.), sec. 706 (478); 2 Elliott on Railroads, sec. 978; 15 Cyc., p. 724. And it may be well to note that these damages are allowed and estimated, as stated, on the theory that the right is to be exercised in an orderly and proper manner; for notwithstanding the acquirement of such an easement, if an owner is
(468) subsequently injured in his proprietary rights by the negligence on the part of the company, a case presented in *Duval v. R. R.,* 161 N. C., 448, and to some extent involved in *Thomason v. R. R., supra,* or if, in the enjoyment of the right, a nuisance is clearly and unnecessarily created, a case presented in *R. R. v. Fifth Baptist Church,* 108 U. S., 317, an action lies, and because it does, compensation for injuries attributable to negligence, etc., are not as a rule included.

The case of *R. R. v. Mfg. Co.,* 166 N. C., 168, relied on by counsel for appellant, does not sustain his position. That was a case in which the plaintiff railroad sought to condemn a right of way through a mill village owned by defendant. For reasons then appearing sufficient a majority of the Court thought that some of the evidence admitted was of a character too conjectural to be made the basis for estimating the

damage, and in the opinion awarding a new trial for that reason the Court, among other things, said: "The elements of damage are those only which arose from some physical interference with the property or some right appurtenant thereto." But the Court did not mean here that there must be some physical entry on the property amounting to a physical trespass, but that the annoyances and inconveniences due and naturally to be expected in the operation of defendant's trains which interfered directly with the proper enjoyment of the property on the part of the owner and for the purpose for which it was used would be a physical interference, within the meaning of the decision, whether this invasion of the owner's rights should be on or above the surface, as in cases of jarring, smoke, cinders, noxious vapors, or otherwise. The new trial was granted, not because the smoke, cinders, jarring, etc., of a railroad train should not be considered, but because, as stated, certain evidence as to the effect of these things on the peculiar facts as presented in that case was too uncertain and remote and might have led to an award of damages entirely speculative.

On the record we are of opinion that the present case has been correctly tried, and the judgment on the verdict is affirmed.

No error.

*Cited: R. R. v. Mfg. Co.,* 169 N.C. 161, 164, 165 (c); *McMahan v. R. R.,* 170 N.C. 458 (c); *Caveness v. R. R.,* 172 N.C. 307 (c); *Teeter v. Telegraph Co.,* 172 N.C. 786 (c); *Campbell v. Comrs.,* 173 N.C. 501 (c); *Lanier v. Greenville,* 174 N.C. 317 (c); *Power Co. v. Power Co.,* 186 N.C. 184 (c); *Rouse v. Kinston,* 188 N.C. 12 (c); *Power Co. v. Russell,* 188 N.C. 726 (c); *Stamey v. Burnsville,* 189 N.C. 41 (c); *Milling Co. v. Highway Com.,* 190 N.C. 699 (c); *Hanes v. Utilities Co.,* 191 N.C. 20 (c); *DeLaney v. Henderson-Gilmer Co.,* 192 N.C. 652 (c); *Ayden v. Lancaster,* 197 N.C. 559 (c); *S. v. Lumber Co.,* 199 N.C. 202 (c); *Colvard v. Light Co.,* 204 N.C. 102 (c); *Durham v. Lawrence,* 215 N.C. 77 (c).

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J. L. SMATHERS & CO. v. TOXAWAY HOTEL COMPANY.

(Filed 23 December, 1914.)

**1. Retrials—Issues—Former Trial.**

Where the trial judge has set aside the answers to certain of the issues involved in the action and ordered them to be again submitted to the jury, it is proper for the court on the subsequent trial to submit only those issues to the jury, though counsel may in their argument to the jury comment

upon the issues already answered; and it appearing on this appeal that the jury must have clearly understood the case on the issues submitted, no error is found.

**2. Same—Pleadings—Evidence.**

Where in an action to set aside notes and a deed in trust securing the same, as fraudulent against creditors, holders of certain of the notes secured by the instrument have intervened, claiming to have acquired them in due course, without notice, etc., and the jury have found upon the issue of fraud in the plaintiff's favor and the issue raised by the intervenor has been set aside by the trial judge, it is not error, upon the retrial of the remaining issues, for the court to refuse to permit the reading of the original complaint, the pleadings applicable being the interplea and the answer; and it is further held that the reading of a certain section of the complaint, not as evidence, but in explanation of the issues being tried, was sufficient in this case.

**3. Corporations—Evidence—Pleadings—Prima Facie Case.**

Where there is an allegation that a party to an action is a corporation, and the answer refers to it as a corporation and proceeds to reply to the allegations of the pleadings, and there is testimony on the part of a witness claiming to be an officer thereof, that it was in fact a corporation, and it has been dealt with as such, it makes out a *prima facie* case of the fact of incorporation and its power to contract in that capacity.

**4. Appeal and Error—Evidence—Objections and Exceptions.**

An objection to an answer of a witness to a question, which is made in general terms, will not be sustained on appeal when it appears that parts of the answer were competent as evidence.

**5. Corporations—Officers—Fraud—Contradiction—Evidence.**

A corporation must act through its officers, etc., and where a corporation claims to have acquired in good faith a note secured by a deed in trust sought to be set aside for fraud, it is competent for the officer who conducted the transaction in the corporation's behalf to deny the specific intent which it is alleged vitiates the transaction, and to contradict by his testimony the bad motive imputed to the corporation in acquiring the note.

**6. Bills and Notes—Indorsements—Evidence.**

An indorsement on a note which is not admitted does not prove itself, but requires some outside or extraneous evidence to show the handwriting of the alleged indorser, or that it was in fact indorsed, which is sufficiently shown in this case by testimony of witnesses and other circumstances surrounding the transaction.

**7. Bills and Notes—Fraud—Intervenor—Due Course—Burden of Proof.**

In this action the trial judge correctly charged the jury that the burden of proof was upon the intervenor claiming to be a holder in due course without notice, etc., of a note, secured by a deed in trust, made in fraud of creditors of the maker. Revisal, sec. 2208.

**8. Trials—Evidence—Intervenors—Appeal and Error—Objections and Exceptions.**

Where there are two intervenors, each claiming to be a holder in due course of separate notes secured by a deed of trust fraudulent as to creditors of the maker, who are the plaintiffs in the action, exceptions by the plaintiffs, referring solely to matters relating to one of the intervenors, cannot be considered on the appeal as to the other.

**9. Bills and Notes—Defects—Notice—Bad Faith—Interpretation of Statutes.**

To invalidate a negotiable instrument for a defect or infirmity therein in the hands of a transferee thereof, it is required that he should have had actual knowledge of the infirmity or defect or knowledge of such facts or circumstances as amounted to bad faith in his acquiring the paper; and the charge in this case being sufficiently definite upon this phase of the case, no reversible error is found. Revisal, sec. 2205; *s. c.*, 162 N. C., 346. *Semble*, the evidence in this case was insufficient as a matter of law.

**10. Bills and Notes—Deeds in Trust—Fraud—Due Course—Creditors' Bill—Subrogation.**

Where the creditors of the maker of a deed in trust securing several notes have succeeded in setting the notes and deeds aside for fraud, as between them and their debtor, and in the same suit two holders of these notes have interpleaded, claiming as purchasers in due course of separate notes secured by the deed of trust equally upon all the property conveyed, and the jury have found in favor of one of the interpleaders only, the plaintiffs are not entitled to be subrogated to the share of the fund, claimed by the unsuccessful intervenor, in the distribution of the fund, or to prorate with the successful one, for the latter is entitled under the terms of the mortgage, valid as to him, to have his note first paid out of the proceeds of the sale of the property.

**11. Appeal and Error—Lost Notes—Trials—Argument of Counsel.**

Objections to counsel referring on the trial to certain notes, introduced on a former trial and since lost by the clerk of the court, are held to be without merit.

APPEAL by plaintiff and intervenor from *Harding, J.*, at Feb- (470) ruary Term, 1914, of BUNCOMBE.

This action was brought by the plaintiffs to set aside as fraudulent a bill of sale made by the Toxaway Hotel Company to R. A. Jacobs, conveying certain personal property, and a deed of trust executed by Jacobs to the Wachovia Bank and Trust Company to secure the purchase-money notes given for the personal property described in the bill of sale, the same being a stock of goods and certain cattle, horses, farming utensils, and so forth. The deed of trust and notes referred to were dated 13 November, 1906. There were fourteen of the notes, each (471) for the sum of $500. The plaintiffs alleged that the bill of sale, notes, and deed of trust were executed by Jacobs and the Toxaway Hotel

Company with the intent to hinder, delay, and defraud the plaintiffs and other creditors of the Toxaway Hotel Company.

McMichael intervened pending the action, and alleged that he was an innocent purchaser for value of four of the notes secured by the deed of trust, amounting to $2,000, principal, which said notes were all dated 13 November, 1906, and were due respectively 1 July, 1907, 1 January, 1908, 1 July, 1908, and 1 January, 1909; and also that he was a holder of the same in due course without notice of any fraud. Frank & Co. also intervened and made a like claim as to $2,000 of the notes.

The case was first tried before *Foushee, J.*, at November Term, 1912, when there was a verdict in favor of the plaintiffs, but upon appeal by the intervenors and defendants, this Court granted a new trial, 162 N. C., 346, where the principal facts are stated.

The case again came on for hearing before *Judge Justice* at February Term, 1914. At that term the court submitted to the jury four issues, which appear in the record, and the jury found that the debts of the plaintiffs were as claimed by them; that the deed of trust and bill of sale referred to were fraudulent; and that the intervenors, McMichael and Frank & Co., were each purchasers for value of the notes claimed by them. The judge, at this trial, instructed the jury peremptorily on the issues as to the intervenors' claims, and the intervenors and defendants admitted that the deed of trust and bill of sale were fraudulent. The judge, however, at that term, upon motion of the plaintiffs, set aside the verdict on the third and fourth issues, in which the jury found that McMichael and Frank & Co. were innocent purchasers for value of the notes held by them, becoming convinced that he had committed error in not submitting those issues to the jury under proper instructions, and retained the other issues by consent. When the case came on to be heard at the April Term, 1914, of the court, before *Judge W. F. Harding,* he submitted two issues only to the jury. One was as to whether or not McMichael was an innocent purchaser for value and without notice of fraud in the notes claimed by him, and the other involved the same inquiry as to Frank & Co. As has been stated, the jury found in favor of McMichael on this trial and against Frank & Co., and returned a verdict that McMichael was an innocent purchaser for value of the notes claimed by him, and that Frank & Co. were not innocent purchasers for value of the notes claimed by them. There was a judgment in favor of McMichael, directing that he be allowed to recover the full sum of $2,000, principal, with interest thereon from the date of the notes, and that this sum be paid out of the funds in the hands of the receiver hereto-
(472) fore appointed in this cause. There was a further judgment that the plaintiffs recover on their debts and that the receiver pay the

balance of the funds to them pro rata, there not being sufficient funds to pay their debts in full. It appeared on the trial that the deed of trust referred to had originally secured $7,000 in notes; that one of the notes had been paid by the defendant Jacobs; and that $6,500, principal, of the notes was still outstanding. McMichael claimed $2,000 of the notes and Frank & Co. claimed $2,000 of the same. No one presented the other notes or made any claim thereon. It appeared on the trial that the plaintiffs had brought this action in June, 1907, and had levied an attachment on all of the property then in the possession of the defendant Jacobs which had been conveyed to him by the defendant Toxaway Hotel Company, and that a receiver had thereupon been appointed by the court in this cause to convert the property into money, and that he had on hand at the time of the trial of this cause about $4,500 of the funds derived from the sale of the property covered by the bill of sale and the deed of trust, which had been attached in this cause.

The parts of the deed of trust from R. A. Jacobs to Wachovia Bank and Trust Company, dated 13 November, 1906, material to this inquiry, are as follows: After reciting the execution of the fourteen notes, each for $500 and aggregating $7,000, and the dates of their maturity, Jacobs conveys to the Wachovia Bank and Trust Company the property, describing it, "upon this special trust, nevertheless, that the said party of the second part, its successors and assigns, shall hold said personal property for the following and no other purpose, to wit: If the party of the first part shall fail to pay the aforesaid sum of money or any part thereof promptly as it, *or any part thereof,* shall become due, or shall fail to pay any part of the interest that may accrue thereon promptly as the said interest becomes due, or shall fail to keep the personal property insured strictly in accordance with the promise of the said party of the first part, as hereinafter set forth, or shall fail to pay the taxes on said property within the time prescribed by law for their payment, or shall fail to keep faithfully all other covenants contained herein, and in the notes hereby secured, then immediately upon such default in any of these respects the party of the third part may declare the whole of said indebtedness and interest and all other moneys then owing from the said party of the first part to the said party of the third part secured hereby, instantly due and payable, and it shall be the duty of the said party of the second part, its successors and assigns, and it is hereby authorized and empowered, to sell all of said personal property" (describing it), and convey it to the purchaser, "and apply the proceeds of said sale to the discharge of said indebtedness herein secured and interest on the same, and to the payment of the expenses of this trust, including 5 per cent commissions to the trustee, and of any moneys then owing from the said party (473)

of the first part to the said party of the third part and secured by this deed in trust, any surplus to be paid to the said party of the first part." The juries returned the following verdicts: Upon the issues submitted and retained by *Judge Justice:*

1. Is the Toxaway Company indebted to the plaintiff, as alleged in the complaint? Answer: "Yes," by consent.

2. Were the bill of sale, deed of trust, and notes dated 13 November, 1906, mentioned in the pleadings in this cause and executed between the Toxaway Hotel Company and R. A. Jacobs, made and executed with intent to hinder, delay, or defraud the creditors of the Toxaway Hotel Company? Answer: "Yes," by consent.

Upon the issues submitted by *Judge Harding:*

3. Are the intervenors J. C. McMichael, Inc., innocent purchasers for value, and without notice of said fraud, of the notes mentioned in paragraph 7 of the plea of intervention filed herein? Answer: "Yes."

4. Are the intervenors Frank & Co. innocent purchasers for value and without notice of such fraud of the notes described in paragraph 7 of the plea of intervention filed herein? Answer: "No."

Judgment was rendered in favor of McMichael upon the verdict, and plaintiffs appealed therefrom, and against Frank & Co. upon the verdict as to them, and they also appealed.

*Bourne, Parker & Morrison and T. F. Davidson for intervenors.*

*W. R. Whitson and J. C. Martin for plaintiffs.*

APPEAL BY PLAINTIFF.

WALKER, J., after stating the case: First exception. The judge properly refused to submit the first and second issues tendered by plaintiffs, because they had already been answered at a previous term. They merely related to the indebtedness of the Toxaway Hotel Company to plaintiffs and the fraudulent character of the notes, deed of the Hotel Company to Jacobs, and the latter's deed of trust to the Wachovia Bank and Trust Company. The two issues already answered could have been referred to in the argument of counsel to the jury, if desired, and we presume they exercised this right, and it appears from the case that the jury must have understood clearly the nature and bearing of those two issues and the answers thereto.

Second exception. The court was correct in refusing to permit the reading of the original complaint to the jury, and the answer of the Toxaway Hotel Company thereto, as the issues raised thereby had been decided. It allowed all plaintiffs were entitled to, viz., the reading of the interplea of the intervenors and plaintiffs' reply thereto. The

court afterwards allowed the plaintiffs to read section 21 of their (474) complaint, not as evidence, but as merely showing the nature of the allegations and to inform the jury as to the character of the issues they were trying. This was quite sufficient for the plaintiffs' purpose.

Third, fourth, fifth, and sixth exceptions. These exceptions fall under the same head as the second. The intervenor McMichael was permitted to read from the interplea and the reply thereto for the evident purpose of explaining the issues to the jury.

Seventh, eighth, and ninth exceptions. If McMichael knew the facts to which he testified, there is no reason why he should not have been allowed to state them. The corporation of J. C. McMichael, Inc., was recognized and dealt with as such by the hotel company, indorser of the notes to it, and this is sufficient, with the other evidence, to show *prima facie,* at least, its incorporation and capacity to contract. *R. R. v. Johnston,* 70 N. C., 348; *Dobson v. Simonton,* 86 N. C., 492. In their reply to McMichael's intervention plaintiffs do not deny the allegation of the incorporation which appears therein, but rather admit it by "replying to the further answer of the said J. C. McMichael, Inc.," and then proceeds to answer the other allegations. Besides, the objection to McMichael's answer to the question is too general, as his testimony relates to several distinct matters, some of which, at least, he was competent to speak of.

Tenth exception. It was competent for the witness J. C. McMichael to state that the notes were accepted by him in good faith as a payment of a valid indebtedness then due by the hotel company to him. He conducted the transaction for the corporation and knew the fact. His good faith had been impeached, and when this is the case, it has been held that he may speak of it to the extent of saying whether or not he acted fraudulently or in bad faith, or not. *Phifer v. Erwin,* 100 N. C., 59, and *Sanford v. Eubanks,* 152 N. C., 697, citing 1 Wharton on Ev., sec. 482, and *S. v. King,* 86 N. C., 603. In the last case *Chief Justice Smith* said that when one is charged with a bad motive or intent, it is competent for him to disavow it and to deny the specific intent which it is alleged vitiates the transaction or shows his criminality, and to this effect is *Phifer v. Erwin, supra,* where the intent charged was a fraudulent or dishonest one, involving bad faith. As McMichael acted for the corporation, its intent could only be shown or disproved by his intent. It could not act very well, either honestly or dishonestly, except through its officers. McMichael was virtually the corporation and the corporation was McMichael. It could think, speak, and act only through him. It was a distinct legal entity, but he was the intermediary through whom its dealings were conducted with others.

(475) Exception eleven. The question here presented is whether there was any evidence that the notes were indorsed by the hotel company. There was an indorsement on the note purporting to have been signed by the company. We think there was some evidence of its genuineness. It is true, we said in *Tyson v. Joyner,* 139 N. C., 69, that an indorsement does not prove itself, but requires some outside or extraneous evidence to show the handwriting of the alleged indorser, but this appears in this case by the testimony of Thomas H. Shipman and J. C. McMichael, and there were facts and circumstances which tended to prove it.

Exception twelve. The court sufficiently instructed the jury as to the burden of proof being upon the intervenors, and substantially complied with the request for instructions on that point. The charge was confined to the rule as stated in the statute, Revisal, sec. 2208, and as construed in *Bank v. Fountain,* 148 N. C., 590, and *Bank v. Branson,* 165 N. C., 344, and numerous cases therein cited.

Exceptions thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, and twenty. Of these, exception thirteen refers to Frank & Co. and is not available to plaintiffs on this appeal. Besides, they recovered as to him. Exceptions nineteen and twenty are merely formal, being addressed to the refusal of the court to set aside the verdict, and we will hereinafter consider the one to the judgment entered thereon. The remaining exceptions relate to the charge upon the question as to knowledge of the fraud by McMichael and his bad faith in acquiring the notes. Our statute provides (Revisal, ch. 54, sec. 2205): "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith."

In this case when here on a former appeal (162 N. C., 346), *Justice Hoke* traces the changes in the rule which disqualified one to claim as innocent purchaser or holder in due course; the repudiation by the courts of *Lord Tenterden's* "due care and caution" rule, and the substitution of the more definite and safer principle introduced by *Lord Denman,* requiring actual knowledge of the fraud or defect, or of such facts as would make the act of acquiring the note amount to one of bad faith. The two rules are contrasted in *Hamilton v. Vought,* 34 N. J. L., 187, and it was shown that decided preference and sanction has been given by the courts to the later and more modern rule of *Lord Denman,* which has been incorporated into our statute.

We have examined the charge of the court in this case, and while it might have been a little more explicit and kept in closer touch with the

language and spirit of our law, it was sufficiently definite and clear to fully inform the jury, without danger of misleading them, as to what the intervenors must show in order to establish their claim (476) of being holders in due course, and as to what would constitute actual knowledge of the fraud or defect in the execution of the notes, deed, and deed of trust, or, if there was no such actual knowledge, then what would constitute bad faith on their part in the transaction.

The case has been fairly tried upon its merits. We really can discern no clear indication of a fraudulent knowledge or of bad faith, so far as McMichael is concerned. The corporation appears to have had an honest and valid claim against the hotel company, for which the note was fairly and in good faith transferred to it. But the court left the matter to the jury, and they have settled it against the plaintiffs, and we think justly so. The transaction, so far as we can see, bears the impress of fair dealing. We find no badge of dishonesty, even placing the burden upon the intervenor to acquit itself of the charge of fraud and bad faith. *Chief Justice Beasley* said in *Hamilton v. Vought,* 34 N. J. L., 187, that under *Lord Tenterden's* rule every case possessed of unusual incidents would, of necessity, pass under the uncontrolled discretion of the jury—a mere incident of the transaction, from which any suspicion could arise, being sufficient to take the case out of the control of the court, and, therefore, there was left no judicial standard by which suspicious circumstances could be measured before committing them to the jury. It is precisely this want which the modern rule supplies. He then says: "When *mala fides* is the point of inquiry, suspicious circumstances must be of a substantial character, and if such circumstances do not appear, the court can arrest the inquiry. Under the former practice, circumstances of slight suspicion would take the case to the jury; under the present rule, the circumstances must be strong, so that bad faith can be reasonably inferred." There certainly are no facts here which will stand the test of this more drastic rule. There are no strong circumstances of suspicion, but all we find are weak and inconclusive.

There is one more question requiring our notice. The amount secured by the deed of trust executed by R. A. Jacobs to the Wachovia Bank and Trust Company was originally $7,000. One of the $500 notes was paid by Jacobs, leaving $6,500 still secured. Of the remaining notes, thirteen in all, McMichael held four, Frank & Co. four, or eight in all, leaving five, aggregating $2,500, still outstanding; but these notes, it appears, were never issued or put in circulation, as no one has presented or claimed them. It follows, therefore, that the only notes secured were those of McMichael and Frank & Co. The trustee realized $4,500 from the sale of the property, and that amount is in his hands for distribution

to the secured note-holders, after, we presume, first paying costs and expenses. At any rate, there are ample funds to pay McMichael and to leave a considerable balance.

(477) Plaintiffs, who brought this suit to set aside and cancel the deed, notes, and deed of trust, and failed as to McMichael, and levied a writ of attachment on the property, now insist that, as the notes held by Frank & Co. were avoided for the fraud of which he had notice, they should be subrogated to the right he would have had in the distribution of the fund if he had succeeded in establishing and retaining his claim against their attack. They, therefore, assert the right to share pro rata with McMichael in the distribution of the assets; but this is far from being the law. Plaintiffs cite and rely on *Hancock v. Wooten,* 107 N. C., 9. That suit was treated as a judgment creditor's bill, and the Court held that it was in the nature of an equitable *fi. fa.,* having the force and effect of an equitable levy upon the assets of the debtor, by virtue of which the vigilant creditor acquires a priority as he would when he pursues the analogous remedy at law. The creditor is not, under our present system, required to obtain judgment before proceeding in equity, so to speak (*Bank v. Harris,* 84 N. C., 206); but notwithstanding this change, the same principle governs which formerly prevailed in regard to the priority of his claim. *Hancock v. Wooten, supra,* and cases cited at p. 20. It is an eminently just rule, when clearly understood and confined to its proper limits, for it would seem unjust that the creditor who has incurred all the risk and expense of bringing his suit to a successful termination should, in the end, be obliged to divide the avails thereof with those who have slept upon their rights, or have intentionally kept back, that they might profit by his exertion. *Edmeston v. Lyde,* 1 Paige (N. Y.), 637; *McDermitt v. String,* 4 Johns. Ch., 691 (per *Chancellor Kent*). The rule is not applicable to a general creditor's bill. But we have a very different case here. In *Hancock v. Wooten* the creditor who made common cause with the trustee in resisting the attack upon the deed of trust utterly failed to make good his defense, and was compelled to surrender, because the deed was found to be fraudulent and void as against creditors, and it was so adjudged. He was not allowed "to blow hot and cold," and was postponed until the attacking creditors were satisfied, as a just reward for their diligence and as a punishment to him for his false clamor and his wrongful resistance. But McMichael stands upon much higher ground than he did. He has succeeded in sustaining the deed of trust, so far as it secures him, against the attack of the plaintiffs. Why, then, should he lose his prior lien upon the funds? It is expressly given in the deed of trust, which provides that if the indebtedness of Jacobs, *or any part thereof,* is not paid, the trustee shall sell the property and apply the pro-

ceeds to the same, that is, to what is *then* due. There was no application of any particular part of the property to each of the notes, but each and every note was made a lien upon all of the property. If Jacobs had paid the other notes, would it not have inured to McMichael's benefit and entitled him to full payment, although he would have received (478) less if they had not been paid? Surely, this would be the case; and by retiring Frank & Co. from the distribution a like result must follow. But the question has been settled by authority. 20 Cyc., p. 827, says: "Creditors who attack a conveyance executed by a debtor to secure certain other creditors, and succeed in establishing the fictitious or fraudulent character of some of the claims so secured, are not thereby advanced to the place of the excluded claimants so as to take priority over the *bona fide* creditors named in such conveyance; but such *bona fide* creditors are entitled, not only to the *pro rata* share which would have gone to them respectively if all the claims had been valid, but to their shares of the whole of the property conveyed, up to the full amount of their respective claims." The cases cited for this principle fully support the text. *Woodson v. Carson,* 135 Mo., 521 (*s. c.,* 35 S. W., 1005, and 37 S. W., 197); *Tefft v. Stern,* 73 Fed. Rep., 591 (21 C. C. A., 67, decided by *Judges Hammond, Severens,* and *Barr*); *Farmers National Bank v. Teeter,* 31 Ohio St., 36. And, again, says 20 Cyc., at p. 822: "Where a conveyance is fraudulent as against creditors, and certain creditors attack and defeat it upon that ground, another creditor is not by that fact required to treat it as void, but may still ratify it and enforce rights given him thereunder." And to the same effect is *German National Bank v. Leonard,* 40 Neb., 676. In *Hardcastle v. Fisher,* 24 Mo., 75, *Justice Leonard* forcefully and tersely thus states the rule: "The attaching creditor, however, cannot be allowed to stand in the place of the excluded claimant, and take his share of the fund. There is no legal principle upon which we can allow this. The impeached claim is extinguished by the fraud, so far as any participation in the assigned effects is concerned; and the effect of this in reference to the other creditors is that the share that would otherwise have been appropriated to its payment sinks into the residue for the benefit of those who are entitled to it by the terms of the deed." Another strong authority is *Cohen v. Ward,* 15 S. E. (W. Va.), 141. Many other cases might be cited which recognize and apply the same doctrine, but those we have mentioned would seem to suffice.

There is no merit in the objection as to the lost notes. They were produced at the former trial and afterwards lost by the clerk of the court, and it was competent to refer to them.

The case is a very important one, with respect to the amount as well as to the principle involved, and we have given it a most careful examina-

tion and have been unable to discover that any error was committed by the court below in this appeal.

No error.

*Cited: Smathers v. Hotel Co.,* 168 N.C. 69 (S.c.); *Weeks v. Telegraph Co.,* 169 N.C. 705 (4c); *Howard v. Wright,* 173 N.C. 345 (4c); *Holleman v. Trust Co.,* 185 N.C. 52, 53 (9c).

(479)

B. I. TEDDER, ADMINISTRATOR, v. R. L. DEATON.

(Filed 2 December, 1914.)

1. **Justice's Courts—Appeal—Docketing Transcript—Interpretation of Statutes.**

An appeal from a justice's court not docketed in the Superior Court by the term thereof required by the statute is properly dismissed.

2. **Justice's Courts—Appeal—Recordari—Laches—Findings of Fact—Appeal and Error—Court's Discretion.**

Where, upon application to the Superior Court for a writ of *recordari* to issue to a court of a justice of the peace to bring up an appeal, the judge finds as facts, upon evidence, that the appellant has been guilty of laches in not giving the legal notice of appeal (Revisal, secs. 1491, 1492) and otherwise neglectful in failing to look after his appeal, and refuses to grant the writ, his judgment will not be disturbed in the Supreme Court; and it is *Held*, that praying for the appeal and the payment of the fees in the justice's court by the appellant are not, in themselves, sufficient to entitle him to the order, as a matter of right, or to take the matter out of the discretion of the trial judge.

APPEAL by defendant from *Harding, J.,* at April Term, 1914, of MONTGOMERY.

This was an application for *recordari* and *supersedeas,* heard at chambers on 16 April, 1914.

Plaintiff recovered three judgments against defendant before O. C. Bruton, a justice of the peace: one for $100, on 8 December, 1913; another for $131.25, on 19 February, 1914; and the last one for $75, on the same day. The summons in each case was duly served and the trials proceeded regularly, though the defendant was not present. He attempted to appeal, but did not give notice thereof as required by Revisal, secs. 1491, 1492. The papers in the first case were docketed, not at the next (January) term of the Superior Court, but after the said term. He afterwards applied for this *recordari* in all the causes, and the judge found the foregoing facts, and further, that defendant had been guilty

of laches, and was negligent as to all three cases. He thereupon dismissed the first case, which had been docketed, and refused to allow the other two to be docketed. Defendant appealed.

*R. T. Poole for plaintiff.*
*W. A. Cochran for defendant.*

WALKER, J., after stating the case: We do not perceive any valid ground upon which the defendant can ask a reversal of the judgment. The court found that he had been guilty of negligence in looking after his appeals, had failed to serve the proper, or legal, notices of his appeal in each of the cases, and this finding as to his carelessness and indifference to his interests is well supported by the evidence. A (480) party who wishes to review the judgment against him cannot afford to be passive or idle. He must be active and vigilant, and see that the successive steps are taken to perfect his appeal. *Love v. Love,* 139 N. C., 363; *Blair v. Coakley,* 136 N. C., 409. His prayer for an appeal, if duly made, is not sufficient, for he cannot stop there and leave the case to take care of itself. *Wilson v. Seagle,* 84 N. C., 110. Payment of fees is not sufficient. *MacKenzie v. Development Co.,* 151 N. C., 276. He must be attentive to his case during its progress, and especially when put on notice that such attention is required. *Abell v. Power Co.,* 159 N. C., 348. When defendant is personally served with the summons, he is fixed with constructive knowledge of the ensuing judgment (*Spaugh v. Boner,* 85 N. C., 208; *McDaniel v. Walker,* 76 N. C., 399; *Sparrow v. Davidson College,* 77 N. C., 35), and this knowledge requires him, within the time required by law, unless he has reasonable excuse for delay, to serve his notice of appeal and to see that his case is duly docketed. *Spaugh v. Boner, supra; S. v. Johnson,* 109 N. C., 852; *Clark v. Mfg. Co.,* 110 N. C., 111; Revisal, sec. 1491. He should not rely upon a liberal exercise of the discretion of the appellate court, when his appeal is from a justice of the peace, to condone his negligent act in failing to comply with the plain directions of the law in regard to notice, as he may fail to secure it. He should start with promptness and proceed with diligence and care in preserving his right of appeal and safeguarding his interests. *S. v. Johnson, supra.* Defendant is required to bestow the same degree of care upon his case in court as a man of ordinary prudence does upon his important affairs.

The appeal in the first case was properly dismissed, as it was not docketed at the first term to which it was returnable. *Davenport v. Grissom,* 113 N. C., 38; *Abell v. Power Co.,* 159 N. C., 348, and cases cited. In respect to the other cases, the order was also proper, because defendant had been grossly negligent, and the court, therefore, did not

regard his prayer for the favorable exercise of its discretion with any favor, although it probably would have been so exercised if the application of the defendant had been meritorious. *Davenport v. Grissom, supra.*

There was no error in the proceedings below.

No error.

*Cited: Bargain House v. Jefferson,* 180 N.C. 33 (1c, 2c); *Simonds v. Carson,* 182 N.C. 84 (p); *Pickens v. Whitton,* 182 N.C. 780 (2c); *S. v. Lakey,* 191 N.C. 574 (1p, 2p).

(481)

S. G. BERNARD, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF AMERICAN FOUNDRY COMPANY, A BANKRUPT CORPORATION, v. LOUIS CARR.

(Filed 23 December, 1914.)

**1. Corporations—Subscription to Stock — Trusts and Trustees — Unpaid Stock—Creditors.**

Subscriptions of indebtedness for stock due a corporation are a trust fund for the benefit of its creditors, and whatever may be the rights of the stockholders as among themselves, the creditors have the right to have such fund collected and applied to the discharge of their debts, which may be required by the courts, when necessary, and in a proper and appropriate action.

**2. Corporations — Stock Subscriptions — Consideration — Acceptance of Stock.**

It is not lawful for a stockholder in a corporation to pay for his stock only by lending his credit to the concern, or by indorsing the corporate note; but no other consideration is necessary to be shown, in order to fix him with a stockholder's liability to the corporation creditors, than his acceptance of and holding the stock issued to him.

**3. Corporations—Unpaid Subscriptions—Trustee in Bankruptcy—Right of Action.**

A trustee in bankruptcy of a corporation may, since the amendment to the bankruptcy act of 1910, maintain an action against the shareholders of the corporation to compel payment of their unpaid subscriptions to its stock to the extent necessary to protect its unpaid creditors; and he is not bound by any illegal acts of the corporation with respect to the issuance of the shares.

**4. Same—Bankrupt Courts—Orders—State Courts—Collateral Attack.**

Where upon petition filed by the trustee of a bankrupt corporation in proceedings in the Federal court, a citation is issued to a stockholder to show why an assessment should not be made against him to collect the

unpaid amount of his subscription, and the trustee is authorized to bring his action in the State court for the purpose of enforcing payment, and these proceedings appear to be regular in all respects, the validity thereof cannot be questioned in the State courts.

APPEAL by defendant from *Cline, J.,* at September Term, 1914, of BUNCOMBE.

Civil action, tried upon exceptions to a report of referee.

From the judgment rendered the defendant appealed.

*Harkins & Van Winkle for plaintiff.*

*Stevens & Anderson for defendant.*

BROWN, J. This is an action brought by the trustee in bankruptcy of an insolvent corporation to collect the assessment made upon a stockholder for unpaid stock. It appears from the findings of fact that the defendant Louis Carr was a stockholder in the said corporation, owning ten paid-up shares. Afterwards, in order to induce the (482) defendant to give the corporation the benefit of his influence, and in order that he might become a director, the defendant was given twenty shares of the capital stock of the corporation of the par value of $100 each.

It is contended that the defendant did not subscribe for the said shares. It is not necessary that he should. The facts are that the stock certificate was issued to him, mailed to him, received by his secretary, and accepted by him. It is well settled that the acceptance and holding of the certificate of shares of the corporation makes the holder liable to the responsibilities of a shareholder. *Upton v. Triblecock,* 23 Law Ed. (U. S.), 204; *Powell v. Lumber Co.,* 153 N. C., 52.

It is well settled in this State, as in most other States of this Union, that the subscription of indebtedness for stock due to a corporation is a trust fund for the benefit of its creditors, and whatever may be the rights of its stockholders as among themselves, the creditors have the right to have such fund collected and applied to the discharge of their debts. If the capital stock has not been paid for by those to whom the certificates have been issued, it is the plain duty of the directors or of the courts to require it to be collected, or so much thereof as may be necessary to discharge its unpaid debts. *Clayton v. Ore Knob Co.,* 109 N. C., 385, and cases cited.

In the case of *Hobgood v. Ehlen,* 141 N. C., 344, the Court said: "The general rule in all the States is that a subscriber to the stock of a corporation is under liability to pay therefor, which liability, so far as creditors are concerned, can only be extinguished by actual payment or a

valid release. . . . This is founded upon the theory that the capital stock is the fund or resource with which the corporation is enabled to transact its business, *and upon the faith of which persons give credit to the corporation.* It is a trust fund for the benefit of creditors. *The public has a right to assume that the capital stock has been or will be paid for in money or money's worth when necessary to meet corporate liabilities.*"

This trust fund doctrine not only prevails in practically all of the States of the Union, but is recognized and enforced by the Supreme Court of the United States. *Scovill v. Thayer,* 105 U. S., 143; *Washburn v. Green,* 133 U. S., 30; *Upton v. Triblecock,* 91 U. S., 45; *Sanger v. Upton,* 91 U. S., 56; *Hanley v. Stulz,* 139 U. S., 417.

There is something said in the record that a supposed consideration for this stock was the indorsing of a note for the corporation by the defendant. Such a transaction would not be lawful, for stock cannot be paid for by services of that character. Besides, the defendant, himself, says that he paid nothing by reason of this indorsement.

(483) It is further contended that the trustee in bankruptcy has no power to sue for the unpaid purchase money due for the stock; that the records and proceedings did not show any right or authority in the trustee to sue, as no assessment was made. The right of a trustee to sue is well founded. Since the amendment of the bankruptcy act of 25 June, 1910, a trustee in bankruptcy is vested with all the rights of a judgment creditor upon whose judgment execution has been issued and returned unsatisfied. The trustee is not bound by the illegal acts of the corporation. He has power to sue, to set aside its fraudulent conveyances, as well as to collect its unpaid stock subscriptions. *In re Bazemore,* 189 Fed., 236; *In re Colhoun Supply Co.,* 189 Fed., 537; *In re Farmers Supply Co.,* 196 Fed., 990.

It appears from the record that the trustee filed his petition in the bankrupt court, setting forth the necessity of collecting the unpaid stock subscriptions, and the defendant was cited to appear to show cause why an assessment should not be levied against him. The proceeding seems to be in all respects regular. *Scovill v. Thayer,* 105 U. S., 143.

The orders of the bankrupt court are conclusive upon us as to the right of the trustee to bring this suit. That decree gave the jurisdiction and necessary authority to the trustee, and its validity and regulation cannot be questioned in this proceeding.

The defendant cannot be allowed to question the validity of the proceedings in the bankrupt court except in a separate and direct proceeding in that court instituted for that purpose. As said in *Sanger v. Upton,* 91 U. S., 56, "A different rule would be pregnant with mischief and confusion."

The judgment of the Superior Court is
Affirmed.

*Cited: Lynch v. Johnson,* 171 N.C. 630 (3j).

JOHN COX WEBB v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 25 November, 1914.)

**1. Telegraphs—Nominal Damages—Issues—Special Instructions — Appeal and Error—Harmless Error—Punitive Damages—Trials—Evidence—Questions of Law.**

Where a telegraph company is sued for its negligent delay in the delivery of a message, and issues of negligence, amount of compensatory and punitive damages are separately submitted, exceptions to the second issue, upon which the jury has found only nominal damages in accordance with the defendant's special request for instructions, became immaterial, so far as the defendant is concerned, it appearing that the company has negligently delayed its delivery; and while punitive damages are recoverable when the amount of compensatory damages are only nominal, the evidence, to sustain such recovery, must not only tend to show an unexplained delay of the message which, being a failure of the defendant to perform a public duty, will sound in tort, but some acts on the part of the defendant or circumstances of aggravation which will amount to willful, wanton, or malicious conduct, in regard to the message sued on. The grounds upon which punitive damages may be awarded, and whether it is necessary that the corporation, as principal, must in some way have recognized or participated in the wrongful conduct of its local agent, and whether the recovery is not necessarily dependent upon the company's profits or loss at the particular locality, discussed by WALKER, J.

**2. Telegraphs—Tort—Nominal Damages — Notice of Importance — Parol Evidence—Compensatory Damages.**

The breach of duty of a telegraph company to promptly transmit or deliver a message it has accepted for that purpose, though it does not give notice of its importance on its face, makes it liable for nominal damages, at least, and verbal communications made to the local agent receiving it, with respect to its importance, are admissible upon the issue of compensatory damages.

**3. Telegraphs—Issues—Appeal and Error—Punitive Damages—Courts—Trials—Instructions.**

An action to recover damages for mental anguish, physical suffering, etc., of a telegraph company, for its negligent failure to transmit or deliver a telegram relating to sickness or death, ordinarily may be submitted to the jury under two issues, though the question of punitive damages arises therein; and where a third issue, as to punitive damages, has been

erroneously submitted, or there is no evidence as to it, the court should withdraw it or instruct the jury to answer it in the negative.

(484) APPEAL by defendant from *Lyon, J.*, at June Term, 1914, of ORANGE.

This is an action against the defendant to recover damages for delay in delivering a telegram, alleged to have been caused by its negligence. Plaintiff on 8 July, 1911, filed with defendant's operator at Morehead City, N. C., a message addressed to William Faucette, a hackman at Hillsboro, N. C., and of which the following is a copy: "Leaving Morehead this evening; meet me tonight sure." He informed the operator at Morehead City that "he must be sure to get it off at once, as he, the plaintiff, would arrive in Hillsboro very early in the morning and wished to be met by a hack driver, who ordinarily did not meet that train, and he accepted the message and promised to do the best he could." Plaintiff also stated to the operator that "he lived from 1 to 1¼ miles from the station at Hillsboro, and had heavy baggage, and that he had hurt his hands severely on a fishing trip." He left Morehead City on 8 July, 1911, at 5 o'clock p. m., taking passage on a Pullman car, and arrived at the station in Hillsboro about 4 o'clock a. m., 9 July, 1911, his uncle, J. W. Webb, being with him. "It was about daylight," he testified. He was worried at not meeting the hackman, and they decided to
(485) carry his baggage about 300 yards to the Bellevue Mills and leave it with the watchman there, which they did; and then he walked home. "He was tired and worn out from the trip." He testified, on cross-examination, that there was a dwelling-house about 150 yards from the station, but the occupants were asleep, and that there were other dwellings near by; that the weather was pleasant, and that he had many times before walked from his home to the station and from the station to his home.

William Faucette, the hackman, testified that he was at the station from 5:15 p. m., 8 July, 1911, until the train passed at about 5:38 p. m., and no telegram was delivered to him. Plaintiff telephoned the next morning at 9 o'clock and inquired if he had received his message, and was told that he had not. He went to the station about 8 o'clock a. m. on the 9th, inquired for the telegram, and was told that there was none for him, and that about 10 o'clock the same day, when he was at the station to meet a train, the message was handed to him. He lived 1½ miles from the station, had a telephone; but did not know whether the agent, who had been there about a month, knew him or not. That he would have met the plaintiff at 4:30 a. m. on the 9th, had he received the message in time to do so.

The defendant requested the court to charge the jury:

1. That plaintiff could not recover more than nominal damages, including the cost of sending the telegram.

2. That nominal damages, in this case, meant 25 cents, or some similar amount.

3. As there was nothing in the message to indicate the importance of prompt delivery, and as the attention of the company was in no way called to such matters, the plaintiff cannot recover any damage for mental suffering, and they will not consider it in making up their verdict.

The court refused to give the instructions, and defendant excepted.

The court charged the jury as follows on the third issue: "You cannot give punitive damages unless you find that defendant willfully or maliciously or recklessly refused to transmit and deliver the message in question in a reasonable time; but if you so find, you may, in your discretion, give such damages as you may see fit by way of punishment to the defendant." Defendant excepted.

There was no other exception to the charge, except the one taken to the refusal to instruct as requested by defendant.

The jury returned the following verdict:

1. Was the defendant guilty of negligence in failing to deliver the telegram, as alleged in the complaint? Answer: "Yes."

2. What compensatory damages is plaintiff entitled to recover? Answer: "25 cents."

3. What punitive damages, if any, is plaintiff entitled to (486) recover? Answer: "$100."

The defendant appealed from the judgment thereon.

*Frank Nash for plaintiff.*

*George H. Fearons, King & Kimball, and Alf. S. Barnard for defendant.*

WALKER, J., after stating the case: The jury having decided the second issue according to the defendant's prayer for instruction in regard to it, its exception as to the issue became immaterial; and those which relate to the first issue are unimportant, as it was not denied that there was delay in delivering the message, and this constituted a *prima facie* case of negligence (*Sherrill v. Tel. Co.*, 116 N. C., 655; *Ellison v. Tel. Co.*, 163 N. C., 5); and, besides, the negligence is apparent from the uncontroverted facts; so that we dismiss those exceptions with this brief comment, and proceed to consider the only remaining question, whether the plaintiff was entitled to recover punitive damages.

We have already stated that defendant was guilty of negligence, and, in a legal sense, it was inexcusable. The law will recompense the party

whose right has been violated, by allowing actual damages; but exemplary or vindictive damages are not included therein, but are those in excess of the actual loss and rather designed as a punishment for the willful, wanton, or malicious conduct of one person towards another, and as a warning to other wrongdoers. Being in the nature of a penalty, they should not be awarded unless there are circumstances of aggravation, or such a reckless disregard of the rights of the plaintiff as to imply wantonness, bad motive, or malice. "Such damages," says *Justice Hoke* for the Court, "are not allowed as a matter of course, but only where there are some features of aggravation, as when the wrong is done willfully and maliciously, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights. It is not necessary to submit this element of damage under a separate issue, but there is no objection to this course, and frequently it is desirable. As stated in the principal opinion, there are no circumstances of aggravation shown in this evidence which would justify an award of exemplary damages, but on the issue as to actual or compensatory damages the jury under proper instructions should be directed to award what, in their judgment, is a fair compensation for the plaintiff's wrong under the principle here stated, and not confined to the actual loss in time or money, as was done on the former trial." *Ammons v. R. R.*, 140 N. C., at p. 200. In that case a conductor had ejected a passenger from a train because he had no ticket and had refused to pay 10 cents more than the price of a ticket, which was 40 cents, and which he (487) could not procure on application to the ticket agent before boarding the train, as the supply of tickets had been exhausted, as he was told by the agent, who promised to see the conductor about it and secure him passage at the ticket rate, which he failed to do. The Court unanimously held that he could not recover punitive damages, *Justice Brown* saying, in the leading opinion, at p. 198: "To entitle a passenger to such damages, his wrongful expulsion from the train must be attended by such circumstances as to show rudeness, insult, aggravating circumstances calculated to humiliate the passenger. The subject of punitive and compensatory damages has been discussed in many cases in our own reports. In the opinion in this case at the last term the Court called attention to some of the more important. The plaintiff's testimony fails to bring this case within the authority of any of these precedents so as to justify the awarding of punitive damages. On the next trial of the case it will be the duty of the trial judge to explain to the jury the meaning of, and difference between, punitive and compensatory damages, and to instruct them, upon the plaintiff's own testimony, as herein set out, that he is entitled to compensatory damages only," citing *Holmes*

*v. R. R.*, 94 N. C., 318; *Rose v. R. R.*, 106 N. C., 170; *Knowles v. R. R.*, 102 N. .C, 66. *Justice Hoke* filed a separate opinion in which the three other justices concurred, and in which will be found the language above quoted. It was also there held that where a passenger is wrongfully ejected from a railroad train, the demand may be considered as one in tort, and, on an issue as to actual or compensatory damages, he may recover what the jury may decide to be a fair and just compensation for the injury, including his actual loss in time or money, the physical inconvenience and mental suffering or humiliation endured, and which could be considered as a reasonable and probable result of the wrong done. "Wounding a man's feelings is as much actual damage as breaking his limb. The difference is that one is internal and the other external; one mental, the other physical. At common law compensatory damages include, upon principle and, I think, upon authority, salve for wounded feelings, and our Code had no purpose to deny such damages where the common law allowed them," citing *McNeill v. R. R.*, 135 N. C., 683; Hale on Damages, sec. 261, and *Head v. R. R.*, 79 Ga., 350, opinion by *Bleckley, J.* We stated in *Jackson v. Tel. Co.*, 139 N. C., 346, that the doctrine had been thoroughly well settled that the jury, in addition to actual or compensatory damages, may award those which are exemplary, punitive, or vindictive, and sometimes called "smart money," to vindicate the right, punish the wrong, and to set an example before others who may be prone to the commission of like offenses, if the defendant has acted wantonly or with criminal or reckless indifference to civil obligations, or has been guilty of an intentional and willful violation of plaintiff's rights, citing *R. R. v. Prentice*, 147 U. S., 489; *Hansley v. R. R.*, 117 N. C., 565. (488)

In *Fohrmann v. Traction Co.*, 63 N. J. L., 391, the Court goes very fully into the doctrine of punitive damages as applicable to individuals or corporations who conduct their business by agents, the wrongful deed having been actually committed by the latter, and refers with some fullness to the case of *L. S. and M. S. Railway Co. v. Prentice*, 147 U. S., 489, already cited by us. It quotes and approves the following passages taken from the opinion in that case, which it says is a fair abstract thereof: "The railroad company cannot be charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger; punitive or vindictive damages, or smart money, are not to be allowed as against the principal unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct, authorizing or approving it either before or after it was committed; and a corporation, like a natural person, may be held liable in exemplary or punitive damages for the

act of an agent within the scope of his employment, provided the criminal intent is brought home to the corporation." The New Jersey Court then refers to its own decision in *Haines v. Schultz,* 21 Vroom, 481, cited and relied on in the *Prentice case,* and adds the following as its own statement of the principle discussed, as made in the case of *Haines v. Schultz, supra,* as quoted in *R. R. v. Prentice:* "The right to award, then, rests primarily upon a single ground—wrongful motive. It is the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent knowledge is an essential prerequisite. Absence of all proof bearing on the essential question, towit, the *defendant's* motive, cannot be permitted to take the place of evidence without leading to a most dangerous extension of the doctrine *respondeat superior.*" But we need not decide that question, although it may be in this case, as we think, that upon another and sufficient ground the plaintiff is not entitled to recover vindictive damages. A kindred question to the one decided in the *Prentice* and *Haines cases* was discussed by us in *Daniel v. R. R.,* 136 N. C., 517.

The court allowed the jury, upon the question of damages, to consider every element of compensatory damages involved in the second issue, including mental anguish, although the plaintiff states in his brief that there is nowhere in the case any claim for damages on account of mental anguish, and notwithstanding the broad latitude permitted to them, the jury assessed the actual damages at 25 cents, which was practically nothing, as it was merely returning to the plaintiff what he had paid out and giving him nothing besides as compensation for the wrong. He was entitled to damages for pecuniary loss, mental or physical pain (if any),

inconvenience, annoyance, or discomfort, which is physical, and
(489) must not be purely imaginary, but produced through the medium

of the senses and not flowing from mere delicacy of taste or refined fancy or abnormal sensibility, and surely not the result of a morbid supersensitiveness. *Saunders v. Gilbert,* 156 N. C., 463, citing 1 Sedgwick on Damages (8 Ed.), secs. 37 to 42; 4 Sutherland on Damages, secs. 1010a and 1241, and *Williams v. R. R.,* 144 N. C., 498, to which we add *Ammons v. R. R., supra,* and *Smith v. Tel. Co., ante,* 248. The verdict as to actual damages unmistakably shows that the jury thought the wrong one of a trivial character, or else they would have awarded substantial damages in response to the second issue, instead of giving, as we have said, practically nothing or only a nominal amount. There are no circumstances of aggravation in the case, and nothing that indicates more than an ordinary tort or breach of contract, whichever way we may view the true nature of the action. There was apparent neglect, to be sure, and the defendant offers no excuse for it, nor palliation of it,

but the law holds it only to that measure of responsibility and damages as will compensate the plaintiff for the wrong done, and for nothing beyond, as there is no sufficient evidence in the case to show wantonness or malice, nor even a reckless and contemptuous disregard of plaintiff's rights. There are no circumstances of aggravation to be found in the wrong committed. The operator at Morehead City promised to do the best he could, and may have done so; and if he did not, we can, from this record, discover no such unusual breach of his and the company's duty as to warrant the assessment of punitive damages. If we should permit them to be awarded, almost every case of negligence in failing to deliver with due promptness must call for the application of the same principle, and there would be no end or limit to the responsibility of telegraph companies or even carriers. The result would be the one stated by us in *Williams v. Tel. Co.*, 136 N. C., 82, that a rule of damages which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service would be a serious hindrance to the operations of commerce and to the transaction of the common business of life. The effect would be to impose a liability wholly disproportionate to the nature of the act or service which a party has bound himself to perform, and to the compensation paid and received therefor. If, therefore, the law should allow the imposition of vindictive damages in a case of this kind, it would shock our sense of justice and fair play, and go beyond what the protection of the public or a proper regard for the rights of the individual required. Eminent authors have said that the doctrine is an exceptional or anomalous one, at variance with the general rule of compensation, and hence is logically wrong. Sedgwick on Damages, sec. 353; Hale on Damages. But while we do not accept this theory, we deem it proper, in the administration of justice, to restrict it (490) within reasonable limits, so that in its enforcement it may not be productive of oppression and do much greater harm than would a denial of such damages. It is far better to adopt the middle and safer course, by which we would apply the principle as laid down by Thompson on Carriers of Passengers, sec. 27, p. 573: "Such damages are termed exemplary, punitive, or vindictive—sometimes called 'smart money'—and are only awarded in cases where there is an element of either fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, willfulness, or other causes of aggravation in the act of omission causing the injury. Some of the authorities include 'gross negligence' as one of the elements which entitles the plaintiff to exemplary damages. But the better view is given in an opinion delivered in a recent case in the Supreme Court

of the United States. In reviewing that case, *Mr. Justice Davis,* who delivered the opinion, said: 'Some of the highest English courts have come to the conclusion that there is no intelligible distinction between ordinary and gross negligence.' *Milwaukee R. R. Co. v. Ames,* 91 U. S., 489. 'The general rule, therefore, is that where the violation of duty makes the defendant a wrongdoer, only compensatory damages are allowed, while proof of a wrongful purpose may take a case out of it, as an exceptional one.' " This is consonant with our own decisions, and is the wiser and more conservative rule. *Rose v. R. R.,* 106 N. C., 168; *Tomlinson v. R. R.,* 107 N. C., 327; *Ammon v. R. R.,* 140 N. C., 196; *Hayes v. R. R.,* 141 N. C., 199; *Carmichael v. Telephone Co.,* 157 N. C., 21 (*s. c.,* 162 N. C., 333), and especially in *Williams v. R. R.,* 144 N. C., 498, where plaintiff had to walk 1½ miles in consequence of a breach of duty by defendant.

In *W. U. Tel. Co. v. Reeves,* 126 Pas., 216 (*s. c.,* 34 Okla., 468), the Court said: "Treating, for the time, that the cause of action stated was for a breach of a contract to promptly transmit and deliver the message, we are confronted with the very general rule that punitive damages are not recoverable for the mere breach of contract, irrespective of the motive on the part of the defendant which prompted the breach," citing many cases. And further: "Treating the action, however, as one sounding in tort, was plaintiff entitled to recover? As a general rule it may be said that exemplary, punitive, or vindictive damages will not be awarded, unless there is proof going to show a wrongful purpose or reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness, or other causes of aggravation in the act or omission causing the injury, or because the injury was inflicted maliciously, wantonly, or under circumstances of contumely or indignity, or because the circumstances showed a reckless indifference to duty." It will be seen, after a full reading of that case, that, as do the courts in other cases to
(491) the same effect, the learned justice attaches great importance to and lays much stress upon the intrinsic nature of the wrong and any circumstances of mitigation or aggravation in the extent of the injury flowing from it. We must not be understood as denying the right to recover where there is only trifling or even nominal damages (*Saunders v. Gilbert,* 156 N. C., 463), for sometimes there may be substantially no actual damages, though the wrong is committed wantonly and maliciously and exasperatingly, as was the fact in that case. The plaintiff was pursued by a mob and he and his wife fired at, but little or no damages resulted. There were circumstances of great aggravation there, and of a serious nature. But here they are entirely absent.

The case of *W. U. Telegraph Co. v. Westmoreland,* 44 So. Rep. (Ala.), 382, is more exactly in point, for there a sister wired from Montgomery, Ala., to her brother at Athens, Ala., in the evening of 28 November, 1903, requesting him to meet her that night at the railroad station in the latter town, which he failed to do, as he did not receive the message in time, the message not being delivered until the next evening. *Chief Justice Tyson,* in the course of a very able and learned opinion, says: "It does not appear by any testimony that the plaintiff was not duly escorted home, or that she sustained any actual damages whatever of any kind by the misfortune of the message not arriving before the train on which she had taken passage. It was not shown that the delay in the delivery of the message arose from any willful or malicious act whatever, nor was there any proof whatever that any mental distress, anxiety, or pain was caused to the plaintiff by the nondelivery of the message." He further states that two questions were presented, and one of them is this, whether punitive damages are assessable for the mere failure to deliver punctually a social message of the character here shown and under the circumstances of this case. He then answers his own question, at p. 383: "Where the wrong in its essence is the mere failure to perform a contract, involving no insult or outrage to the feelings cognizable by the law, and no actual damage to the person or property of the plaintiff, it cannot be held that the public peace or quiet is offended, and therefore there is no basis for the infliction of vindictive damages. And we think, if this was a case in which vindictive damages were assessable at the discretion of the jury, the proofs would not be sufficient to support a verdict involving their allowance. When an actual trespass is committed, or an act, like slander or libel, necessarily involving in its essence an active and intentional wrong, malice may be inferred from the act itself; but when the relations of the parties are contractual, and call for the performance of stipulations undertaken, the presumption of innocence which the law uniformly indulges would characterize the omission of performance in this case as unintentional—that is, simple negligence. We think this is not a case for punitive damages." We may not agree with (492) all that has thus been so well said, but the case is an authority, based upon facts so closely analogous to those appearing in this record, that it is fully sufficient, in other respects, to sustain our view. See Hale on Damages, sec. 124.

While we decide that there was error in regard to the third issue, we do not mean to imply that there are not cases where telegraph companies may be mulcted in pecuniary damages by way of punishment and example for its wrongs in handling messages. Some cases have been before this Court in which such a course might well have been pursued,

and where conscious and reckless indifference to the rights of patrons was apparent, the negligence being of a very grave and serious character. It will be well for the defendant to have a care for its own interests in the future and avoid such inexcusable lapses from its plain duty to the public. If its returns, at any particular office, are not profitable enough to justify the employment of a sufficient force to conduct its business properly, it must remember that this shortage in funds at one place may be more than compensated by much larger receipts at others. The law looks at the average profits, for in all extensive businesses some part thereof is likely to be unremunerative. This was expressly held in *Corporation Commission v. R. R.*, 137 N. C., 1, where the matter is fully considered and the authorities collated, the Court especially referring to *R. R. v. Gill*, 156 U. S., 664; *R. R. v. Minnesota*, 186 U. S., 261; *U. S. v. Freight Assn.*, 166 U. S., 322; *Cantwell v. R. R.*, 176 Ill., 512; *R. R. v. R. R. Commission*, 109 La., 247; *Gladson v. Minnesota*, 166 U. S., 430, and *Wisconsin v. Jacobson*, 176 U. S., 296. The principle is tersely stated in *Cantwell v. R. R., supra:* "The sufficiency of the earnings of a railroad to justify the expense of running a separate passenger train over a certain branch line constituting part of the entire system is not to be determined by considering the profits of that branch alone, but of the whole business of the various parts of the roads operated with the branch as one continuous line." Defendant has not pleaded, in exculpation of its negligence, any lack of sufficient funds from business at either the initial or terminal office to perform its duty to the public adequately, and if it had done so, we see that it would have been in vain, as scant earnings are no excuse for imperfect service, and especially so where there has been negligence.

The presiding judge should not have submitted the third issue, or, having submitted it, he should have told the jury to answer it in the negative, and not have given the instruction to which exception was taken by the defendant.

In any view of the evidence the plaintiff was entitled to recover something—at least nominal damages. What plaintiff told the operator
(493) at Morehead as to his reasons for wanting the hack to meet him the next morning was competent. It showed the importance of the message to plaintiff, and put defendant on its guard. The defendant's assignment of error No. 4, subdivision 3, shows the relevancy of this evidence, for there it is claimed that the message, on its face, did not disclose its importance or the necessity for prompt delivery. We have already said that plaintiff was entitled to damages for mental and physical suffering, inconvenience, and so forth. It therefore follows that defendant's assignments of error, relating to these questions, should be,

and they are, overruled. The other exceptions have become unimportant.

We therefore direct that the third issue be disregarded and stricken out, and that judgment be entered for the plaintiff upon the remaining issue, that is, for 25 cents and the costs of this Court and the Superior Court.

Error.

*Cited: Ferebee v. Berry,* 168 N.C. 282 (3p); *Tripp v. Tobacco Co.,* 193 N.C. 616 (1c, 3c); *Picklesimer v. R.R.,* 194 N.C. 42 (1c, 3c); *Worthy v. Knight,* 210 N.C. 500 (1c); *Parris v. Fischer & Co.,* 221 N.C. 113 (1c); *Gaskins v. Sidbury,* 227 N.C. 469 (3c).

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W. G. McDOWELL ET AL. v. W. T. JUSTICE.

(Filed 23 December, 1914.)

**1. Summons—Irregular Process—Appearance—Waiver.**

A summons is irregular when made returnable at a term of court less than ten days from its date of issue; but a defendant against whom a judgment has been obtained in the action cannot avail himself thereof when he has moved for a restraining order.

**2. Judgments—Motions—Excusable Neglect—Inadequate Excuse.**

A judgment should not be set aside for excusable neglect when it appears that it was for default of answer filed, and the defendant has permitted term after term of court to pass, stating in his affidavit supporting his motion, as the ground for the relief, and that he had had an erroneous impression of the plaintiff's name, and had repeatedly inquired of the clerk if complaint had been filed in the case, giving the wrong name as that of the plaintiff, with information that it had not been filed, etc. *Pierce v. Eller,* at this term, cited and applied.

APPEAL by defendant from *Harding, J.,* at April Special Term, 1914, of BUNCOMBE.

This is a motion to set aside a judgment upon the ground of excusable neglect.

The summons was issued and served 9 March, 1910, returnable to a term of court beginning the first Monday after the first Monday in March, 1910. The complaint was filed 31 May, 1910.

At March Term, 1912, no answer having been filed, judgment by default and inquiry was entered against the defendant, but the judgment was not signed until January Term, 1913.

(494) On 11 April, 1913, the defendant filed an affidavit in the action, and moved for and obtained a restraining order thereon.

On 21 August, 1913, the defendant filed his affidavit, which is the basis of his motion.

His Honor found, among other things, that defendant W. T. Justice forgot who the parties were and got the impression that the case was James J. Bailey v. W. T. Justice. That there does not appear that there was any such case as James J. Bailey v. W. T. Justice. That the defendant appeared at the office of the clerk at the return term of the summons, and several times thereafter in and out of term, and inquired if there had been any complaint filed against him in the case of James J. Bailey v. W. T. Justice; that there is uncontradicted evidence that defendant has been, prior to the commencement of the claim, vigilant in attending to his matters in the courts, and there is evidence tending to show that defendant has a meritorious defense to this action.

The motion was denied, and the defendant appealed.

*Merrimon, Adams & Adams for plaintiff.*
*Glenn & Sale for defendant.*

ALLEN, J. The summons is irregular, in that it was made returnable to a term of court convening within less than ten days from the date of its issue (*Scott v. Jarrell, ante,* 364), but the defendant cannot avail himself of this objection, because he appeared in the action and moved for a restraining order. *Scott v. Life Assn.,* 137 N. C., 517; *Grant v. Grant,* 159 N. C., 531.

The facts found by his Honor are not as favorable to the defendant as those in *Pierce v. Eller,* at this term, in which a motion to set aside a judgment was denied, and that case is decisive of this.

Affirmed.

*Cited: Buncombe County v. Penland,* 206 N.C. 305 (1c).

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JOSEPH C. McADAMS v. PIEDMONT TRUST COMPANY AND S. A. MORROW ET AL.

(Filed 2 December, 1914.)

**Liens—Material Men—Mortgages—Priorities.**

The lien upon a building given the contractor for its erection, and to those furnishing material used in its construction, relates back to the

time of the commencement of the work; and where the parties have entered into a contract for the erection of the building before, and the contractor commences work thereunder subsequent to the execution and registration of a mortgage on the lands given by the owner to pay off encumbrances thereon and to acquire additional land to widen the lot, together with commissions and expenses in securing the loan, it is held that his lien is taken subject to the mortgage, of which registration has fixed him with notice before commencing to work under his contract. *Chadbourn v. Williams*, 71 N. C., 444, cited and distinguished.

APPEAL by defendant trust company from *Lyon, J.*, at Janu- (495) ary Term, 1914, of ALAMANCE.

This action was brought by the plaintiff to recover of the defendants S. A. Morrow and wife the sum of $1,264.50, alleged to be the balance due him on a contract, dated 14 June, 1911, to erect a hotel building for them on their lot, 36 x 70 feet, in the city of Burlington, opposite the Presbyterian Church. Defendants, the Morrows, on 19 July, 1911, which was some time prior to the date when plaintiff first commenced to do the work and to furnish the materials under the contract, executed to the Piedmont Trust Company, their codefendant, as trustee, a deed of trust on the property in question, which was duly registered on 20 July, 1911, to secure their thirteen bonds in the sum of $500 each, aggregating in amount $6,500, which bonds were negotiated and placed by said trust company with their customers, and the proceeds thereof were applied as hereinafter set forth. That said money was borrowed by the Morrows to pay off certain liens and encumbrances upon the property conveyed to them by the trust company as trustee, costs and expenses and commissions for securing the loan; the satisfaction of a mortgage on part of the property; the payment of the purchase money due on 6 feet acquired to widen the lot for the building, and the balance for the plaintiff. It appears from the plaintiff's own evidence that he did not begin the work on the hotel nor furnish any of the materials for its erection until 7 August, 1911.

Miss Dora Teague testified that she was secretary and treasurer and bookkeeper for the trust company, and the following is a correct statement of amounts paid out of the proceeds of the bonds secured by the deed of trust:

| | |
|---|---|
| Paid bal. due Piedmont Trust Co. on fire ins. | $ 21.25 |
| For registration deed trust and notary fees | 5.00 |
| Paid bal. due on $2,200 loan and interest | 622.82 |
| Paid Piedmont Trust Co., securing loan | 200.00 |
| Paid W. E. Sharpe, bal. on loan on Rippy House | 1,307.22 |
| Paid J. D. Andrew, 6-foot lot | 240.00 |
| | $2,396.29 |

That all the balance of said $6,500 was paid to the plaintiff J. C. McAdams upon the order of Morrow and wife, and that frequently, in making payments, said McAdams directed that said orders be made to parties to whom he was indebted.

(496) The defendant Piedmont Trust Company moved to nonsuit the plaintiff, and afterwards for judgment upon the verdict, which motions were denied. It also excepted to rulings upon evidence and to the charge of the court.

The court submitted certain issues to the jury, which with the answers thereto are as follows:

1. Are the defendants Mr. and Mrs. S. A. Morrow indebted to plaintiffs? If so, in what amount? Answer: "$1,164.50, with interest."

2. Did the plaintiff begin the work, or the furnishing of material upon the premises described in the complaint, before the registration of the deed of trust to the defendant the Piedmont Trust Company? Answer: "No."

3. Did the defendant the Piedmont Trust Company have actual notice that plaintiff had a contract to build the house at the time of the taking and registration of the deed of trust? Answer: "Yes."

The court told the jury that the first issue did not concern the defendant Piedmont Trust Company, and then instructed them as to the evidence and law relating to that issue. He directed the jury to answer the second issue "No," as there was no evidence to show that the work was begun or the materials furnished by the plaintiff before the deed of trust was registered. As to the third and last issue, the jury were instructed to answer it according to the greater weight of the evidence, the burden being on the plaintiff.

Judgment was entered on the verdict for the amount found by the jury to be due from the Morrows to the plaintiff, and the defendant Piedmont Trust Company, after reserving its several exceptions, appealed to this Court.

*W. H. Carroll for plaintiff.*

*E. S. Parker, Jr., for defendant.*

WALKER, J., after stating the case: There was a motion to nonsuit the plaintiff, to the refusal of which and to alleged errors in other rulings exceptions were duly taken, but we need consider only one of them, which is the denial of the defendant's motion for judgment upon the verdict, as we think the defendant trust company was entitled to have this motion granted, and as this will finally dispose of the case, we confine our attention to it.

Construing our statute on liens of mechanics and laborers, this Court held in *Burr v. Maltsby, 99* N. C., 263, that the lien relates back to the time the work was commenced or the materials were furnished, and does not impair or affect encumbrances existing prior to that time, but only those subsequently created. This has been the uniform and finally accepted interpretation since that decision was made. In the later case of *Cheesborough v. Sanatorium,* 134 N. C., 245, it is (497) said: "There can be no doubt that as against the defendant corporation (for whom the work was done), the plaintiffs have a lien, pursuant to the provisions of the statute which provides for such liens. This lien, however, is subordinate to the registered deed of trust, attaching, as it does, at the time of the beginning of the work or the furnishing of the materials." This language cannot be misunderstood, and is plainly against the contention of the plaintiff and the ruling of the court, unless the mere fact of notice by the trust company that plaintiff had contracted to build the hotel at the time of taking and registering the deed of trust should be permitted to alter the case, and we think clearly it should have no such effect. Plaintiff's counsel relied very much on *Chadbourn v. Williams,* 71 N. C., 444, but that case is far from sustaining his position. There some of the materials had been furnished before registration of the mortgage, and it was held that, the contract being entire, the contractor might proceed to complete the contract, notwithstanding the mortgage had been given intermediately, unless the mortgagee had forbidden it after his mortgage had been registered (*Pipe Co. v. Howland,* 111 N. C., 615), "but," said *Justice Rodman,* "it is otherwise where a sale is made, or a mortgage duly registered, before the materials are begun to be furnished, although the mortgagor remains in possession. In such case the material man has notice of the mortgage, and furnishes the materials on the sole credit of the mortgagor and his estate," citing *Jessup v. Stone,* 13 Wise, 466; *Hoover v. Wheeler,* 23 Mass. (1 Cush.), 314. It should be noted that in the cases cited by the Court for the first proposition, the absolute title to the property had passed pending the work being done and the materials furnished, and it was nothing but reasonable that the owner should have been required to object and stop the work, if he was not willing to pay for it; but the principle last stated fits this case exactly. *Platt v. Griffith,* 27 N. J. Eq., 207, is still more analogous, for it decides the question upon the same state of facts as appears in this case. It was there said: "The conclusion flows from the fact that the lien claimants had notice, before giving credit on the security of the land, of the existence of the complainant's mortgage, and of the amount for which it was to be security, and in such case, where the mortgage is executed,

*bona fide,* to secure the payment of advances to be used in constructing the building, there appears to be no reason why the mortgagee should not have priority as against the lien claimants with notice, to the extent of his advances *bona fide* made according to his agreement, up to the amount for which the mortgage is, according to its terms, intended to be security." It will be seen by reading the facts of that case that the mortgagee had full notice of the intention to erect the building, and the mortgage, as here, was given for the purpose of raising the money (498) in advance to pay for its construction, which is our case. See 2 Jones on Liens (2 Ed.), sec. 1469; 1 Jones on Mortgages (6 Ed.), sec. 609; *Haeussler v. Thomas,* 4 Mo. App., 463; *Crandall v. Cooper,* 62 Mo., 478; *Hardware Co. v. Investment Co.,* 10 Col. App., 161; *Ferguson v. Miller,* 6 Cal., 402. In the case last cited the Court said, at p. 404: "The mechanics who erected the house for Miller were bound by the previous outstanding mortgages executed by him. It was not their province to determine the legality of his recorded title, but having contracted with him in the face of these encumbrances, they are postponed until they shall be first paid off." In this connection we find that *Moroney's Appeal,* 24 Pa. St., 372, is a strong authority. It was there held that a mortgage, given with a bond and in the common form and immediately recorded, and intended to secure the payment of a sum of money which the mortgagee then contracted to loan to the mortgagor for the purpose of enabling him to erect houses on the mortgaged property, and which was to be advanced in proportion to the progress of the work, is valid, though the contract of loan be not referred to in the mortgage, nor recorded; and it ranks as a lien for the amount loaned from the date of its record, and not from the date of the actual advances; and this is so, though the mortgagor contracted to apply the money to the payment of the builders, and had, in part, failed to do so, and they had entered their liens. And the other cases to which we have just referred are equally as emphatic in declaring the law to be contrary to the position now taken by the plaintiff. See, also, *Allis-Chalmers Co. v. Cent. Trust Co.,* 39 L. R. A. (N. S.), p. 84, and annotations, where it is said that the fact that funds for the improvement of property were raised by a mortgage thereon does not estop the mortgagees from asserting a priority over persons claiming liens for lumber and materials supplied for the improvement.

The plaintiff also relies on cases where it is held that as to a certain kind of property, which can be segregated from the land, the lienor has a preference over the mortgage, and *U. S. v. N. O. R. R. Co.,* 79 U. S. (12 Wall.), 362 (20 L. Ed., 434), so holds; but the principle there considered relates peculiarly and solely to property not permanently affixed

to the realty, such as cars and other rolling stock, and does not apply where the property on which the lien is claimed is so attached to the realty as to become a part thereof, in which case the prior mortgage upon the realty will take precedence.

The following propositions were decided in *U. S. v. N. O. R. R. Co., supra:*

1. A mortgage by a railroad company covering all future acquired property attaches only to such interest therein as the company acquires, subject to any liens under which it comes into the company's possession. (499)

2. If the company purchase property subject to a lien for the purchase money, such lien is not displaced by the general mortgage.

3. If the company give a mortgage for the purchase money at the time of the purchase, such mortgage, whether registered or not, has precedence of the general mortgage.

4. This rule fails, however, when the property purchased is annexed to a subject already covered by the general mortgage, and becomes a part thereof; as when iron rails are laid down and become a part of the railroad. The principle, too, was applied only to cases where there was after-acquired property of the kind described, having a distinct identity and susceptible of separate ownership and separate liens, which were subject to the lien of the prior mortgage, along with other property not affected by the mechanic's lien. *Fosdick v. Schall,* 99 U. S., 285, was of this class, as were the other cases mentioned in plaintiff's brief.

The work and labor was performed and the materials furnished by the plaintiff with full knowledge, in law at least, and also in fact, of the prior mortgage. He must be presumed to have been able to take care of his own interests and to have contracted for a lien with reference merely to the equity of redemption and in subordination to the older encumbrance, of which he had full notice, and his case must now be judged by these considerations. The mortgagor could not give him a better right or title than he himself possessed at the time. As the work was commenced after the defendant's mortgage was registered, the lien of the plaintiff is subject to the prior lien of the mortgagee, and the court should have so declared.

There was error in not granting the trust company's motion for judgment upon the verdict, and the case is remanded to the court below with directions to enter a judgment there for the appellant upon the merits; that plaintiff, as against said defendant, take nothing by his action, and that said defendant go without day and recover its costs.

Reversed.

*Cited: Roberts v. Mfg. Co.*, 169 N.C. 32 (c); *Humphrey v. Lumber Co.*, 174 N.C. 520 (p); *Porter v. Case*, 187 N.C. 636 (c); *Harris v. Cheshire*, 189 N.C. 227 (c); *King v. Elliott*, 197 N.C. 97 (c); *Horne-Wilson, Inc., v. Wiggins Bros.*, 203 N.C. 89 (c); *Boykin v. Logan*, 203 N.C. 199 (c).

(500)

W. D. PATTON ET AL. v. J. W. SLUDER.

(Filed 23 December, 1914.)

**1. Deeds and Conveyances—Description—Parol Evidence.**

A description contained in a deed or contract to convey lands is sufficiently definite to admit of parol evidence of identification when it is capable of being reduced to certainty by reference to something extrinsic to which the instrument refers.

**2. Same—Acquired by Adjoining Owner—Identity of Lands—Interpretation of Statutes.**

When P., the owner of a tract of land, has acquired by deed lands adjoining his own sufficiently described by metes and bounds, and thereafter conveys them with the same description and designated lines and boundaries, which description is used in the subsequent conveyances, with reference to the original deed for further description, and the possession of the land has been held successively by those under whom a party claims, and he tenders a deed thereto under his contract to convey, with the same description set out in his claim of title, and the other party refuses to accept it, it is *Held*, that the *locus in quo* did not lose its identity because P. owned the adjoining tract at the time of acquiring the title thereto, and that parol evidence of identification of the lands to fit the description in the deed is competent both under the later decisions of our Court and our statutes, Revisal, secs. 948, 1005; and it is *Further held*, that this principle is not affected by the fact that the original deeds call for a less number of acres than the later ones, the description of the lands and boundaries given being identical.

APPEAL by defendant from *Cline, J.*, at November Term, 1914, of BUNCOMBE.

Civil action heard on case agreed. The action was by vendor to enforce specific performance of a contract for sale of land, and the relevant facts are stated in the case agreed, as follows:

"The plaintiffs and defendant on 16 May, 1914, entered into a contract, whereby the plaintiffs agreed to sell and convey, in fee simple, free from all encumbrance, and the defendant agreed to purchase at the price of $2,915, to be paid in cash, all that certain tract or parcel of land situate, lying, and being in the county of Buncombe and State of North Carolina, on the waters of Swannanoa River, and being more particu-

larly bounded and described as follows, towit: On the headwaters of Swannanoa River, adjoining the lands of William Hemphill and others, beginning on a stake in William Hemphill's line, and runs south 56 degrees west 42 poles to a stake; thence north 40 degrees west 126 poles to a pine, W. Y. Porter's corner; thence north 3 degrees east 64 poles to a stake; thence south 33 degrees east 92 poles to a stake; thence south 48 degrees east 88 poles to the beginning, containing 41 acres, be the same more or less.

"That the above described land is a part of a larger tract shown (501) on the map hereto attached, the title to which was vested in one Elizabeth Gilliam, and after her death was duly partitioned among her heirs, as shown on said map, the particular tract hereinafter described being the one marked on said map 'W. C. Gilliam,' and was by deed dated 1 May, 1875, registered 31 August, 1875, containing the same description as that hereinbefore set out, duly conveyed by the said W. C. Gilliam to one W. Y. Porter, Sr., and it is agreed that the fee-simple title to said lands vested by virtue of said deed in the said W. Y. Porter, Sr.

"That at the date of said deed, and at the date of various conveyances hereinafter mentioned, W. Y. Porter, Sr., was the owner of a large tract of land adjoining the above tract and the lands of Hemphill, all of which is correctly shown on the aforesaid map.

"That thereafter, towit, on 13 March, 1877, W. Y. Porter, Sr., executed and delivered to one M. M. Jones a bond for title for a certain tract of land described in said bond as follows: 'On the headwaters of Swannanoa River, adjoining Hemphill heirs, Gilliam heirs, and others, containing 41 acres, more or less.'

"Said bond was duly recorded in the county of Buncombe, 6 November, 1905, and said M. M. Jones, upon the execution and delivery of said bond, entered into possession of a part of the lands first hereinbefore described, claiming title thereto by virtue of the said bond, and the said Jones and the plaintiffs, claiming under him, have been in actual possession of a part of the tract hereinbefore described, towit, that part thereof which was cleared, and on which was a house, since the date of said bond, the other portion of said tract being woodland, and no actual possession having been had thereon other than the occasional taking of wood therefrom from time to time, as the same was desired, the part in possession being shown by the letter 'A' and dotted line on map.

"That the purchase money required by said bond having been paid in full, R. J. Stokely, administrator of W. Y. Porter, Sr., deceased, on 23 December, 1905, executed and delivered to R. J. Jones, wife of the said M. M. Jones, a deed describing the lands therein intended to be conveyed as follows; towit: 'On the headwaters of Swannanoa River, adjoining Hemphill and Gilliam heirs and others, and being the same land

referred to in the aforesaid bond or agreement between W. Y. Porter, Sr., deceased, and said M. M. Jones, which bond or agreement was duly recorded in the office of the register of deeds in Book 141, at page 96, of the record of deeds to Buncombe County and State of North Carolina, reference to said bond or agreement being hereby expressly made for the purposes of description.' And that the plaintiffs Patton and Eskridge, by duly executed and recorded deeds, containing the same description as that set out in the bond of Porter to Jones, towit,
(502) deed from M. M. Jones and wife, R. J. Jones, to W. Y. Porter, Jr., and deed W. Y. Porter, Jr., to Patton and Eskridge, now claim the tract hereinbefore first described.

"That at the date of the deed from Gilliam to Porter, and at the date of the bond from Porter to Jones, Porter was the owner of a large tract of land adjoining the tract hereinbefore described, all of which is correctly shown on the map hereto attached, and the tract first hereinbefore described contains by survey 29.8 acres; but thereafter Porter sold and conveyed to other parties the lands adjoining Hemphill and Gilliam, except the *locus in quo*.

"That the foregoing is all the evidence possible to produce tending to identify the land described in the bond and deeds thereafter executed as the land described in the deeds of W. C. Gilliam to W. Y. Porter, Sr., and in the contract between the parties.

"That the plaintiffs have tendered to defendant a deed in fee simple, properly executed, for the lands first hereinbefore described, and that defendant has declined to accept the same, on the ground that the plaintiffs are not the owners in fee simple of said lands, and that said deed does not convey to him a title in fee simple thereto."

On these facts there was judgment for plaintiff, and defendant excepted and appealed, assigning for error that no good title could be made on account of insufficient description in the bond for title to M. M. Jones and the deeds made pursuant to same.

*Fortune & Roberts for plaintiff.*
*Merrimon, Adams & Adams for defendant.*

HOKE, J. The decisions in this State are in very general recognition of the principle that a deed conveying real estate or a contract concerning it, within the meaning of the statute of frauds, must contain a description of the land, the subject-matter of the contract, "either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers." *Massey v. Belisle*, 24 N. C., 170.

In the application of this principle there was, at times, some discrepancy in the cases; considered, however, more apparent than real until the decisions of the Court in *Blow v. Vaughn,* 105 N. C., 198, and in *Wilson v. Johnson,* same volume, 211, in which it was held that deeds describing the land as "adjoining the lands of A, B, and others and containing 25 acres, more or less," etc., and another giving description as "adjoining lands of J. P. and J. H. Liberman and Isaac J. Snipes *et al.* and containing 50 acres," were too vague and indefinite to be aided by parol proof.

These decisions, published in 1890, being the cause of much (503) concern in the State as to the validity of titles, the Legislature, in 1891, chapter 465, passed a statute designed to change the principle of construction. Revisal 1905, sec. 948 and sec. 1005. And the Court itself, and apart from the operation of the statutes, in the subsequent case of *Perry v. Scott,* expressly disapproved the two decisions referred to, and it was then held that a deed for land containing the description, "lying and being in Jones County, bounded as follows: on the south side of Trent River, adjoining lands of Colgrave McDaniel *et al.,* containing 360 acres, more or less," was not too vague to permit the reception of parol evidence in aid of the deed, and if the evidence offered in such deed was sufficient to satisfactorily identify the tract of land intended, the deed should be held a valid conveyance so far as the matter of description was concerned.

The case of *Perry v. Scott,* based upon former decisions of the Court, such as *McLawhorn v. Worthington,* 98 N. C., 199; *Farmer v. Batts,* 83 N. C., 387, etc., has been since repeatedly cited with approval (see *Bachelor v. Norris,* 166 N. C., 506; *Johnston v. Mfg. Co.,* 165 N. C., 105; *Hudson v. Morton,* 162 N. C., 6), and being entirely consistent with the legislation referred to, may be considered as controlling where the question is similarly presented.

Applying the principle to the facts in evidence, we concur in the decision of the Superior Court that plaintiffs hold and can convey a good title pursuant to their contract. From these facts, as we apprehend them, it appears that the title of an entire tract being in Elizabeth Gilliam, same was devised amongst her heirs at law and the part allotted to W. C. Gilliam was conveyed by him to W. Y. Porter by deed dated on 1 May, 1875, describing the land by metes and bounds, as shown in the deed presently tendered by plaintiffs under their contract, and same said to contain 41 acres, more or less.

While the facts further show that this tract, when conveyed to W. Y. Porter, adjoined a larger body of land also owned by him, it did not become a part thereof in the sense that it lost its identity, and W. Y.

Porter, Sr., having sold all the other land owned by him, gave a bond for title to this tract to M. M. Jones, described as follows: "On the headwaters of Swannanoa River, adjoining the Hemphill heirs, Gilliam heirs, *et al.*, and containing 41 acres, more or less," and the same description enters into one or more deeds since executed, in the line of plaintiff's title.

True, the boundaries of the original deed from Gilliam to Porter, and which accord with the deed now tendered by plaintiff, are said to contain only 29.8 acres; but this does not affect the principle.

(504) The proof shows that it adjoins the land of the Hemphill heirs, the Gilliam heirs, and others; it was the only land in that locality owned by W. Y. Porter, Sr., and comes directly within the principle of *Perry v. Scott,* and the language of the statute now controlling the question. Revisal, sec. 948: "No deed or other writing purporting to convey land or an interest in land shall be declared void for vagueness in the description of the thing intended to be granted by reason of the use of the word 'adjoining' instead of the words 'bounded by,' or for the reason that the boundaries given do not go entirely around the land described: *Provided,* it can be made to appear to the satisfaction of the jury that the grantor owned at the time of the execution of such deed or paper-writing no other land which at all corresponded to the description contained in such deed of paper-writing."

The case of *Smith v. Proctor,* 139 N. C., 314, to which we were cited by defendant's counsel, is not in contravention of the principle. "That was a conveyance of a portion of land to contain 40 acres to be taken out of a larger tract of 150 acres," with nothing to indicate the shape and "affording no data whatever by which the divisional line could be established." But in this case the land was a separate tract which, in the original deeds, was fully described by metes and bounds and which the evidence could satisfactorily ascertain and identify from data appearing in deed.

There is no error, and the judgment below must be

Affirmed.

*Cited: Alston v. Savage,* 173 N.C. 215 (c); *Timber Co. v. Yarbrough,* 179 N.C. 337 (c); *Freeman v. Ramsey,* 189 N.C. 797 (c); *Bissette v. Strickland,* 191 N.C. 262, 263 (c); *Bryson v. McCoy,* 194 N.C. 95 (d); *Self Help Corp. v. Brinkley,* 215 N.C. 620 (c); *Peel v. Calais,* 224 N.C. 425 (d).

JAMES H. PADGETT v. S. ANNIE McKOY.

(Filed 16 December, 1914.)

**1. Deeds and Conveyances—Color—Adverse Possession — Wire Fence — Evidence—Trials—Instructions—Limitations of Actions.**

The plaintiff in this action claims title to the land in dispute by adverse possession under color, and there is evidence on defendant's part that her agent entered upon the land, being on the east side of a certain wire fence, and cut timber therefrom in 1908, and the plaintiff, in response to his request, pointed out the wire fence as the dividing line between the lands. There was also evidence of plaintiff's adverse possession of the land on the east of this fence prior to 1908, sufficient to ripen his title. The court charged the jury, according to defendant's request for special instruction, in substance, that if the plaintiff pointed out the wire fence as the dividing line "and stated that the lands on the east thereof belonged to defendant, and the wire fence was constructed by permission of the defendant," that would be a recognition of the ownership of the defendant of the lands on the east side of the fence, and the possession of these lands by plaintiff thereafter would not be hostile, etc.: *Held*, it was not error for the court to modify this instruction by charging this would be so unless the plaintiff's title had ripened by adverse possession before 1908; and if it had, occurrences or conversations thereafter had between the parties could not divest it; and it is *Further held*, that construing the charge as a whole, the principles of law were clearly and correctly charged upon this phase of the controversy and the jury could not have been misled or confused in their deliberations to the defendant's prejudice.

**2. New Trial—Newly Discovered Evidence—Motions.**

A motion for a new trial for newly discovered evidence is denied. *Johnson v. R. R.*, 163 N. C., 453.

APPEAL by defendant from *Justice, J.*, at February Term, 1914, (505) of BUNCOMBE.

This action involves the title to the land indicated on the diagram filed in the record, by the letters A, D, E, F, G, H, and back to A, they being the yellow lines on the map. The grant of the State to one Cathcart was introduced by the plaintiffs, but they did not connect themselves with it by mesne conveyances, but relied on adverse possession of the land under color, which was a deed from W. B. Smith to their ancestor, James Padgett, dated 18 November, 1882. Defendant also claimed title to the *locus in quo* by adverse possession under color, which consisted of deeds from Rebecca Freeman to A. J. Mangum, dated 10 July, 1884, for the *locus in quo;* a deed from W. B. Smith to A. J. Mangum, dated 12 February, 1883, for the part of the Cathcart land east of the line A, D, and a deed from A. J. Mangum to Mrs. Annie McCoy, dated 14 April, 1885, for the entire Cathcart tract, including the *locus in quo.* Each of the parties offered evidence of possession. There also was evi-

dence that there was a wire fence on the land, extending from the point indicated on the map by the letter E towards the point indicated by the letter G, and a short distance east of the line E, F.

With reference to the fence, the defendant requested the court to give this instruction to the jury:

"If the jury find from the evidence that in the year 1908 the defendant, through her agent, Ed. Stepp, entered upon the lands in dispute and cut timber therefrom, and if at that time said agent asked the plaintiff to point out to him the line of the defendant, and said plaintiff did point out said line at a point west of the wire fence and as claimed by the defendant, and stated that the lands east thereof belonged to the defendant, and the wire fence was constructed by permission of the defendant, then this would be a recognition of the ownership of the defendant, and the possession of the plaintiff thereafter would not be hostile, under claim of right, and adverse."

(506) The court gave the instruction with the following modification: "This would be so unless the plaintiff obtained his title before 1908. If he had obtained his title before that date, then no language could divest him of it." But the court, after correctly defining adverse possession, also charged the jury, in this connection: "The plaintiff contends that he did not have it cultivated until it was worn out, and then he put it in pasture; that he cultivated and pastured for forty years, and that at the time he was holding it adversely, under his deed, and that it was in his possession under this character of holding. Now, if he did that, seven years would put his title indefeasibly in him. And after he ripened his title, if he did, then no language of his, mere talk, could divest it. And if he had the title in him, it would require a deed to take it out of him, or something as solemn as a deed. Now, it is in evidence, and the defendant claims, that at some time after he built the wire fence, or at the time he was building the wire fence, he got permission from the McKoys to build the wire fence, and at that time he was not claiming the land at all. The plaintiff says that he had ripened his title already, and that for a long time there had been a rail fence; and that he had ripened his title and had a good and indefeasible title at the time that wire fence was put there. If you find that he had ripened his title, then the mere permission would amount to nothing; and if he said that he did not own the land, that would not take the title out of him, if he had it in him. So the question is restricted to the time that this wire fence was built. One inquiry for you to make is, Had he had seven years possession before that time? He claims that he had. The defendant contends that the plaintiff went to him and asked his permission to put a wire fence on his land. He said, 'I did; but I intended

at that time to put it (farther) over, but I did not have the money to buy the wire to put it that far.' "

The court again charged the jury fully and correctly as to what would constitute adverse possession sufficient in law to ripen the title of the parties under their color. With reference to the defendant's possession, he told the jury that occasional acts of trespass would not be sufficient for that purpose, but the possession must be notorious and continuous, indicating that the party claimed the land and was using it as owner. He also stated that if the plaintiff had cultivated the land beyond the line E, F, that is, east of it, accidentally or inadvertently and not intending to claim it, but under a mistake as to the true location of it, his possession would not be adverse. There was a verdict for the plaintiff, and from the judgment thereon defendant appealed.

*Mark K. Brown for plaintiff.*

*Garland A. Thomasson, Zebulon Weaver, and Wells & Swain for defendant.*

WALKER, J., after stating the case: The defendant reserved (507) several exceptions to the rulings of the court and the charge, but we are of the opinion that there is but one which we need consider, and that is, whether the court should have modified the instruction which defendant requested and above set forth. We do not understand the defendant's counsel to contend that if the title of the plaintiff had already ripened under their color, that anything said to Ed. Stepp, agent of defendant, after its ripening, as to the fence or the true line dividing their lands, would be evidence against the plaintiff, but his position is that the added words of the judge were calculated to mislead the jury or confuse them as to whether they could consider that evidence in order to ascertain whether the title had vested. We think that the judge was clear enough in his statement, and that the qualification of the instruction was a proper one. It evidently meant that if, before the conversation between the witness, Ed. Stepp, and Padgett, about the fence and the line, the title had ripened by adverse possession—and we do not doubt that there was some evidence of this fact—then the declarations of Padgett, if they were made, would not affect his title, or divest him of it. And this conclusively appears to have been what was meant, if we refer to other parts of the charge which we have quoted, and the matter is left perfectly free from doubt in our minds, and also must have been, as we think, in the minds of the jurors.

We must read the charge as a whole, and construe it in the same way, as we have so often said (*S. v. Exum,* 138 N. C., 599; *Reynolds v.*

*Palmer, ante,* 454); and when thus considered, we do not see how it could have been misunderstood by the jury. The entire charge was a very full and correct exposition of the law "arising upon the evidence." The contention of each party was fairly stated, and defendant has no reasonable ground of complaint. It is manifest, from the evidence and the charge, as they throw light upon the verdict, that the jury have found that plaintiff held the land in adverse possession a sufficient time to ripen his color into a good title, and that defendant had no such possession, having made only occasional entries upon the land. The court gave substantially all of the instructions requested by the defendant to which she was entitled, and we can find no error in the case. The jury have really settled it against the defendant, upon the evidence, and after a correct submission of it to them.

No error.

*Cited: Milling Co. v. Highway Com.,* 190 N.C. 697 (1p); *Alexander v. Cedar Works,* 177 N.C. 537 (2c).

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JAMES H. PADGETT v. S. ANNIE McCOY.

*Mark W. Brown for plaintiff.*

*Garland A. Thomasson, Zebulon Weaver, and Wells & Swain for defendant.*

PER CURIAM. The motion for a new trial in this case, because of newly discovered evidence, is denied. The application is not within the rule applicable to such cases. *Johnson v. R. R.,* 163 N. C., at page 453. Besides, it is without real merit.

Motion denied.

L. LIPINSKY v. CAROLINE E. REVELL.

(Filed 23 December, 1914.)

**1. Married Women — Executory Contracts — Necessaries — Husband and Wife—Interpretation of Statutes.**

A married woman, since the ratification of the Martin act, Public Laws 1911, p. 109, may bind herself by an executory contract, for the purchase of goods, inclusive of necessaries, and she may deal and contract without

her husband's consent as freely as if she were unmarried, except in dealing with her husband under Revisal, sec. 2107, and in the conveyance of her real estate.

**2. Married Women—Executory Contracts—Joinder of Husband—Parties—Counterclaim of Husband.**

Where a married woman is sued alone upon her executory contract, and her husband is permitted to file answer, it is not error for the court to order that the answer of the husband be stricken out, for he is not a necessary party; and he cannot acquire any rights in setting up a counterclaim against the plaintiff who demands judgment solely against the wife.

**3. Evidence—Goods Sold and Delivered—Verified Account.**

A verified account in due form of goods sold makes out a *prima facie* case of the amount due, etc., under Revisal, sec. 1625.

APPEAL by defendant and her husband from *Connor, J.*, at April Term, 1914, of BUNCOMBE.

This is a civil action. From a judgment in favor of the plaintiff against the *feme* defendant, Caroline, she and her husband, O. D. Revell, appeal.

*Mark W. Brown for the plaintiff.*
*Lee & Ford for the defendants.*

BROWN, J. This is an action to recover of the *feme* defendant (509) $247.30 for merchandise sold and delivered to her. On the trial the plaintiff introduced verified account in evidence under Revisal, sec. 1625. We think the verification in due form and sufficient to make out a *prima facie* case. *Knight v. Taylor*, 131 N. C., 84.

The *feme* defendant in her answer denies that she is indebted to the plaintiff, admits the receipt of some of the goods charged against her, and admits that she has paid no part of said account, and avers that the goods so purchased by herself from the plaintiff were for necessaries, and that her husband, and not herself, is liable therefor.

The plaintiff offered evidence tending to establish his cause of action against the *feme* defendant. The defendants offered no evidence, but were permitted to put the plaintiff on the stand and cross-examine him.

The court charged the jury as follows: "If you are satisfied from the greater weight of the evidence in this case that the plaintiff S. Lipinsky sold and delivered to the defendant Mrs. Caroline E. Revell articles of merchandise as set out in this statement of account; that at the time said sales were made she promised and agreed to pay the prices shown on this account; that she has not paid them, then you should answer the issue '$247.30, with interest.' If you are not so satisfied, you will answer the issue 'Nothing,'" to which charge defendants except.

We find no error in this instruction. This debt was contracted in 1912 since the ratification of the Martin act, page 109, Public Laws 1911. That act completely emancipates the *feme covert.* Now she may deal and contract without her husband's consent as freely as if she was unmarried, except in dealing with her husband under Revisal, sec. 2107, and in the conveyance of her real estate.

It is true, the husband is liable for the support of his family, and may yet be subjected to the payment, under proper circumstances, for necessaries. *Berry v. Henderson,* 102 N. C., 528; *Farthing v. Shields,* 106 N. C., 296. But now the wife may purchase not only necessaries, but other articles, in her own name and on her own credit, and the creditor may recover of her for them without making the husband party defendant. This case was properly tried on that theory, and in any view of the evidence, if believed, the *feme* defendant is liable for the debt. The plaintiff made no claim against the husband and asked no judgment against him.

The husband was not a necessary or even a proper party to this action, and consequently was not made a party. But at February Term, 1914, he was allowed to file answer. The answer was not filed until 8 April, 1914, beyond the time allowed. This answer undertook to plead a counterclaim in favor of the husband exclusively against the plaintiff.

(510) At April Term, 1914, his Honor made this order: "This cause coming on to be heard upon motion of the plaintiff to strike out the answer filed by O. D. Revell in this action, and it appearing that the said O. D. Revell was made a party defendant on account of sections 408 and 2103 of the Revisal of 1905, and that the plaintiff demands no relief against the said O. D. Revell: It is ordered that the answer of the said O. D. Revell be stricken out."

To the foregoing order the defendants excepted.

It is not clear to us how the defendant's husband is in any way injured by the ruling of the court. His answer only sets up a counterclaim to a claim for which he is admitted by the plaintiff not to be liable, and no judgment has been taken against him. The plaintiff alleges no cause of action against the husband, and how can he counterclaim against the plaintiff, when the plaintiff claims nothing of him?

It is admitted that the plaintiff is abundantly solvent and the courts are open to him to bring his suit against the plaintiff whenever he will.

The costs of this Court will be taxed against both appellants.

No error.

*Cited: Bowen v. Daugherty,* 168 N.C. 244 (1d); *Royal v. Southerland,* 168 N.C. 406 (1c); *Warren v. Dail,* 170 N.C. 410 (1l); *Thrash v. Ould,* 172 N.C. 730 (1c); *Machine Co. v. Morrow,* 174 N.C. 201 (1c);

*Grocery Co. v. Bails,* 177 N.C. 299 (1c); *Croom v. Lumber Co.,* 182 N.C. 219 (1c); *Shore v. Holt,* 185 N.C. 314 (2l); *Richardson v. Libes,* 188 N.C. 113 (1c); *Tise v. Hicks,* 191 N.C. 613 (1c); *Brown v. Brown,* 199 N.C. 477 (1c); *Boyett v. Bank,* 204 N.C. 645 (1c); *Morten v. Bundy,* 212 N.C. 444 (1c); *Buford v. Mochy,* 224 N.C. 242 (1j); *Buford v. Mochy,* 224 N.C. 247 (2p).

GRADY H. RIDGE v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 16 December, 1914.)

**1. Trials—Nonsuit—Evidence.**

In the suit of an employee against his employer to recover damages for a personal injury, it is necessary that the plaintiff's evidence should be sufficient to show actionable negligence, but a motion to nonsuit will not be granted when there is legal evidence of such negligence.

**2. Negligence—Evidence—Res Ipsa Loquitur.**

When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as under the ordinary course of things does not happen if those who have the control of it use the proper care, it furnishes evidence, in the absence of explanation by the defendant, that the accident arose from the want of care, under the doctrine of *res ipsa loquitur.*

**3. Same—Railroads.**

When there is evidence that an employee of a railroad company was on the roof of a box car in a train of sixteen cars in the course of his duties, and was injured by the roof of the car blowing off, in a wind so slight that he had stood thereon without difficulty, and that the roofs of the other cars remained intact, the doctrine of *res ipsa loquitur* applies.

**4. Evidence—Res Ipsa Loquitur—Burden of Proof.**

The doctrine of *res ipsa loquitur* applying to the evidence of a case does not relieve the plaintiff of the burden of proof required of him, the effect of this doctrine being only that sufficient evidence has been introduced to take the case to the jury.

**5. Railroads — Master and Servant — Evidence — Negligence — Res Ipsa Loquitur.**

It is negligence for a railroad company to permit the walkway upon the top of its box cars, which its employees are required to use in the course of their duties, to become so rotten, or otherwise defective, that an ordinary wind will blow it off; and conditions of this character being particularly within the knowledge of the railroad company, and not necessarily known to the train crew using it, the doctrine of *res ipsa loquitur* does not become inapplicable merely for the reason that it is invoked by

an employee who has been injured by a defect of this character, especially when the employee thus injured was inexperienced, and learning the business of railroading at the time of the injury.

**6. Same—Federal Employers' Liability Act.**

The doctrine of *res ipsa loquitur* applies, in proper instances, to an action brought under the Federal employers' liability act.

**7. Railroads—Master and Servant—Negligence—Order of Vice Principal—Dangerous Condition.**

Evidence tending to show that the conductor on defendant's freight train ordered the plaintiff, an inexperienced hand learning the business under him, to go along the top of a moving train in a wind sufficiently strong to take the roof off of the car, which was defective, and injure him, when he must have observed or known of the danger, affords direct evidence of the defendant's negligence, although the evidence was conflicting as to the force of the wind.

**8. Railroads—Master and Servant—Safe Place to Work—Inspection—Foreign Car—Negligence—Evidence.**

In an action to recover damages against a railroad company for an injury to the plaintiff received while in the course of his employment by the top of a box car being blown off by the wind, striking him and carrying him to the ground, there was evidence tending to show that the planks of the roof of the car, an old one, were seen by the plaintiff, just prior to the injury, "jumping up and down"; that the car belonged to another railroad company, but it could readily have been inspected by the defendant, under the circumstances, considering its location and the defendant's usual methods of inspection. *Held*, it was sufficient evidence that the planks on top of the car were not properly nailed or fastened, and of the defendant's actionable negligence in failing to discover the defects of the car by reasonable inspection and remedy it.

**9. Same—Vis Major—Concurrent Negligence.**

It is the duty of the master to furnish the servant with a reasonably safe place to do his work, under the rule of the ordinarily prudent man with reference to his own safety, and when the master fails in this respect, and his negligence concurs with conditions over which he has no control, in producing an injury to an employee, it will be held as the proximate cause of the consequent injury; and where an injury to its train hand is caused by the negligence of a railroad company to provide a box car reasonably safe for the purpose of his going along its top in the performance of his duties, and in consequence, during a windstorm, the roof of the car is blown off and hurls the plaintiff to the ground to his injury without other or intervening cause, the doctrine of *vis major* will not apply, and the negligence of the defendant will be held the proximate cause of the resulting injury.

**10. Master and Servant—Railroads—Inspection of Cars—Trials—Absence of Witnesses—Evidence.**

Where there is evidence that a personal injury was inflicted upon an employee of a railroad by reason of the failure of the company to inspect a defective box car, the absence of the railroad's inspector as a witness

justifies the jury in drawing inferences unfavorable to the defendant, in an action for damages, upon the issue of its negligence in this respect.

**11. Negligence—Concurrent Causes—Proximate Cause.**

Where two causes coöperate to produce an injury, one of which is attributable to the defendant's negligence, the latter becomes liable, if together they are the proximate cause of the injury, or if the defendant's negligence is the proximate cause.

**12. Master and Servant—Negligence—Safe Place to Work—Ordinary Care—Definition.**

The measure of care against accidents which a master must take to avoid responsibility for injuries to his servant in the performance of his duties is that which a person of ordinary prudence and caution would use if his own safety were to be affected and the whole risk were his own.

**13. Master and Servant—Negligence—Co-operating Cause—Apportionment of Liability.**

Where the master's negligence contributes to the result of the servant's injury, although there may be a coöperating cause, not due to the servant's act, the law will not undertake to apportion the liability, but will hold him responsible to the servant in the same degree and with the same consequences as if his negligence had been the sole cause of the injury.

**14. Evidence—Opinion—Expert—Evidence as to Fact.**

In this action to recover damages for a personal injury it is held competent for a medical expert to testify, within his own knowledge, that the plaintiff's vertebrae had been crushed in the accident, for which damages are claimed, and for him and other physicians, who have qualified, to give their expert opinion as to the effect of this condition upon the plaintiff.

**15. Measure of Damages—Evidence—Personal Injury.**

In an action to recover damages for a personal injury alleged to have been caused by the defendant's negligence, it is competent for the plaintiff to testify, upon the question of the measure of damages, as to his trade or business and proficiency therein, and how the injury had reduced his earning capacity.

APPEAL by defendant from *Adams, J.*, at July Term, 1914, of RANDOLPH.

This is an action to recover damages for injuries alleged to (513) have been caused by defendant's negligence. The testimony of the plaintiff in his own behalf will sufficiently show the nature of the case and enable us to understand the exceptions:

He is 23 years old, had lived in Ashboro for about seventeen years, and had worked for the Norfolk Southern Railroad Company, beginning on 4 August, 1913. Started as flagman; didn't have any special run, but was a new man and was put anywhere on the road when they had a vacancy. Didn't remember how many days he had worked from 4 August until 20 October. In August he drew $31 as his wages, and

they paid him anywhere from $1.65 to $2 a day. After September his wages were right at $30, and in October $30. On 20 October he started out with a fellow Brown on a baggage run; Brown was showing him how to handle baggage on a passenger train from Fayetteville to Raleigh, on a Norfolk Southern train. Brown had held the baggage man's position, and was teaching the witness how to be a baggage man. They went to Raleigh, and, on arriving, they set off the passenger coaches and picked up a string of box cars and started back to Fayetteville. There was one passenger car on the train, and the conductor was Fred Jones. Witness was in the passenger coach when the train left Raleigh. Fred Jones, L. P. Brown, and a colored fellow, a brakeman, were in there with him; he did not remember the colored fellow's name. He went out of the passenger coach to a station or two along the road to help unload some stuff and set off some cars.

Plaintiff was then asked the following question:

"Were you subject to the orders of the conductor?" Defendant objected, objection overruled, and defendant excepted. Answer: "Yes, sir; I was." Plaintiff testified further: "Just before they got to Cardenas, Brown himself and a colored brakeman were in the coach, and the conductor said: 'Boys, go across and get ready to unload the freight at this station' (Cardenas). And these fellows started on, and Brown said, 'Come on, Ridge.' So we started out; went on top of the box car. The train was in motion at the time, and the way you cross a box car is to get out of the coach, walk out on the platform, climb the ladder to the top, and then walk on top clear across, if there is nothing to prevent you. There is a walkway on top of the car for the passage of the railroad hands, and there was one on this car. We started across on the top of the car, and there was an oil tank on the train next to this box car, in front of it. We had to go across the box car to get to the oil tank, and these fellows had climbed down the ladder of the box car to get to the oil tank, and I was walking up toward the end where I had to get down, and I noticed some plank jumping up and down on the box car,

but I didn't think anything about that, and I don't remember any-
(514) thing then until I came to myself. I was on the ground bleeding,

with a box car on me. The last I remember was the planks jumping up and down. Then they took me on a freight train, and carried me to some station, and put me in a waiting-room on a cot; and later there was a passenger train that came by, and I remember riding in a passenger coach, or baggage car, to Raleigh." Plaintiff then stated the extent of his injuries, which were quite severe. He further testified that he had never been over that road before, and was being broken into the service as a beginner. It was level country where the injury

occurred. It was not blowing very hard, not so hard that it blew him nearly off the car. The wind was blowing to some extent. It had been blowing all day, but just a little now and then, and not steadily. He did not know whether the wind increased in velocity after he went out of the coach.

F. H. Jones, the conductor, testified in behalf of defendant: "I had trouble in getting over, the wind was blowing so hard. I couldn't hold on, and a time or two I had to grab the running-board and crawl from one car to the other. It was a very hard wind. I did not look to see whether others were coming or not. We were running west at the time. I saw where the top of the car blew off. It was on the right of the railroad track, going west; the left side blew off. The top is made into two parts, with a slight shed on each side so that it will shed the water. Each half is separated from the other in the middle. I do not know how heavy the top is; it looked like pine with tin under it. It tore the tin off. I saw the rafters left on the car, and they looked to be in good condition; saw no defects in the wood or anything of that kind. . . . Ridge was learning to flag the road between Raleigh and Fayetteville. He was along with Brown so that he could learn his duties. There were fifteen box cars on that train; none of the other tops blew off. I do not remember sending Ridge back to flag at tank. I didn't do it; didn't give him any orders at all. I did not send him back to flag at tank right out of Raleigh. There was a very hard wind blowing. I crawled over the car, and walked a little bit until the wind blew so hard that I had to grab the running-board. I walked a step or two at the time, something like that; I did not look back to see the others. Brown was right behind me. Do not know how far the colored man was behind. Do not know whether all four were on the top of the car at the same time or not. The wind was coming from the south. That violent wind was blowing all day, and was harder after we left Raleigh. It was blowing harder at this place where Ridge was blown off than it was in Raleigh. The wind quieted down that afternoon. I do not know how a standard box car is built; I have seen them put together. I know the roof is nailed on; there is a tin lining underneath the wood, which extends all over the top of some cars; I think it did on this car."

There was much evidence pro and con in regard to the velocity (515) of the wind and the condition of the car's top.

R. H. Jones, defendant's witness, testified that the car returned to Raleigh "with the left-hand side blown off and one-half of the roof was gone," and there was evidence that the other cars, fifteen freight cars in all, were not injured. The car in question was loaded with hay.

The court, in its charge, stated the contentions of the parties: the plaintiff's, that the top of the car was defectively constructed or out of repair, and by reason thereof the wind lifted it and threw it and him violently to the ground; and the defendant's, that the car was not defective, but the wind was high and blew plaintiff off, and that it had carefully inspected the car. The court then drew the attention of the jury to the Federal employers' liability act, reading section 1 to them, and charged them to inquire, under the issues, whether defendant had been guilty of negligence in any of the respects mentioned in that section, if they found that it was, at the time, engaged in interstate commerce, and that plaintiff, at the same time, was employed in such commerce, and particularly to inquire if defendant had exercised ordinary care (defining and explaining it) to see that the car was in reasonably safe condition for the use of its hands, if they found that the car was defective and that it was the proximate cause of the injury. If the car was in a defective condition and defendant had not made a reasonable inspection of it; whereas if it had, the defect would have been discovered, and that by reason of the defect, the top was blown off and against the plaintiff, so that he was thrown to the ground and injured, and that the negligence of the defendant in the particulars mentioned was the proximate cause of the said injury, they would answer the first issue "Yes"; otherwise, "No."

The court then fully stated and explained the defendant's evidence and contentions, and then gave this instruction, among others:

"Defendant contends, then, that you should find from the evidence that this was what is known as an unusual and extraordinary wind and that the injury caused the plaintiff, if you find that it was caused by the removal of the car roof, was due to the unusual and extraordinary velocity of the wind, over which the defendant had no control and for which it could not, in the exercise of reasonable care, have provided. If you find from the evidence that on the occasion referred to the wind was unusual and extraordinary, and that the top of the car would not have been displaced and the plaintiff would not have been injured except for such unusual and extraordinary character of the wind; that is to say, if you find that the unusual and extraordinary character of the wind was the proximate cause of the plaintiff's injury, you will answer the first issue 'No.' Now, what is meant by a wind that is unusual and
(516) extraordinary? In the meaning of this instruction, an unusual and extraordinary wind is such as could not reasonably have been anticipated and expected by the defendant in the climate at the season of the year and in the section of the country when and where the injury is alleged to have occurred. Now, applying this definition to the evi-

dence, how do you find? Was this wind an extraordinary wind? Was it a wind which could not reasonably have been anticipated and expected by the defendant at that season of the year, at that place, in that climate, at the time the injury is alleged to have occurred, or was it such wind that the defendant might reasonably have anticipated and expected? These are questions, gentlemen, for you to determine from the evidence. The defendant contends that it was unusual and extraordinary. Plaintiff contends that it was not."

The court then correctly instructed the jury as to the other issues. The jury returned this verdict:

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

2. Was the plaintiff, at the time of the alleged injury, employed by the defendant in interstate commerce? Answer: "Yes" (by consent).

3. What damages, if any, is plaintiff entitled to recover? Answer: "$4,750."

Judgment was entered therein, and after duly reserving its exceptions, the defendant brought the case here by appeal, and assigned the following errors:

1. That the court erred in refusing to nonsuit the plaintiff when plaintiff rested and closed all the evidence, as set out in defendant's exceptions Nos. 4 and 5.

2. That the court erred in charging the jury, as set out in defendant's exception No. 6, which is as follows: "If you find from the evidence that the defendant engaged the plaintiff to take Brown's place as flagman on its train on Tuesday morning, 21 October, and engaged him on the day preceding, Monday, 20 October, to go on its train from Fayetteville to Raleigh, and from Raleigh back to Fayetteville, in order to learn the road or to become more familiar with the duties that would be required of him as flagman, before undertaking in fact to perform these duties, and it became necessary for the plaintiff in doing the service required of him on Monday to walk on top of the car in front of the caboose, you will then find that it was the duty of the defendant to use ordinary and reasonable care to see that the top of the car was in a reasonably safe and suitable condition for this use, and, in the exercise of such care, to examine or inspect the car from time to time with a view to knowing its condition; and if you find that the defendant failed to exercise such care, you will then find that it was negligent."

3. That the court erred in giving that portion of the charge as (517) set out in exception No. 7, which is as follows: "And if you further find from the evidence that the top of the car on which the plaintiff was required to walk was not in a reasonably safe condition,

and that when the plaintiff, in the performance of the duty required of him at that time, was walking on the top of the car, the left side of the car was blown from its position against the plaintiff, and that the plaintiff was thereby thrown to the ground and injured, and that the defendant's negligence was the direct and proximate cause of the injury, you will answer the first issue 'Yes.' If you do not find these to be the facts, you will answer it 'No.'"

The motion to nonsuit makes this statement necessary, though it is only a small portion of the evidence, which is very voluminous.

*Hammer & Kelly for plaintiff.*

*J. T. Brittain, W. B. Rodman, and J. A. Spence for defendant.*

WALKER, J., after stating the case: The counsel of defendant, in their argument before us, and also in their brief, laid great stress upon the position that there was no evidence that the car from which the plaintiff fell was defective, and for this reason the instructions of the court, to which they had excepted, were unwarranted and erroneous, and not that they did not state correctly the legal principle applicable to the case, if there had been such evidence. Defendant also moved to nonsuit for the same reason. We agree with them that it is necessary, in all cases, that there should be evidence from which the jury might reasonably and properly infer that there was negligence (*Wittkowsky v. Wasson,* 71 N. C., 451; *Byrd v. Express Co.,* 139 N. C., 273; *Crenshaw v. Street Railway Co.,* 144 N. C., 320), but we do not concur in the statement that there is no such evidence of negligence in this case. If we were permitted to restrict our inquiry to the evidence introduced by the defendant, we might assent to the conclusion of the learned counsel; but we are required to examine both sides of the case—to hear and consider what each has said about the tragedy. They stoutly resist the plaintiff's assertion that the doctrine, *res ipsa loquitur,* applies to the case; but we think it does.

The undisputed facts, in this connection, are these: There were at least fifteen box cars in the train, and a caboose, from which the men started when ordered to make themselves ready for loading and unloading at Cardenas, the next stopping place. There is no evidence that the roof of any of those fifteen cars were blown off by the wind except the one in question, on which plaintiff was standing at the time he was carried away, with the roof of the car, by the wind, to the ground,
(518) the roof falling from left to right. It was the roof that struck the plaintiff, after being torn by the wind from its fastenings, and forced him to the ground.

Plaintiff testified that the velocity of the wind at the time he was blown off was so slight that he could stand on top of the car without difficulty. When the top of a box car blows off under these circumstances, the conclusion is quite irresistible that the top was defectively constructed. The eaves of a box car project only a few inches from the body of the car, and the pressure of the wind against the eaves would not be as great as against a man standing on top of the car.

These facts alone make a stronger case for the application of the doctrine of *res ipsa loquitur* than any of the cases in which our Court has recognized the doctrine.

This maxim of the law, *res ipsa loquitur,* extends no further in its application to cases of negligence than to require the case to be submitted to the jury upon the face of the evidence as affording some proof of the fact in issue. The jury are not bound to decide accordingly; but if they think proper to do so, when applying their reason and common sense to the case, they may reject the conclusion that there was negligence and ascribe the injury to some other cause. It merely carries the case to the jury for their consideration, and is bottomed upon this logical principle, as decided in many cases: When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the control of it use the proper care, it furnishes evidence, in the absence of explanation by the defendant, that the accident arose from want of care. *Ellis v. R. R.,* 24 N. C., 138; *Aycock v. R. R.,* 89 N. C., 321; *Stewart v. Carpet Co.,* 138 N. C., 60, and *Womble v. Grocery Co.,* 135 N. C., 474 (elevator cases); *Ross v. Cotton Mill,* 140 N. C., 115, and *Morrisett v. Mills,* 151 N. C., 31 (sudden and unexpected starting of machines); *Haynes v. Gas Co.,* 114 N. C., 203, and *Turner v. Power Co.,* 154 N. C., 131 (loose or unguarded wires charged with electricity); *Fitzgerald v. R. R.,* 141 N. C., 530 (where a piece of coal fell from the tender); *Knott v. R. R.,* 142 N. C., 242 (where sparks flew from the engine, as in the *Aycock case*); and numerous other like cases which the present *Chief Justice* has collected in a note to the *Aycock case,* 89 N. C. (Anno. Ed.), at marg. p. 331.

The doctrine and its limitations are well settled by our own decisions, and they have been recently approved by the highest of the Federal courts in *Sweeney v. Erving,* 228 U. S., 233, where the Court substantially states the rule as follows:

"In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking; but it is evidence to (519)

be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they may make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur,* where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff. Such, we think, is the view generally taken of the matter in well considered judicial opinions"; and the Court, after citing many authorities, then quotes this passage from *Stewart v. Carpet Co., supra:* "The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor. Whether the defendant introduces evidence or not, the plaintiff in this case will not be entitled to a verdict unless he satisfies the jury by the preponderance of the evidence that his injuries were caused by a defect in the elevator, attributable to the defendant's negligence. The law attaches no special weight, as proof, to the fact of an accident, but simply holds it to be sufficient for the consideration of the jury, even in the absence of any additional evidence."

There is a most exhaustive and valuable note upon this question to be found at the foot of *Cincinnati Traction Co. v. Holzenkamp,* 113 Am. St. Rep., at p. 980 *et seq.*

In Whitaker's Smith on Negligence, at p. 422, which is quoted with approval in the *Haynes case,* at p. 208, it is said: "If the accident is connected with the defendant, the question whether the phrase, *'res ipsa loquitur,'* applies or not becomes a simple one of common sense." Ray on Neglect of Imposed Duties, 423; Wood on Railroad Law, 1079.

Now, let us apply the principle, as thus recognized by the courts, to the facts of this case. The car in question was certainly under the management of defendant. As was said of the coal dropping in *Fitzgerald's case,* so it may be said in this case, that the top of a box car, properly constructed, does not blow off "in the ordinary course of things," when the velocity of the wind is not so great that a conductor and a brakeman can walk across without serious difficulty. In *Freeland v. R. R.,* 146 N. C., 266, it was held to be negligence for a railroad company not to provide a walkway on top of a box car. Does a railroad company fulfill this legal duty by furnishing a walkway so rotten or otherwise defective that a slight wind will blow it off? Assuredly not. The doctrine of *res ipsa loquitur* is, to some extent, founded upon the fact that the chief evidence as to the true cause of the injury, whether culpable or innocent, is practically accessible to the party charged and perhaps inaccesible to the party injured. Can a case be supposed in which the evidence of the "true cause" of the injury would be more exclusively within the

knowledge of the defendant than in this one? The doctrine is (520) not confined to injuries caused by the failure of mechanical appliances or machines, as is decided in *Fitzgerald's case, supra,* and several of the cases heretofore cited are authority for the proposition that the doctrine applies to a servant's action against his master for negligent injury.

Some text-writers state that the Supreme Court of the United States does not recognize this doctrine in actions between master and servant, and the case of *Patton v. T. P. and R. Co.,* 179 U. S., 658, is cited as authority for this contention. The reference in the opinion to this doctrine is *obiter,* as will be seen by a careful consideration of the facts in that case. But even if the Court did so hold in that case, the reason for depriving a plaintiff of the benefit of the doctrine, when the plaintiff happens to be a servant of the defendant, no longer exists. Those cases which deny the applicability of the doctrine in an action by a servant against his master proceed upon the theory that the injury may be referred to the negligence of a fellow-servant, or to contributory negligence of the plaintiff, with just as much reason as to the negligence of the master. Under the employers' liability act the defense of the fellow-servant doctrine is excluded, as is that of contributory negligence to some extent; hence the reason for the law, as thus stated, having ceased, the rule ceases.

In the recent case of *Sweeney v. Erving,* 228 U. S., 233, already cited by us, the doctrine of *res ipsa loquitur* is recognized by the Supreme Court of the United States in an action for damages for personal injuries brought by a patient against a physician in the use of the X-ray, and the question of contributory negligence might become involved in such a case.

The fact that the plaintiff was along for the purpose of learning the road would place upon the defendant the duty of observing a higher degree of care with regard to plaintiff than with respect to a regular servant. He had no duties to perform on this return trip that would in any wise acquaint him with the condition of the cars, because he had none to perform at all, except when ordered to perform some specific duty by the conductor, as he was "subject to the orders of the conductor." Every argument that can be advanced for applying the doctrine, when plaintiff is a passenger, applies with equal force for the recognition of the doctrine in this case.

But in this case it is not necessary for plaintiff to invoke the aid of this doctrine. There is ample proof of positive negligence from both plaintiff's and defendant's witnesses. The motion to nonsuit was made at the close of all the evidence; hence all the evidence will be construed

in the light most favorable to plaintiff. *Parlier v. R. R.*, 129 N. C., 262.

We cannot decide upon the nonsuit by selecting portions of the
(521) evidence which appear to favor the defendant. *Poe v. Tel. Co.*, 160 N. C., 315; *Dail v. Taylor*, 151 N. C., 289; *Hamilton v. Lumber Co.*, 156 N. C., 523.

Plaintiff testifies that before he was thrown off he observed the planks of the roof "jumping up and down." This proves that the planks were not nailed to the rafters as clearly as if he had sworn directly to that fact. If they were not nailed, this fact would have been readily disclosed by inspection. If this were all the evidence, the plaintiff, it would appear, has established negligence by direct and positive proof; but the evidence is still stronger. It had been ten days since this car had been inspected. Defendants do not explain where the car was; they merely show its arrival in Raleigh on 10 October, loaded with hay for Fayetteville, and its inspection, and that is all. Is it not a question for the jury to say whether or not the car should have been inspected within less than ten days before its departure for Fayetteville? Again, the defendant had a car inspector at Fayetteville, named Cameron, and the car was carried on to Fayetteville after the injury. Cameron was not introduced as a witness. He could have described the condition of the car after the injury and thus have aided the jury in fixing the cause of the injury, as defendant attempted to do by others. The jury was justified in drawing inferences unfavorable to defendant from its failure to use him as a witness. This car was P. and R., No. 2930. P. and R. means Philadelphia and Reading—one of the oldest railroads in the country—and the low number, 2930, may indicate that it was an old car. Conductor Jones says that it was not new. The defendant was under a duty to inspect this car with reasonable care and such frequency, owing to its age, as to keep posted regarding its condition. The testimony of Jones is inconsistent with defendant's theory that the injury was due to a wind of extraordinary violence. He testified that there were fifteen cars in the train; that the top of the one in question was the only one to blow off; that underneath the pine plank forming the roof there was a tin lining which did not project out even with the eaves, but was folded back so that the wind could not get under it; yet this tin lining was blown off, showing that it was not fastened, because the most violent wind could hardly have moved the tin lining if properly fastened.

There is another aspect of the case which justified its submission to the jury. Defendant's pleadings and proof were both to the effect that plaintiff was along on the freight run for the purpose merely of learning the road. Plaintiff alleges that defendant was negligent, *inter alia*, in that it "allowed and ordered plaintiff to walk over the top of said car

while in motion." If plaintiff was along for the sole purpose of learning the road, it was grossly negligent in the conductor to order him to walk over the car at a time when the conductor himself testifies it was dangerous to do so. The conductor was only a few feet in front of the plaintiff, and it would have been a reasonable inference by (522) the jury that he observed the plank of the roof "jumping up and down," yet he did not warn plaintiff. Defendant is not bound by his statement that he did not, as he had the opportunity of doing so. He testified that the wind was so violent that he had to hold to the running-board to prevent being blown off; yet he orders plaintiff, an inexperienced youth, who was there to learn the road, to cross over under these circumstances. Plaintiff testifies that he was expressly ordered by the conductor to go across the top of the car.

It was the plain duty of the defendant to have made a reasonable inspection of this car, even though it was a foreign car or one belonging to another road. Any other rule would expose its employees to great hazards. We have held that the failure to properly inspect such a car is negligence, and if damage ensue therefrom, it is culpable or actionable negligence (*Leak v. R. R.*, 124 N. C., 455); and the same principle was recognized and applied in *B. and O. R. R. v. Mackey,* 157 U. S., 72. The inspection must not only be made, but it must be done with due care. *Leak v. R. R., supra; Sheedy v. C. M. and St. Paul R. R.*, 55 Minn., 357.

There were facts in evidence from which the jury might reasonably have found that either no inspection had been made, or, if made, that it was carelessly done, and the defective condition of this car was, therefore, overlooked. The car in question was received by defendant at Raleigh on 10 October; it remained in its charge until the day of the injury, 20 October. Why it held this loaded car on its yard for ten days is unexplained; but, at all events, defendant had abundant opportunity for inspection. Defendant kept an inspector at Raleigh. The roof of this car is seen "jumping up and down," *i. e.,* loose, unnailed, only 16 miles from Raleigh, less than an hour's run. Is the conclusion not reasonable that the roof was in this condition when it left Raleigh? Nothing had happened, so far as the evidence discloses, between Raleigh and the place of injury, that should have caused the roof to get into this condition. A roof would not become defective in this way instantaneously from ordinary wear and tear. This case is not like the one of a latent defect in a car wheel or an iron brake, or an undiscoverable flaw in material, on account of which the defendant might be held blameless.

In *Mich. Central Ry. v. Townsend,* 114 Fed., 741, a brakeman fell from the top of a box car by reason of a defective running-board. The Court held that the jury was warranted in inferring that the master

knew of the defect (a loose brace), from the fact that it was seen hanging loose after the injury. The facts of the case at bar create a much stronger presumption of the master's knowledge, as will be seen by a comparison of the two cases, because the defective roof was seen by plaintiff and could have been seen by defendant before the (523) accident.

There are only two possible explanations for this injury, towit: (1) That the roof was defective, causing it, under the impact of an ordinary wind, to be thrown against plaintiff, thereby knocking him off the car, or (2) that the roof was not defective, and that a whirlwind of extraordinary violence blew the top off the car and carried plaintiff along with it. The plaintiff was entitled to recover in either event. If the roof was defective, it was a defect that should and would have been discovered by inspection before the car left Raleigh, as heretofore explained. If the roof was not defective, then the proximate cause of the injury was the violent wind, and the conductor having ordered plaintiff to cross over the car at a time when a wind of this violence was blowing, was guilty of negligence, or, to speak more accurately, the jury might have so found. If this explanation be accepted as correct, it cannot be said that this injury was due to the act of God, or to the *vis major*, which defendant could not successfully resist or overcome, because the wind did not arise after they had started across the car, but was blowing before they started, with equal violence. So we have, according to this view of the case, an order given plaintiff by one whom he was bound to obey, that he should expose himself to the peril of this violent whirlwind, and as a proximate result of his obedience of this order it blows both the car top and the plaintiff off the car. It was actionable negligence to give such an order under these circumstances. *Shadd v. R. R.*, 116 N. C., 968. Did the conductor give the order? Ridge's testimony is capable of no other construction. Conductor Jones states that he saw Ridge coming on behind him. Brown repeats the order in the presence of the conductor.

As to the general doctrine of *res ipsa loquitur*, in its application between master and servant, the following cases may profitably be consulted: *Parussi v. Railway*, 155 Fed. Rep., 654 (affirmed in 161 Fed. Rep., 66); *Byers v. Carnegie Steel Co.*, 159 Fed. Rep., 347.

The fact that the accident is of such a kind that it does not ordinarily occur if proper care is used, raises a *prima facie* case of negligence, nothing else appearing, and we can see no valid reason why it should not apply to master and servant, as to other relations. If there are special circumstances that take the case out of the operation of the rule, they are easily susceptible of proof by the defendant, who is in control of

the situation. But we are proceeding under the Federal employers' liability act, which has abolished the defense of "fellow-servant," as our statute has done (Revisal, sec. 2646, and Laws of 1913, ch. 6), and also the defense of contributory negligence, which now goes to the proportionate diminution of the damages, if it is present in the particular case. At any rate, and however the law may be with respect to other circumstances of a kind differing from those appearing in this record, we hold it applies here, and that, in addition, there is (524) ample evidence of culpable negligence, apart from the applicability of that doctrine.

When a string of fifteen cars pass through a windstorm and only one of them is unroofed, it naturally leads us to inquire, What was the cause for this exception? And, too, we naturally answer: Well, there must have been something wrong with that particular car; its roof was weak or poorly fastened or braced to its sides, or there was some other defect in the roof, which caused it to give way to the force and pressure of the wind and fall to the ground, taking the plaintiff with it. There was a like query in *Haynes v. Gas Co., supra,* and a similar answer, holding the company liable for the death of the child from handling a loose wire, highly charged with electricity, and dangling from one of its poles in the street.

This case, in principle, is not unlike that of *Means v. R. R.,* 124 N. C., 574. The negligence alleged there was that the train had several box cars, and one or two flat cars which were next to the engine, and a coach or caboose. The train had no conductor, but the engineer served in the double capacity of conductor and engineer, and in order to discharge his duties as such, he was accustomed to order the intestate, one of the train hands, to collect the tickets in the coach or caboose from the passengers and bring them to him, over the moving train. While doing so on one occasion, intestate fell from a flat car—how or why did not clearly appear—and was killed. The Court held that the defendant should not have required such perilous service to be performed by the intestate, for the sake of economy in operating its train, but that it should have had a conductor, and whether its failure to have one was the proximate cause of the death was a question for the jury. The only difference between that case and this is not unfavorable to the plaintiff. There the failure to have a conductor was the negligent act, and here the failure to have a car with a sound or proper roof is the negligence charged; but this dissimilarity of quality in the particular negligence charged against defendant should not be allowed to differentiate the two cases in principle. But this case is stronger for the plaintiff upon its facts than was that case for the plaintiff there. Here the plaintiff was required to do a dangerous

service by walking over a moving train, as in *Means' case,* but the peril was greatly increased by the defective condition of the foreign car, over which he had to pass, and the then known fact that a high wind was prevailing, which even with a perfect car, as the conductor said, made it risky to venture thereon during the prevalence of the wind. He had to catch hold of the running-board to steady and save himself. In any view we can take of the case upon the conceded facts, the negligence of defendant is unquestionable.

(525) Where there are two causes coöperating to produce an injury, one of which is attributable to defendant's negligence, the latter becomes liable, if together they are the proximate cause of the injury, or if defendant's negligence is such proximate cause. We discussed this question fully and exhaustively in the recent case (at this term) of *Steele v. Grant,* 166 N. C., 635. Where the master's negligence contributes to the result, although there may be a coöperating cause not due to the servant's act, the law will not undertake to apportion the liability, but will hold him responsible to the servant in the same degree and with the same consequences as if his negligence had been the sole cause of the injury. *Steele v. Grant, supra; Wade v. Contracting Co.,* 149 N. C., 177. As said in the oft-cited case of *Kellogg v. R. R.,* 94 U. S., 469, 475, "The inquiry must, therefore, always be whether there was any intermediate cause *disconnected from* the primary fault, and *self-operating,* which produced the injury." In this case there was no intermediate, or intervening, independent and efficient cause, which, operating alone, was sufficient of itself to break the connection between defendant's negligence and the injury, and the primary wrong must be considered as reaching from the beginning to the effect, and, therefore, as proximate to it. *Hardy v. Lumber Co.,* 160 N. C., at pp. 124, 125; *Kellogg v. R. R., supra; Ins. Co. v. Boon,* 95 U. S., 619. The windstorm would not, of itself, have caused the injury, as the testimony shows, when viewed favorably for the plaintiff; but it required the concurrence and coöperation of the defendant's negligence in having a defective car to produce the disastrous result. Judge Cooley thus states the rule, which applies to our facts: "If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." Cooley on

Torts (Ed. of 1879), p. 69. And this seems to accord with the *Kellogg case, supra.*

But we will consider this question further with reference to the duty of defendant to its employee. The rule deducible from the authorities is that the measure of care against accident which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own. *The Nitro-glycerine case,* 16 Wall. (U. S.), 524 (21 L. Ed., 206). And ordinary diligence or care is such as a man of ordinary prudence and intelligence will generally use under like circumstances, the standard of comparison being the ordinary man. (526) *C. I. Co. v. Stead,* 95 U. S., 161; *Texas, etc., R. Co. v. Behmyer,* 189 U. S., 468; *Union Ins. Co. v. Smith,* 124 U. S., 405. It is now generally conceded that there is no classification of negligence with respect to the degree of care required in any given case, as being slight, ordinary, and gross, as such a distinction can serve no practical purpose and is often very misleading. *Steamboat New World v. King,* 16 How. (U. S.), 469, 475; *Milwaukee, etc., R. Co. v. Arms,* 91 U. S., 489; 8 Enc. of U. S. S. C. Reports, pp. 878, 879, and notes. The requisite degree of care to be employed is that which is suited to the particular transaction being investigated, and reasonably commensurate with its circumstances and surroundings, that being supposed to be the care which any man of ordinary prudence will use, as dictated to him by a natural sense of his own protection and safety, if his personal rights were involved. Under this principle it was a duty owing to the plaintiff by the defendant that the latter furnish him with a reasonably safe working place, which in this case would be a car with a roof so constructed and kept in order or in reasonably safe and good condition for him to perform his duties with safety—not that defendant was required to insure or guarantee his safety, but to exercise due care in seeing that he is not unnecessarily imperiled or subjected to unusual dangers. *Marks v. Cotton Mills,* 135 N. C., 287. There was evidence that the defendant did not perform this duty, and the next question is, Was it the proximate cause of the injuries received by the plaintiff? On this question the language of *Justice Miller* in *Ins. Co. v. Tweed,* 74 U. S. (7 Wall.), at p. 52, is directly pertinent: "That the explosion was in some sense the cause of the fire is not denied, but it is claimed that its relation was too remote to bring the case within the exception of the policy. And we have had cited to us a general review of the doctrine of proximate and remote causes as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them

the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations. One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. In the present case we think there is no such new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning. Nor can the accidental circumstance that (527) the wind was blowing in a direction to favor the progress of the fire towards the warehouse be considered a new cause." See, also, *Ins. Co. v. Boon,* 95 U. S., 117, and *Brady v. Ins. Co.,* 11 Mich., 42, where proximate cause is defined to be, "That which is the actual cause of the loss, whether operating directly or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed." The case of *Milwaukee, etc., R. Co. v. Kellogg,* 94 U. S., 469 (24 L. Ed., 256), is also directly applicable, as in that case it appeared that the fire had been carried by a wind from the point of its origin to the property which was destroyed, and it was held to be proper that the question should be submitted to the jury to determine if the first act of negligence causing the fire was not the proximate cause of the destruction of the property which was burned. The jury so found, and the judgment upon the verdict was affirmed. The same Court held, in *G. T. R. Co. v. Cummings,* 106 U. S., 700 (27 L. Ed., 266), that "If the negligence of the railroad company (towards its employee, who was injured while performing his regular duties) contributed to, that is to say, had a share in producing the injury, the company was liable therefor," even though another cause intervened which united with such negligence in causing the injury, for which cause the company was not responsible. *Chief Justice Waite* said further: "If the negligence of the company contributed to it, it must necessarily have been an immediate cause of the accident, and it is no defense that another was likewise guilty of wrong." We have referred liberally to the decisions of that honorable Court because this is a case arising under a Federal statute, relating to the liability of employers engaged in interstate commerce. But the same views will be found expressed in our own books and those of our neighbors in the other States, and they seem to be practically of universal acceptance.

The recent decision in *Ferebee v. R. R.*, 163 N. C., 351, at p. 354, seems to cover this case completely. *Justice Hoke* there says: "It was urged for defendant that the evidence tending to show the prevalence of an unusual windstorm on the night in question has not been allowed its proper weight; but, on the facts in evidence, the position cannot avail the defendant. The negligent placing of the boxes having been accepted as the proximate cause of the injury, or one of them, the defendant is not relieved, though an unexpected or unusual storm should have contributed also to the result. . . . 'Inevitable accident is a broader term than an act of God. That implies the intervention of some cause not of human origin and not controllable by human power. An accident is inevitable if the person by whom it occurs neither has nor is legally bound to have sufficient power to avoid it or prevent its injuring another. In such a case the essential element of a legal duty is (528) wanting, and it cannot, therefore, be a case of negligence.' . . . 'When an act of God or an accident combines or concurs with the negligence of the defendant to produce the injury, or when any other efficient cause so combines or concurs, the defendant is liable if the injury would not have resulted but for his own negligent act or omission' "; citing and quoting from Sh. and Redf. on Negligence (6 Ed.), sec. 16.

There are some questions of evidence in the appeal. The opinion of the expert, Dr. Hunter, was not subject to the ground of objection stated by defendant's counsel. It is restricted in this Court to the reason given below for its objection (*Presnell v. Garrison*, 122 N. C., 595), which was that there was no evidence that plaintiff's vertebra was crushed. But Dr. Heartt testified that it was, and this was the statement of a fact and not merely the expression of an opinion. It was competent for the doctors to state what effect, if any, in their opinion, the broken vertebra would have upon their patient's physical and mental condition, as we think. *Summerlin v. R. R.*, 133 N. C., 551; *Alley v. Pipe Co.*, 159 N. C., 327, and especially *Mule Co. v. R. R.*, 160 N. C., 252. The defendant's own witness, Dr. Burrus, substantially testified to the same thing. *Albert v. Ins. Co.*, 122 N. C., 92. As to defendant's second assignment of error, it was competent, on the question of damages, for the plaintiff to testify as to his trade or business and his proficiency therein, and how the injury had reduced his earning capacity. *Rushing v. R. R.*, 149 N. C., 158.

We have been greatly aided in this case by the able arguments and briefs of counsel on both sides. Mr. Kelly has satisfied us, by his clear statement of the facts and the law and the citation of authorities, backed by his strong and lucid oral argument, that the views we have expressed are the correct ones and applicable to this case.

Upon a careful review of the whole case, we have concluded that there was no error committed at the trial of the cause. The rulings of the court upon evidence and the motion to nonsuit were correct, and the principles of law applicable to the facts were stated and explained to the jury by the court, in its charge, with great clearness and precision.

No error.

*Cited: Shaw v. Public-Service Corp.*, 168 N.C. 616 (4c); *Cochran v. Mills Co.*, 169 N.C. 63 (2c); *Hardister v. Richardson*, 169 N.C. 189 (2c); *Horne v. R.R.*, 170 N.C. 654 (1j); *Dunn v. Lumber Co.*, 172 N.C. 134 (2c); *Gallup v. Rozier*, 172 N.C. 288 (4c); *Orr v. Rumbough*, 172 N.C. 759 (2l); *Harris v. R.R.*, 173 N.C. 112 (9c, 11c); *Howard v. Oil Co.*, 174 N.C. 653 (7c); *Mumpower v. R.R.*, 174 N.C. 744 (11c); *Mirror Co. v. R.R.*, 176 N.C. 400 (11c); *Kirkpatrick v. Crutchfield*, 178 N.C. 351 (15c); *Lamb v. R.R.*, 179 N.C. 622, 623 (2c, 4c, 6q); *Davis v. Shipbuilding Co.*, 180 N.C. 76 (7c); *Page v. Mfg. Co.*, 180 N.C. 334 (4c); *Newton v. Texas Co.*, 180 N.C. 564, 565 (11c); *Tatham v. Mfg. Co.*, 180 N.C. 629 (11c); *Comrs. v. Jennings*, 181 N.C. 399 (11c); *Saunders v. R.R.*, 185 N.C. 290 (2d); *Shaw v. Handle Co.*, 188 N.C. 238 (8c); *Paderick v. Lumber Co.*, 190 N.C. 312 (13c); *Wimberly v. R.R.*, 190 N.C. 447 (7c); *Robinson v. Ivey*, 193 N.C. 812 (7c); *Butler v. Fertilizer Works*, 195 N.C. 412 (14c); *Ramsey v. Power Co.*, 195 N.C. 791 (2c, 4c); *Smith v. Ritch*, 196 N.C. 76 (7c); *O'Brien v. Parks Cramer Co.*, 196 N.C. 365 (2c); *Watson v. Construction Co.*, 197 N.C. 592 (12c); *Hamilton v. R.R.*, 200 N.C. 558 (2c); *Pendergraft v. Royster*, 203 N.C. 394 (2c); *Fox v. Army Store*, 216 N.C. 470 (15c); *Helmstetler v. Power Co.*, 224 N.C. 824 (15c); *Thomas v. Motor Lines*, 230 N.C. 130 (4c); *Spivey v. Newman*, 232 N.C. 284 (14c).

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## A. B. WILLIAMS v. S. C. PARSONS AND H. O. PARSONS.

(Filed 23 December, 1914.)

**1. Timber Deeds—Realty—Incidents of Timber Interests.**

A conveyance of timber growing upon lands, as ordinarily drawn, conveys a fee-simple interest in such timber, is realty, and determinable as to all such timber not cut and removed within the time specified in the deed; and while such estate exists it is clothed with the same attributes and subject to the same laws of devolution and transfer as other interests in realty.

**2. Same—Judicial Sales—Interference by Owner of Land—Damages—Evidence—Profits.**

The interest of a grantee in a timber deed is subject to execution and sale under a judgment obtained against him by his creditor, and the purchaser at such sale has the right to cut and remove the timber upon the terms and conditions and within the period specified in the deed; and in an action to recover damages against the owner of the lands for interfering with this right, it is competent for the purchaser to show by his evidence that he could have cut the whole or the greater part of the timber within the remaining period allowed under the terms and conditions of the timber deed, had not the defendant by his acts, threats, and other conduct wrongfully prevented him, and recovery may be had for the profits of all the timber which he might have cut and removed within the time, except for the acts of the defendant, using the means then at hand or reasonably available to him.

**3. Timber Deed—Judicial Sales—Time for Cutting, Etc. — Expiration — Ejectment—Injunction.**

Where the rights of a purchaser at a judicial sale of the interest of a grantee in a conveyance of standing timber has been wrongfully interfered with by the owner of the land, and the time for cutting and removing the timber under the terms of the deed has expired, relief by ejectment or mandatory injunction is not available.

**4. Deeds and Conveyances—Timber Deeds—Adverse Possession—Admitted Into Possession—Possessory Action.**

*Semble*, the possession of land by the owner is not regarded as adverse to the claim of a vendee of the timber growing thereon, under a separate deed, or to a purchaser of his title to the timber at an execution sale thereof, nothing else appearing; and under the circumstances of this case, it appearing that the purchaser at the execution sale was admitted into the possession by the owner of the lands, and thereafter was prevented by the owner of the lands from exercising his rights under his timber deed, it is held that the position is not available to the owner of the lands that his possession put the purchaser to his action therefor.

APPEAL by plaintiff from *Webb, J.*, at March Term, 1914, of WILKES.

Civil action to enforce the enjoyment of an estate in standing timber claimed by plaintiff on the land of S. C. Parsons and for damages for wrongful interference with same.

Defendant denied liability and set up a counterclaim against (530) plaintiff for wrongfully cutting a part of the timber.

On issues submitted, the jury rendered the following verdict:

1. Did the defendant S. C. Parsons unlawfully and willfully prevent the plaintiffs from cutting and removing the timber from the land in dispute, as alleged in the complaint? Answer: "No."

2. And if so, what damage, if any, is the plaintiff entitled to recover of the defendant S. C. Parsons? Answer: "Nothing."

3. Did the plaintiff A. B. Williams unlawfully and willfully enter upon the lands in controversy and cut and remove the timber from same, as alleged in answer? Answer: "No."

4. And if so, what damages is the defendant S. C. Parsons entitled to recover? Answer: "Nothing."

The verdict as stated was rendered under a charge of the court that if the jury believed the evidence they would answer the first issue "No" and second issue "Nothing."

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

*Hackett & Gilreath for plaintiff.*

*T. C. Bowie for defendant.*

HOKE, J. On the trial there was evidence offered tending to show that S. C. Parsons, who owned the land, in 1904 conveyed the standing timber thereon of specified kind and dimensions to H. O. Parsons, and he, in 1906, conveyed the same to W. S. Morrison, giving the right to cut and remove the timber for five years or until 5 July, 1911; in December, 1906, A. B. Williams & Co. obtained a judgment against W. S. Morrison and same was duly docketed in Wilkes County, January, 1907, and was revived by order of clerk, 28 March, 1911; that in May, 1911, pursuant to levy duly made, the sheriff of Wilkes County sold said interest and estate of W. S. Morrison and conveyed same by deed to plaintiff. There are also facts in evidence tending to show that in August or September, 1906, before the docketing of plaintiff's judgment, W. S. Morrison had executed a mortgage on said land to the International Supply Company, and that, subsequent to the docketing of plaintiff's judgment, both this company and W. S. Morrison, by separate deeds, had conveyed all their right, title, and interests in the timber to John F. Stone *et al.*, trustees, the International Harvester Company having assigned the mortgage and also executed a conveyance of their interest in the property to said Stone in 1909.

The rights, legal and equitable, if any, of John F. Stone are not presented in the record, and, as the judgment under which plaintiff purchased, docketed in 1906, constituted a valid lien on the equity of
(531) redemption of W. S. Morrison in this timber, the case is presented as between the purchaser of that interest and S. C. Parsons, the owner of the land, subject to the rights existent under these timber deeds.

Plaintiff, then, holding or claiming title under the sheriff's deed, offered evidence to show that, in May, 1911, he hired some hands, who commenced cutting the timber; that defendant S. C. Parsons at first

made no objection, but showed plaintiff the boundary lines of the property, saying he would "neither tell plaintiff to go on or keep off," but that a few days later he commenced interfering with the work, and by threats and indictments, etc., he so harassed and intimidated plaintiff's hands that plaintiff could not induce them to go on with the work nor get others to take their place, and was prevented from cutting the timber or exercising his right thereunder until his time expired by the limitations of his deed; that he could have cut the whole or greater part of the timber if he had not been wrongfully interfered with by defendant before the limitations contained in the deeds would have expired, which was in July following.

These facts, if accepted by the jury, permit the inference that the legal rights and interests of plaintiff in this timber have been wrongfully interfered with by defendant, causing substantial damages to same—an injury which may result in the entire loss of his estate and giving a right to recover for the whole or a part of the amount, as the facts may disclose.

We have held in numerous cases that these deeds for standing timber, as ordinarily drawn, convey a fee-simple interest in such timber as realty, determinable as to all such timber as is not cut and removed within the time specified in the deed, and that, while such estate exists, it is clothed with the same attributes and subject to the same laws of devolution and transfer as other interests in realty. *Bateman v. Lumber Co.*, 154 N. C., 248; *Hornthal v. Howcott*, 154 N. C., 229; *Midgette v. Grubbs*, 145 N. C., 88; *Lumber Co. v. Corey*, 140 N. C., 467; *Hawkins v. Lumber Co.*, 139 N. C., 160. This being true, we now see no reason why the sheriff's deed did not convey to plaintiff the interest of W. S. Morrison, at least the equity of redemption existent at the time the judgment was docketed, in January, 1907, and giving him the present right to enter and cut the timber for the remaining period of time as against every one whose interests are now before the court. *Mayo v. Staten*, 137 N. C., 670; Revisal 1905, sec. 629.

At the time of his entry in May, he had still the right to enter and cut for a month and seven days, until 5 July, 1911, and if such interest has been wrongfully interfered with by defendant, giving him a right to legal redress, he may recover for the damages done attributable to defendant's wrong.

The estate having expired by limitation on the facts as pre- (532) sented, relief by ejectment or mandatory injunction may not now be open to him; but he is entitled to the present pecuniary value of his interest, and may recover, in any event, for the profits of all timber which he might have cut and removed within the time, using the means then at hand or reasonably available to him. *McEllwee v. Blackwell*, 94 N. C.,

261; *Haskins v. Royster,* 70 N. C., 601; *Carew v. Rutherford,* 106 Mass., pp. 10 and 11; 1 Comyn's Digest, p. 272.

In *Haskins' case, supra, Rodman, J.,* quotes with approval from Comyn's Digest as follows: "Action on the case, A, p. 272: In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." And in *Carew's case, Chapman, C. J.,* cites with approval Bacon's Abridgment, Actions in the case, E: "If A, being a mason and using to sell stones, is possessed of a certain stone pit, and B, intruding to discredit it and deprive him of the profits of his said mine, imposes so great threats upon his workmen and disturbs all comers, threatening to maim and vex them with suits if they buy stones, so that some desist from working and others from buying, A shall have an action on the case against B, for the profit of his mine is thereby impaired." And further: "The illustrations given, in formal terms, relate to such methods of doing injury to others as were then practiced and to the kinds of remedy then existing; but if new methods of doing injury are invented in modern times, the same principles must be applied to them in order that peaceable citizens may be protected in the enjoyment of their rights and privileges and existing forms of remedy must be used."

It is urged for defendant that plaintiff, a purchaser at execution sale, is required to first assert his claim by action; the possession of defendant being regarded as adverse. There is doubt if the principle applies to a case like the present, where a separate interest has been created by deed conveying timber, as there is no reason why the occupation of one is not consistent with possession by the other. (*Jefferson v. Lumber Co.,* 165 N. C., 46); but if the position be conceded, it may not avail the defendant here, as the testimony shows plaintiff was in the possession and enjoyment of his right when he was interfered with by the wrong of the defendant.

There is error, and the cause must be submitted to the jury.

New trial.

*Cited: Timber Co. v. Wells,* 171 N.C. 264 (1c); *Morton v. Lumber Co.,* 178 N.C. 166 (1c); *Gatewood v. Fry,* 183 N.C. 419 (2c); *Shields v. Harris,* 190 N.C. 525 (3p); *Austin v. Brown,* 191 N.C. 627 (1c, 3c); *Bruton v. Smith,* 225 N.C. 587 (2c); *Winston v. Lumber Co.,* 227 N.C. 341 (1c).

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W. M. NORMAN v. CHARLOTTE ELECTRIC RAILWAY COMPANY.

(Filed 23 December, 1914.)

**1. Street Railways—Negligence—City Streets—Vehicles—Trespassers.**

Vehicles and pedestrians on the street of a city or town are not trespassers when going upon street car tracks laid thereon, for the citizen ordinarily has the same privilege to use the street for travel as the street railway company has in the running of its cars thereon; but the latter is held to a degree of vigilance commensurate with the risks and hazards of accidents or injuries to others which the operation of its cars upon such thoroughfares have made more imminent.

**2. Same—Mutual Rights.**

Owing to the benefit to the public arising from the operation of a street railway upon the streets of a city, the rights of wagons to use the part of the street upon which the railway track is situated is subordinate to that of the railway company in certain particulars, and the driver of the vehicle must yield the track promptly on sight or notice of the approaching street car, whether he is going in the same or opposite direction.

**3. Same—Issues—Last Clear Chance.**

While it is negligence for one running an automobile on the streets of a city not to look up and down the track of a street railway before attempting to cross it, it is required of the motorman on the street car to keep a careful lookout to avoid injuring him; and when the motorman, in the exercise of proper care, should have seen that the one running the car had negligently run upon the track without looking for the approaching car, and had unconsciously put himself in a place of danger, it is incumbent upon him to take reasonable precaution to prevent an injury; and where he has the better opportunity of avoiding the injury, under the circumstances, and can see the danger, he is adjudged in law to have the last clear chance of doing so.

**4. Same—Trials—Evidence—Nonsuit.**

The owner of an automobile, finding a street of the city blocked in front of him, in attempting to get out so as to pursue his course by another route, backed upon the car track of a street railway company, without looking up or down the tracks to see if a street car were approaching, but only looked through the rear window of the car in the direction he was backing it, to see if there were any obstructions. There was evidence tending to show that defendant's street car, running in excess of the speed limit permitted by the city, ran upon the plaintiff as he was about to pursue his way forward, being then on the track, and injured him and his automobile, and that by the exercise of proper care the motorman on defendant's street car should have seen the plaintiff's danger in time to have slowed the car and prevented the injury, but that he gave no signal or warning of his approach and did not attempt to stop his car. *Held*, though the plaintiff was negligent in not looking to see if a street car were approaching, it did not relieve the defendant's motorman of his duty, within the rule of the prudent man, from attempting to avoid the injury, if he had the last clear chance of doing so, and this being a question for the jury, it was not

error for the trial judge to submit the issue, as to the last clear chance, or to refuse defendant's special request for instruction directing a verdict in its favor.

**5. Street Railways—Cities and Towns—Ordinances—Speed Limits—Excessive Speed—Negligence—Last Clear Chance—Trials—Evidence—Questions for Jury.**

Where there is evidence that one running an automobile had negligently placed himself upon a street car track on the street of a city, in front of an approaching car, and that the street car was exceeding the speed limit of the city at the time it ran into the plaintiff, causing the injury complained of in the action, a motion to nonsuit upon the evidence is properly denied, the excessive speed of the car being evidence of the defendant's actionable negligence, upon the issue of the last clear chance, it being for the jury to determine whether by the excessive speed of the car the defendant's motorman had deprived himself of the ability to avoid the injury after discovering the plaintiff's danger.

**6. Street Railways—Negligence—Last Clear Chance—Proximate Cause.**

Where the motorman on a moving street car sees in front of him, on the track, an automobile run there by the negligence of its driver, who was unconscious of his danger, it is his duty to lessen the speed of his car and take reasonable measures to avoid injuring him, under the doctrine of the last clear chance, if ordinary prudence so required; and his failure to so act, if he could do so, is the proximate cause of an injury consequently inflicted.

**7. Negligence—Proximate Cause—Definition—Trials—Instructions — Appeal and Error.**

Proximate cause of an injury arising from the negligence of a party is that which, in natural and continuous sequence, unbroken by any new and independent cause, produces the result, without which it would not have occurred, and from which a man of ordinary prudence could have foreseen that the result was probable under all the circumstances as they existed and were known or should by the exercise of due care have been known to him; and a charge of the court, in this case, that proximity in point of time and space is not part of the definition, was not erroneous.

(534) APPEAL by defendant from *Adams, J.*, at April Term, 1914, of MECKLENBURG.

On 27 March, 1913, the plaintiff was driving his automobile from the Seaboard Air Line Railway station at the north end of Tryon Street in the city of Charlotte, in a southerly direction along that street to Ninth Street, intending to turn into the latter street; but when he reached it, he found it blocked by a wagon and a rope across it. He reversed his car and backed out over the two street railway tracks, laid at that point on Tryon Street, and looked in the direction he was going, to see if there was anything in the way to prevent him from backing over to the other side of the street, where he expected to turn toward the south and proceed

down Tryon Street towards Independence Square. On direct examination he testified: "No, I didn't see any street car coming. No, I didn't hear any street car coming. I backed out between the second two (535) wagons across both tracks and was in the act of going forward. I think I was moving forward at the time the street car struck me, trying to turn to go back up Tryon Street towards the Square. I never did discover the street car that hit me. I do not think they rang any bell or sounded any gong. I heard no noise. When the street car hit me I was knocked unconscious. Yes, my automobile had a top on it, and the top was up. I had a hole cut in the back of my head and my collar bone was broken." And on cross-examination he testified: "I had backed out and I had to back off those street car tracks in order to let a wagon pass; then I was bound to turn on that track a little bit to get on the west side of the car track to come on back towards the Square. Yes, sir, I intended to get across the track at last and put myself on the west side where I had been before, and come on up here. Yes, that is what I intended to do. No, I did not hear any automobile or street car either. I think I listened. I am positive that I did. I heard none, and I saw none. No, sir, I did not look up towards the Square to see whether a car was coming before I backed on the track. No, I really do not know whether I was hit by a car coming from that way or from the other way. Yes, sir, I knew when I started to back that I had to cross both of those tracks, and I didn't look. I didn't look up this way very far. I looked back out of the window of the car back onto the street to see where I was backing. I did not look up towards the Square to see if a car was coming down. No, I didn't look straight towards the depot. No, I didn't look very far either way; just where I was backing was where I was looking. Yes, sir, it is right. I looked where I backed and didn't look either up or down; that is a fact. I will stand by that, for it is right. No, I did not look either up or down the track. The first thing I knew I was hit, and that is all I know about it."

The ordinance of the city prohibited the speed for a street car to exceed 15 miles an hour at that place, and there was evidence that it was running at 25 miles an hour. The car was moving on the west track, and the motorman testified that he did not know that plaintiff was going to back as far as his track, as he had plenty of room to turn around before reaching it, and that when he got on the west track the car was about 30 feet or a little more from him, and it was too late to stop it. That he rang the bell and took all necessary precautions to prevent an accident; shut off the current and reversed the car. There was evidence, on the contrary, that the car was from 150 to 200 feet when plaintiff backed upon the west track; that the gong was not sounded and that it

could be seen that plaintiff was not looking for a car in either direction. The plaintiff himself testified that he was backing his car with the top up and that he was not looking in either direction for a car, and
(536) was not aware of any danger, and did not know the car was near him until he was struck by it.

The jury returned the following verdict:

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

2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the defendant's answer? Answer: "Yes."

3. Notwithstanding the contributory negligence of plaintiff, could defendant, by the exercise of ordinary care, have avoided the injury to the plaintiff? Answer: "Yes."

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

Defendant, in due time, objected to the submission of the third issue. It moved to nonsuit the plaintiff, and requested that the court give the following instruction to the jury: "In order to answer the third issue 'Yes,' you must find from the evidence, and by the greater weight thereof, that although the plaintiff was guilty of negligence which contributed to bring about his injury, yet before he was injured, his (the plaintiff's) negligence ceased and culminated and that thereafter the defendant had a clear chance to avoid injuring the plaintiff by the exercise of due care; and unless you do so find, that is, unless you find that the plaintiff's negligence ceased before the injury, and the defendant thereafter had a clear chance to avoid injuring the plaintiff, and negligently failed to avail itself of such chance, you should answer the third issue 'No.'" The request was refused, and defendant excepted.

In regard to this (third) issue the court charged the jury: "(If you answer the second issue 'Yes,' and if you find that after the plaintiff had negligently gone upon the defendant's track he was in a position of peril from threatened contact with the car, and was apparently insensible to the approach of the car; and if you find that the motorman in charge of the car saw, or by the exercise of ordinary care would have seen, his perilous position and averted the injury by any means reasonably consistent with the safety of the street car and the passengers thereon, it was the duty of the motorman to make use of such means; give the proper signals, if reasonably necessary; lessen the speed of the car, and, if reasonably necessary and practicable, to stop the car in time to avoid the injury; and if you find, under these circumstances, that the motorman failed to perform this duty, you will then find that the defendant was negligent; and if you further find that plaintiff, in consequence, was injured, and

that the defendant's negligence was the proximate cause of the injury, you will answer the third issue, 'Yes.') If you do not so find, you will answer it 'No.' "

*Defendant excepted to the part of the instruction which is* (537) inclosed in parentheses.

There was no other exception to the charge, except as to the definition given in connection with the instruction upon the third issue, as follows: "Now, what is proximate cause? Proximate cause of an event is that which, in natural and continuous sequence, unbroken by any new and independent cause, produces the event, and without which it would not have occurred. (Proximity in point of time or space is no part of this definition.)" Defendant excepted to the part of this instruction which is in parentheses.

Judgment was entered upon the verdict, and defendant appealed.

*D. B. Smith, Cameron Morrison, and J. H. McLain for plaintiff.*

*Osborne, Cocke & Robinson for defendant.*

WALKER, J., after stating the case: There was no error in denying the motion to nonsuit the plaintiff, and the exception to the submission of the third issue, which presents practically the same question, was properly overruled. Whatever may be the law in some of the other jurisdictions—and we concede that it seems to be radically and directly at variance with our rulings upon this question—the law here has been well settled for many years, and we do not feel at liberty to disturb it, after it has been so firmly imbedded in our jurisprudence. The law as declared by some of the courts would make this, in one view of the facts, a clear case of concurrent negligence, upon the ground that the omission of the plaintiff to look and listen and the failure of the motorman to exercise care by looking ahead and to take proper precautions for avoiding danger and preventing collisions, were concurrent, or, as sometimes called, simultaneous acts of negligence, both of them having an equal chance and a fair opportunity of preventing the collision and the consequent injury to the plaintiff and his automobile, and both being bound to the same degree of care. But with us this is not so, under the facts and circumstances of the case. There is, to begin with, no possible analogy between a case growing out of an injury caused by a street railway car to a person rightfully upon the public thoroughfare and a case involving an injury inflicted by a steam railroad train on a trespasser wrongfully upon the latter company's right of way. And this is so because the citizen has the same privilege to use the street for travel that the street railway company has for propelling its cars thereon. The

franchise to lay its rails upon the bed of the public street gives to the company no right to the exclusive use of that street, and in no respect exempts it from an imperative obligation to exercise due and proper care to avoid injuring persons who have an equal right to use the same thoroughfare. It is bound to take notice of, recognize, and respect the
(538) right of every pedestrian or other traveler; and if by adopting a motive power which has increased the speed of its cars it has thereby increased, as common observation demonstrates, the risks and hazards of accidents to others, it must, as a reciprocal duty, enlarge to a commensurate extent the degree of vigilance and care necessary to avoid injuries which its own appliances have made more imminent. The right of the wagon, in certain particulars, is subordinate to that of the railway; the street car has, because of the convenience and exigencies of that greater public which patronizes it, the right of way; whether going in the same direction ahead of the car or in an opposite one to meet it, the driver of the wagon must yield the track promptly *on sight or notice of the approaching car;* but he is not a trespasser because upon the track; he only becomes one if, after notice, he negligently remains there. The company has the superior right to the use of its own tracks, as otherwise it could not use them at all. If a wagon and a car meet going in opposite directions, the wagon must turn out, because the car cannot. If going in the same direction, the wagon must also get off the track, because the car cannot go around the wagon, and the public convenience requires a car to travel at a greater speed than the ordinary vehicle. But this superior right is not exclusive, and will not justify the company in needlessly interfering with the convenience of the public, or excuse it from the consequences of its own negligence. Where the wagon and car meet at right angles, either can stop long enough for the other to pass without serious inconvenience, and as the wagon must cross the track in order to proceed, it is said that under such circumstances the rights of the wagon are somewhat greater than between crossings, with a corresponding obligation resting upon the railway company to exercise greater care on account of the greater probability of meeting vehicles and pedestrians, with the increased risk of accidents. But this rule cannot be extended to interfere with the right of the public to cross the track with reasonable care at any point that their convenience may suggest. The foregoing principles are supported by *Moore v. Railway Co.,* 128 N. C., 456, and have been epitomized by us from that case, so far as the questions there decided are presented here and are pertinent to this discussion.

If the motorman, W. N. Turner, saw the plaintiff's car on the western track in front of his car, which was on the same track, and also knew that plaintiff, being forgetful of his duty and inattentive to his surround-

ings, was not aware of the approach of the car, and, on that account, was making no effort to leave the track, and this knowledge came to him in time to prevent the collision, and he knew that a collision would occur if plaintiff did not leave the track in time to prevent it, unless the street car was itself stopped before reaching the automobile, it was his plain duty, according to our decisions, as soon as a collision became probable, to slow down and bring his car under control, so that he could stop, (539) in order to prevent the catastrophe which would inevitably happen if he proceeded on his way and plaintiff did not move his automobile away from the track. If the motorman saw that the plaintiff had evidently not looked and listened, and had not heeded his signal, if he gave one, and was, therefore, unconscious of his danger and not likely to leave the track, it was incumbent on him to take reasonable precaution for his safety; and as he had the better opportunity of so acting as to prevent the collision, he is adjudged by the law, under the circumstances, to have had the last clear chance of averting the injury, and the defendant, therefore, is the responsible author of it. A person on foot or in a vehicle has no right to cross a street in front of an approaching street car and take the doubtful chance of his ability to cross in safety, if a prudent man would not do such a thing under similar circumstances; and if he does so, and is injured by his own carelessness, the fault is all his, and he cannot hold the company to any liability therefor. But the case we have is quite different, as here the plaintiff was seen by the conductor when backing, at a crossing, towards the western track on which the car was moving; he was oblivious of his dangerous surroundings, which might have been seen by the motorman if he was keeping a proper lookout, and he testified that he was doing so. It would seem to be just and humane to hold that, if such were the situation, and the jury afterwards found it to be so, the defendant should be held responsible, as having the superior chance to avoid the injury, though the plaintiff was also negligent, and grossly so. Such, anyhow, is our law.

In *Lassiter v. R. R.*, 133 N. C., 244, the intestate, A. E. Lassiter, was on the track of the defendant, attending to his business of overseeing the shifting of cars, as an employee of the defendant. He was unconscious of the fact that a train was being backed towards him on the same track, by reason of the fact that his attention was fixed on what he was then doing. There was no one on the leading box car of the backing train to warn him of his danger. The Court first distinguishes the case from that of a pedestrian walking on a railroad track in front of an approaching engine or train, who is run over and injured, upon the ground that, being a trespasser, or even a licensee, he has no right to impede the reasonable use of the track by the company, and being ap-

parently in possession of his faculties, the engineer may fairly presume, even to the last moment, when it is too late to save him, that he will step off the track and save himself. It then proceeds to say: "In this case the intestate, according to the evidence of Thomason, was at a disadvantage; was not upon equal opportunities with the defendant to avoid the injury; for his manner and conduct showed that he was oblivious to his surroundings and was engrossed in the management of his train (540) and its hands. His actions showed that he did not hear the bell ringing. Now, if there had been on the backing box car a flagman, or watchman, he would have seen the intestate's obvious absorption in his work and heard the efforts of Thomason to give him warning. The condition of the intestate was as helpless as if he had been asleep or drunk on the track, and the defendant owed him at least as high a duty as if he had been asleep or drunk." And again, in the same case, it was said: "The evidence was competent and fit to have been submitted to the jury upon the question of the last clear chance of the defendant—that is, whether if both the plaintiff and the defendant had been negligent, the defendant could have prevented the death of the intestate by the use of means at hand or that reasonably ought to have been at hand. In *Pickett v. R. R.,* 117 N. C., 616, the Court said: 'If it is a settled law of this State (as we have shown) that it is the duty of an engineer on a moving train to maintain a reasonably vigilant outlook along the track in his front, then the failure to do so is the omission of a legal duty. If by the performance of that duty an accident might have been averted, notwithstanding the previous negligence of another, then under the doctrine of *Davies v. Mann,* 10 M. and W. (Exch.), 545, and *Gunter v. Wicker* (85 N. C., 310), the breach of duty was the proximate cause of any injury growing out of such accident, and when it is a proximate cause the company is liable to respond in damages. Having adopted the principle that one whose duty it is to see does see, we must follow it to its logical results."

A careful reading of the *Lassiter case* will show that the Court regarded the intestate as having been grossly negligent in leaving a safe place for the performance of his work, and taking, instead of it, a most dangerous one on the track. The decision was put squarely on the ground that the defendant had the last clear chance to avoid the natural and probable effect of his negligence by the exercise of proper care in having some one on the leading car to give warning of the approach of the train, or to have it stopped, if need be, by signaling the engineer of danger ahead, and intestate's position of danger was as apparent, although he was merely inattentive and unaware of the danger, "as if he had been

asleep" or "drunk and down" on the track. The two cases are parallel. See, also, *Smith v. R. R.*, 132 N. C., 819.

If the motorman saw that the plaintiff did not hear or heed his signal, if given, the latter's position was no less perilous than if he had been deaf and could not hear. He had no right to kill or injure plaintiff or to break up his automobile, even if he was careless, or even grossly negligent, provided he had a fair and reasonable opportunity to avoid it without injury to his passengers, and especially after seeing and appreciating the danger in going ahead with his car.

The doctrine of *Lassiter's case* has been sustained by a long (541) line of decisions in this Court. *Clark v. R. R.*, 109 N. C., 444; *Deans v. R. R.*, 107 N. C., 686; *Smith v. R. R.*, 114 N. C., 734; *Bullock v. R. R.*, 105 N. C., 180.

Nellis on Street Surface Railroads, at p. 300 (ch. V, sec. 9) referring to the duty of a motorman with respect to travelers on the street, says: "Seeing a person driving along the road parallel with the track as though he had no intention of crossing it, he is not guilty of negligence because he did not anticipate that such person would suddenly turn across the track in the middle of a block. But if he sees the driver of a wagon in front of him does not look back, nor pay any attention to the ringing of the bell, nor increase his rate of speed, nor attempts to leave the track, it is his duty to bring his car under control, and even to stop, if necessary to avoid collision. He should stop his car at once upon seeing the wheels of a heavily loaded wagon in front of it slip on the track while the driver is attempting to get out of the way."

*Hicks v. Railway Co.*, 124 Mo., 115, first lays down the proposition that persons in wagons and other vehicles have the undoubted right to pass over or upon street car tracks without hindrance. Yet the right of a traveler to drive a vehicle upon or along a street railroad track does not absolve him from the duty of looking for approaching cars. The cars can only move upon the tracks, and are used for the convenience of the public, and are consequently entitled to the right of way as to all others. It is, therefore, the duty of a traveler to give way to approaching cars so as to cause no unnecessary hindrance. *Adolph v. R. R.*, 76 N. Y., 532; *R. R. v. Isley*, 49 N. J. L., 468; *Wood v. R. R.*, 52 Mich., 402. The Court then proceeds to declare: "We are not able to say that the evidence shows conclusively that plaintiffs violated any of these rules, unless it was in driving upon the track without observing the cars, which must have been very near them. But that negligence was clearly not the proximate cause of the injury, for plaintiffs not only got safely upon the track without injury, but they were seen by the servants of defendant, and, by their timely action, a collision was then averted. After

that, the conduct of the plaintiff could not be declared negligent as a matter of law. Whether they could have left the track more expeditiously than they did, and whether doing so would have avoided the injury, were questions for the jury. It seems to me that there was very little evidence tending to show contributory negligence in the case; but we cannot say there was none. Defendant's gripman saw plaintiffs in their dangerous and exposed situation, and the chief question is whether, after that, he acted with due care towards them. *Hanlon v. R. R.*, 104 Mo., 389, and cases cited." The facts there were not substantially unlike those in the case at bar.

(542) The case of *Hanlon v. R. R.*, 104 Mo., 389, which was cited in the *Hicks case,* is so much in point and expresses our views so aptly that we are fully justified in quoting from it liberally. It states the contention of defendant in this case and conclusively answers it, and in perfect accordance with the reasons we have heretofore given, which, moreover, are sustained by our own cases. The Court there says: "It is insisted that, although the signals were not given, and if they had been given the injury have been averted, still the negligence of plaintiff himself, in not observing the common prudence of looking out for his own safety, concurred with that of defendant, and the injury resulted on account of the concurring negligence of both, and for that reason debarred plaintiff from recovery. It is well settled by authority, as well as enjoined by the common dictates of prudence, that one going upon the track of a railroad should observe all such precautions for his own safety as reason and prudence dictate; and if disaster comes upon him by reason of a failure to do so, he must bear the consequences. This rule has, however, a qualification which is founded upon principles of humanity and is universally recognized. This qualification enjoins upon the railroad company the duty of using all reasonable efforts to avoid injury to one who has negligently placed himself in a position of danger, if the peril is known, or, under certain circumstances, by reasonable care might have been known. A failure to observe this requirement renders the company liable, notwithstanding the previous negligence of the person injured. The rule and the qualification of it require precautions to be observed by both the railroad company and the traveler, when using a public highway in common. The precautions to be used by each must necessarily vary, with varying circumstances, and no positive rule can be laid down which can be made a test in every case. One rule for their mutual government is imperative, which is the duty and obligation for each to watch for the presence of the other, one to avoid being injured, the other to avoid causing injury. The railroad company must give some regard to the known imprudence of mankind, and not content itself

with the mere obedience of the law requiring signals to be given; and the traveler must, in like manner, take precautions for his own safety, and not depend entirely upon the railroad company to protect him, or give him timely notice of danger," citing *Yancey v. R. R.*, 93 Mo., 436; *Rine v. R. R.*, 88 Mo., 396; *Kimes v. R. R.*, 85 Mo., 611, and numerous other cases in support of the several principles announced.

There are other reasons for denying the motion to nonsuit or for the withdrawal of the third issue. There was evidence that the street car was being run at a greatly excessive speed, in violation of the city ordinance fixing the maximum at 15 miles per hour, whereas the speed of the car was 25 miles an hour. This was, at least, evidence of negligence, as decided in *Davis v. Traction Co.*, 141 N. C., 134, (543) and prevented the judge from taking the case away from the jury by a nonsuit or a directed verdict. This very question was settled against the street car company in that case. *Justice Connor* there said, at p. 140: "It is undoubtedly true that if a car is moving at a lawful—that is, not excessive—speed, and a person enters upon the track, the defendant is required to use ordinary care, give the signals, lower the speed, and, if it appears reasonably necessary, stop the car. If the car is properly equipped and the equipment used with reasonable promptness and care, the defendant will not be liable for an injury sustained. If, however, the car is moving at an excessive speed—that is, a speed in excess of that prescribed by the city ordinance—and by reason of such excessive speed the signals cannot be given or the appliances used by the exercise of ordinary care, the defendant will be liable for an injury, and this for the reason that it has, by the excessive speed, brought about a condition which it cannot control. It was therefore proper for his Honor to modify the instruction by inserting the words, 'and the car was not running faster than 14 miles an hour.' This gave the defendant the benefit of the principle invoked, unless the jury found that the speed was excessive. This Court has held, in accordance with many others, that speed in excess of that prescribed by the ordinance is at least evidence of negligence, and his Honor so instructed the jury. *Edwards v. R. R.*, 129 N. C., 78." And again, at p. 142: "The duty is imposed upon the managers of the car to move at a reasonably safe speed, the maximum of which in Durham is by ordinance fixed at 14 miles an hour; to equip the car with signals and means of controlling it—bringing it to a stop when necessary." The decision clearly recognizes the principle that, as the car must run on the track or not at all, and the citizen on foot or in a vehicle of any kind can so easily and promptly change his course, and use for his purpose the spaces of the street between the tracks and the curb, he must, in the exercise of due care, give way to the car in

order to prevent a collision; but the Court also says that this does not excuse the negligence of the street car company if it runs into the citizen or his vehicle and injures him or his property when, after seeing his perilous position, or when it could have been seen with the exercise of due care, it fails so to act in the control and management of the car as to cause him injury, provided it had time to prevent it by the exercise of such care; and upon this question the jury have the right to consider whether by the excessive speed or other previous negligent act it had deprived itself of the ability to save him or his property.

What was done by the plaintiff in the operation of his automobile and what by defendant in the running of its car were questions for the jury upon the vital issue as to who had the last clear chance to avoid (544) the final catastrophe. Plaintiff's negligence, which we admit was gross, did not forfeit his right to be treated by defendant with ordinary consideration and humanity. The motorman could not drive the car upon his automobile, smash it up and injure him, simply because he happened to be upon the track, all unconscious of his dangerous position.

It was for the jury to say, upon all of the evidence, whether the plaintiff saw the approaching car in time to clear the track, and whether the defendant's motorman had reasonable grounds to believe that he did, and that he would turn from the track before the car could reach him, or whether the motorman knew, or should have known, that he was not aware that the car was coming, and, therefore, was not likely to get out of the way. If they found the facts last stated, then it became the duty of the motorman to give proper signals and to so operate the car with due care as to prevent injuring him or his automobile; and in this view it had the last clear chance. We think that, in this respect, our view may be reconciled with the cases cited by defendant's counsel from courts in other jurisdictions.

The only instruction requested was not a correct one, and was, therefore, properly refused. The liability of defendant, under the doctrine of the last clear chance, did not depend upon the "cessation or culmination of plaintiff's negligence." What is meant by the quoted expression, which is used in the instruction, we suppose to be that plaintiff's negligence must have spent its force, or have become dormant or inactive. But this was not necessary to constitute the defendant's negligence the proximate cause of the injury. The very fact that the plaintiff, in the presence of danger, continued to be negligent, and in apparent ignorance of the danger with reference to the car, but increased the duty of the defendant's motorman to be on his guard and to adjust his conduct to that situation by lessening the speed of the car, bringing it under con-

trol and generally placing himself in a state of readiness to stop, should it be necessary to do so. He should have prepared for the natural and probable eventuality, in view of the plaintiff's persistent neglect of his own safety. This is the common sense and the justice of the case, when looked at from any angle of vision.

Nor do we think it was a vital error, if error at all, for the court to have said, as it did say, in defining proximate cause with reference to "the last clear chance," that proximity in point of time and space is no part of the definition. He properly defined proximate cause as that which, in natural and continuous sequence, unbroken by any new and independent cause, produces the result, and without which it would not have occurred, and from which a man of ordinary prudence could have foreseen that such a result was probable under all the circumstances as they existed and were known or should, by the exercise of due care, have been known to him. Sh. and Redf. on Neg., secs. 25 (545) and 28; *Kellogg v. R. R.*, 94 U. S., 469; *Ins. Co. v. Boon*, 95 U. S., 117; *Ins. Co. v. Tweed*, 74 U. S. (7 Wall.), at p. 52; *Brewster v. Elizabeth City*, 137 N. C., 392; *Ramsbottom v. R. R.*, 138 N. C., 38, and *Ridge v. R. R., ante*, 510, where the subject is fully discussed. In *Ins. Co. v. Boon, supra*, the Court thus defined it: "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. A careful consideration of the authorities will vindicate this rule." And again, quoting from *Brady v. Ins. Co.*, 11 Mich., 425, it says: "That which is the actual cause of the loss, whether operating directly or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed." Phillips on Insurance, sec. 1097, referring to *Gordon v. Rimmington*, 1 Camp., 123, thus deals with the question: "The maxim *causa proxima spectatur* affords no help in these cases, but is, in fact, fallacious; for if two causes conspire, and one must be chosen, the more scientific inquiry seems to be, whether one is not the efficient cause, and the other merely instrumental or merely incidental, and not which is nearer in place or time to the consummation of the injury." And in *R. R. v. Kellogg, supra*, the Court says: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary

cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. 2 Blk. Rep., 892. The question always is, Was there an unbroken connection between the wrongful act and the injury—a concatenated operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no inter-
(546) mediate efficient cause, the original wrong must be considered as reaching to the effect and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty."

We may, though, safely rest our decision of this case upon *Wheeler v. Gibbon,* 126 N. C., 811, where a man driving a buggy in the direction towards which a heavy rain was being driven by a high wind up Tryon Street (the same one mentioned in this case), and ran into Mr. Wheeler, the plaintiff, who was crossing with his umbrella over his head to protect him from the rain. The present *Chief Justice* there said, and it fully covers this case: "Could the defendant, by the exercise of ordinary care, have avoided the injury to the plaintiff, notwithstanding the negligence of the plaintiff? This was the crucial issue of fact, and was peculiarly for the consideration of the jury, for we cannot agree with the appellant that the court could instruct the jury that on such a state of facts, in law, the proximate cause of injury was due to the plaintiff. That is the very fact which the jury, not the court, must determine. The negligence may have been concurrent, or the last negligence may have been the plaintiff's, or notwithstanding the negligence of the plaintiff the defendant could, with the exercise of ordinary care, have prevented his horse striking, and his conveyance running over, the plaintiff. The jury, and they alone, were competent to determine the fact, for there was evidence for their consideration. The plaintiff was crossing, with his head tucked behind his umbrella. This was negligence. The defendant was driving rapidly, '10 miles an hour, or at top of his speed,' and with his oilcloth up in front of the buggy; and this was negligence. He was driving in the same

direction with the storm, and was in a vehicle, and therefore could keep a better lookout. Then his horse and vehicle could do damage to a foot passenger—and did—while the foot passenger was not likely to run into him and do damage, and the defendant should have kept a lookout correspondingly careful to avoid injury. The jury under proper instructions have found that if the defendant, himself driving negligently, had used ordinary care, he could have seen the plaintiff negligently crossing the street in a pelting storm with his head hid behind his umbrella, in time to avoid running over him. This was a pure question of fact, and the Court cannot review it." But the defendant's negligence in our case was the active, efficient, and predominating cause of the injury, and also was the last in point of time, if it was guilty of any negligence, and the jury have found that it was, upon evidence that reasonably supports the verdict.

It follows that no error was committed in the trial of the case.

No error.

*Cited: Ingle v. Power Co.*, 172 N.C. 753 (5c); *Ingle v. Power Co.*, 172 N.C. 754 (1c, 2c); *Sparger v. Public-Service Corp.*, 174 N.C. 777 (6cc); *Davis v. R.R.*, 175 N.C. 652 (3c); *Lea v. Utilities Co.*, 176 N.C. 513 (3c); *Lea v. Utilities Co.*, 178 N.C. 512 (4c); *Buffaloe v. Power Co.*, 180 N.C. 218 (3c); *Costin v. Power Co.*, 181 N.C. 202 (3c); *Casada v. Ford*, 189 N.C. 746 (3c); *Inge v. R.R.*, 192 N.C. 530 (3p); *Fleming v. Utilities Co.*, 193 N.C. 264 (1c); *Elder v. R.R.*, 194 N.C. 620 (3j); *Redmon v. R.R.*, 195 N.C. 768 (3c); *Newbern v. Leary*, 215 N.C. 145, 149 (4c).

(547)

## W. E. SHUFORD, ADMINISTRATOR, v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 23 December, 1914.)

**1. Pleadings—Waiver—Insurance—Supreme Court—Amendments.**

While it is usually necessary to plead a waiver in order to make it available on the trial, the Supreme Court may allow an amendment there, within its sound discretion, and not disturb a verdict and judgment the party may have obtained in the Superior Court; and it appearing in this case that the plaintiff has failed to plead that the defendant had waived a condition contained in its policy of life insurance, requiring proof of death of the insured, and that the action had been commenced in a justice's court, where the pleadings are ordinarily informal, and that full opportunity had been given the defendant to produce and introduce testimony upon the question, the verdict below is left undisturbed.

**2. Insurance — Policies — Proof of Death — Impossible Requirements — Waiver—Principal and Agent—Proof of Agency—Evidence Sufficient.**

Where a policy of life insurance provides that payment thereof to the wife of the insured will discharge the insurer from all liability thereunder, and relying upon the statutory seven years absence, and other evidence sufficient upon the inquiry of the whereabouts of the insured, etc., the wife has made demand for payment on the agent of the insurer, who refuses on behalf of the company to pay the amount of the policy without proof of death of the insured by three witnesses, or certificate to that effect by the physician attending him during his last illness, the conditions imposed by the company are impossible of performance, and will be regarded as a waiver by the company of its right to demand the proof of death. The evidence in this case that the agent was authorized by the company to waive the proof of death in its behalf is held sufficient.

**3. Insurance—Proof of Death—Absence—Evidence—Trials—Questions for Jury.**

Evidence in this action to recover on a life insurance policy, on behalf of the beneficiary, that the deceased had been absent for more than seven years, without hearing from him, whether he were alive or dead; that she had made frequent inquiries of him, had employed an attorney and detective to help find him, who had actively endeavored to do so without result, etc., is held sufficient, upon the question of the death of the insured, to be submitted to the jury. *Sizer v. Severs*, 165 N. C., 500, cited and applied.

APPEAL by defendant from *Cline, J.*, at August Term, 1914, of BUNCOMBE.

This is an action to recover on a policy of life insurance.

In the year 1902 the intestate of the plaintiff was insured by the defendant in two policies of insurance, one for $110 and the other for $55. Both policies were identical in form. The policies were made payable to the executors or administrators of the insured, Melvin Tilson.

The policies contained, among other things, the following pro- (548) visions:

"The Life Insurance Company of Virginia agrees to pay unto the executors or administrators of the person named as insured in this policy the amount of benefit provided in said schedule, within twenty-four hours after acceptance, at its home office, of satisfactory proofs of death of the insured named below, during the continuance of this policy, which is issued and accepted subject to the conditions and agreements below, and on the reverse side hereof, which are hereby referred to, and each one of which is hereby made a part of this contract."

On the reverse side of the policy (*article 6*): "No suit shall be brought against the company after six months from the date of the death of the insured. If any suit be commenced after six months, the lapse of time shall be conclusive evidence against any claim, the provisions of any and all statutes of limitations to the contrary notwithstanding. Proofs of

death under this policy shall be made upon blanks to be furnished by the company, and shall contain answers to each question propounded to the claimant, physicians, and other persons. . . .

Article 7: "Agents (which term includes superintendents and assistant superintendents) may in their discretion receive premiums within four weeks after the same are due, with this exception: they are not authorized to make, alter, or discharge contracts, or waive forfeitures.

"The company may make any payment provided for in this policy to husband or wife, or any relative by blood, or lawful beneficiary of the insured, or to any person appearing to said company to be equitably entitled to the same, and the production by the company of a receipt signed by any or either of said persons, or of other sufficient proof of such payment to any or either of them, shall be conclusive evidence that such benefits have been paid to the person or persons entitled thereto, and that all claims under this policy have been fully satisfied."

Tilson and his wife had separated some time in the year 1903, and did not live together afterwards. In the spring of 1904 he left, and has not been seen or heard of since. After some time Mrs. Tilson instituted inquiries to ascertain his whereabouts, but was unable to get any information. She employed a lawyer and he told her he could ascertain nothing. Afterwards, she employed one Kesterson, who represented himself as a detective, to try to find Tilson, and he, having heard that Tilson had gone to Spartanburg, went there and made inquiry, but learned nothing. Kesterson also wrote to the police of Greenville, S. C., but got no information from them. The wife made frequent inquiries of various parties, but could never get any information. Advertisement was made for him. A number of witnesses testified that he had left here in the spring of 1904; that his health was bad when he left; and he had never been heard of since. The plaintiff relied on the absence for more than seven years, taken in connection with the physical condition (549) of the intestate of the plaintiff at the time of his departure, and the efforts made to find him, to establish death.

The plaintiff offered as a witness Mrs. Sallie Tilson, who testified as follows: That she was the wife of Melvin Tilson, the insured, and had regularly paid the premiums on the policies of insurance; that her husband left her in the spring of 1904, and that he had not been back here since, to her knowledge; that she employed a lawyer by the name of Williamson to help her in finding him, and that she also employed a man by the name of Kesterson to aid her in ascertaining her husband's whereabouts, and whether he was living or dead; that both of these parties reported they were unable to get any information about him at all; that she had made frequent inquiries and had never been able to hear any-

thing of him. She said she had talked to the agents of the insurance company, and asked them to find him for her.

The witness was then asked the following questions:

Q. Did you ever apply to the agent for payment on these policies?

The defendant objected, the objection was overruled, and the defendant excepted.

A. Yes, sir.

Q. Did you go to the superintendent, himself, about it? A. Yes, sir.

Q. What did he tell you?

The defendant objected, the objection was overruled, and the defendant excepted.

A. He said I would have to have three witnesses to the death that saw him, or the doctor's certificate. I stated to him how long he had been gone and what efforts I had made to find him.

Q. Go ahead and state what else you said to him and all he said to you.

The defendant objected, the objection was overruled, and the defendant excepted.

A. I spoke to him and told him I would like to get a settlement in some way; that I had paid out so much on it, and told him I had been thinking of writing the home office, and he said if they replied, it would be to refer it back to him. Then I have spoken to the assistant superintendent, because I had worked hard and paid the money. He said there was not any use to write to the home office unless I could bring the proof of three witnesses that saw him after he was dead, or the doctor's certificate.

Q. What did he say to you, anything more than you have told? A. Only the evidence that they required; he said they could not pay the claims without evidence of that kind.

The defendant objected to the testimony, the objection was overruled, and the defendant excepted.

(550) No proofs of death were furnished by the plaintiff.

The defendant tendered the following issues:

"Is the defendant indebted to the plaintiff, and if so, in what amount?" as the only issue arising under the pleadings; but the court submitted, in addition thereto, the following: "Was the insured, Melvin Tilson, dead at the time of the commencement of this action?"

The defendant excepted.

"Did the defendant waive the condition and provisions of the policies requiring that proofs of death under them should be made upon blanks to be furnished by the company, and shall contain answers to each question propounded to the claimant's physician, and other persons, and shall contain the record evidence and verdict in the coroner's inquest, if one shall be heard?"

The defendant excepted.

His Honor charged the jury, among other things, as follows: "If you find by the greater weight of the evidence that seven years—that the plaintiff, the insured, was dead at the time of the commencement of this action, and that subsequent to his death Mrs. Tilson, the wife of the insured, went to the office of the general superintendent of the defendant here in this city, seeking to obtain payment of the amount of these policies; if you find that she had been continuing the payment of these policies herself all this time; and if you find that the general superintendent declined to pay her—deal with her in the matter; if you find by the greater weight of the evidence that she wanted to take it up with the home office, and that he said there was no use to do that; that it would be referred back to him, and that they would pay nothing under the policies unless they had proof of three witnesses to his death, or a certificate of the physician who attended him in his last illness—had proof of his death—that in substance, I say, I am not attempting to give the language of the witness, then the court instructs you as a matter of law upon such facts, if you find them, would constitute a waiver of these policies, that they are payable only upon proof of death, etc."

All the issues were answered in favor of the plaintiff, and from the judgment pronounced thereon the defendant appealed.

*R. S. McCall and O. K. Bennett for plaintiff.*

*Merrimon, Adams & Adams for defendant.*

ALLEN, J. The principal exceptions relied on by the defendant are:

(1) That as a waiver of the proofs of death is not distinctly pleaded, it was error to submit the issue of waiver to the jury, or to receive evidence bearing on the issue.

(2) That there is no evidence of a waiver in that the demand made on the defendant was by Mrs. Tilson, and that she was not entitled to receive the money under the policy.

(3) That the evidence is insufficient to establish the death of (551) the insured.

1. It is usually necessary to plead a waiver (*Mfg. Co. v. Assurance Co.*, 106 N. C., 28); but when it appears that upon appeal from a justice of the peace, in whose court the pleadings are generally informal, an issue has been fairly tried, and both parties have had full opportunity to produce and introduce their evidence, this Court would not disturb the verdict and judgment for failure to do so, but would in the exercise of its discretion amend the pleading here, as it has the power to do. *Corporation Commission v. Bank*, 164 N. C., 358.

The evidence of waiver offered by the plaintiff consists of conversations with agents of the defendant, testified to by the wife of the insured, and there is no suggestion that the agents with whom she had the conversations could not be produced, or that they would contradict her.

If, therefore, we should sustain the first contention of the defendant we would not set aside a finding of fact based upon evidence, which, so far as the record discloses, is undisputed, because of a failure to file a formal plea. We are of opinion this ought not to be done, and that this is a proper case for allowing the amendment.

2. The policy provides that the defendant may pay to the wife of the insured, and that her receipt shall discharge liability under the policy. If so, she had the right to demand payment, and the refusal to pay except upon conditions impossible of performance would be equivalent to a denial of liability and would be a waiver of the proof of death. *Doggett v. Golden Cross,* 126 N. C., 477; *Gerringer v. Ins. Co.,* 133 N. C., 410.

3. The evidence of death is fully as strong and conclusive as that sustained in *Sizer v. Severs,* 165 N. C., 500.

Upon a review of the whole record we find

No error.

*Cited: Beard v. Sovereign Lodge,* 184 N.C. 156 (3c); *Laughinghouse v. Ins. Co.,* 200 N.C. 436 (1c); *Misskelley v. Ins. Co.,* 205 N.C. 505 (2c); *Aldridge Motors v. Alexander,* 217 N.C. 756 (1c).

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

(Filed 25 November, 1914.)

**1. Contracts, Wagering—Cotton Futures—Pleadings—Counterclaim—Malicious Prosecution—Abuse of Process.**

Where action is brought here to recover the purchase price of cotton and commissions thereon by a New York concern upon a contract made there, and the defendant sets up our statute against wagering contracts of this character and pleads as a counterclaim that he has been damaged by reason of attachment proceedings which had been sued out in an action brought by the plaintiffs in New York, but where he had nothing which was subject to the writ, and thereunder no levy had been made, it is *Held,* that the counterclaim is not one arising from an abuse of the process, it appearing that there has been no illegal use of it, but for a malicious prosecution of the New York action, requiring that the plaintiff allege and show its termination or that his person or property has been interfered with; and failing in this, the defendant's demurrer to his cause

of action should be sustained. The principles relating to abuse of process and malicious prosecution discussed by WALKER, J.

**2. Pleadings—Counterclaim—Demurrer—Voluntary Nonsuit.**

It appearing in this case that the plaintiff's demurrer to the defendant's alleged counterclaim should have been sustained, thus depriving the defendant of any right to affirmative relief, it is held that the plaintiff's motion for a voluntary nonsuit should have been granted without leave to the defendant hereafter to amend his answer in respect thereto.

**3. Courts—Lex Loci Contractus—Statutes—Extraterritorial Effect—Wagering Contracts—Cotton Futures—Public Policy—Conflict of Laws.**

Our statute prohibiting dealing in wagering contracts in cotton futures has no extraterritorial effect, and ordinarily the law governing a contract is that wherein the contract was made; and while our courts may not enforce here a contract declared void by our statutes or contrary to our public policy, it has no power to interfere in any manner with the enforcement by the courts of another State of a contract valid according to its own laws, or with their action to determine their validity.

APPEAL by plaintiffs from *Devin, J.*, at March Term, 1914, of (552) FORSYTH.

The plaintiff complained as follows:

1. Plaintiffs above named, under the firm name of Carpenter, Baggott & Co., were at the times hereinafter mentioned engaged (in the ordinary course of their business) in buying and selling cotton for a commission.

2. Defendant W. M. Hanes is a citizen and resident of the State and county aforesaid, and was at the times hereinafter mentioned engaged (in the ordinary course of his business) in the manufacture of cotton.

3. On and between 12 June, 1912, and 27 September, 1912, plaintiffs purchased and sold for defendant, and at his special instance and request 5,000 bales of cotton.

4. Plaintiffs, at the special instance and request of defendant, paid out for defendant, in and about the purchase and sale of said 5,000 bales of cotton, the sum of $11,300.

5. Defendant agreed to pay plaintiffs the sum of $15 per 100 bales as plaintiff's commission for buying and selling said cotton, or the sum of $750 for plaintiff's services in buying and selling said 5,000 bales of cotton.

6. Defendant has paid plaintiffs, on said aggregate indebtedness of $12,050, the sum of $9,305, but has failed and refused to pay the balance due plaintiffs, towit, $2,745.

Wherefore plaintiffs demand judgment that they recover of (553) defendant W. M. Hanes the sum of $2,745, with legal interest from 27 September, 1912, and the costs of this action.

Defendant answered, denying generally the allegations of the complaint, and setting up three counterclaims. In the first he averred that he had requested plaintiffs, cotton merchants of New York city, to sell for his account for future delivery, according to the rules of the New York Cotton Exchange, a lot of cotton, and that he deposited a large sum of money to cover margins. That they were not, and were not intended to be, real sales, but the transactions were to be settled upon a basis of the rise or fall of prices. It all amounts to this, that they were dealing in cotton futures—gambling transactions, pure and simple. He prayed judgment for $3,000, amount of money deposited with plaintiffs as margins. In a second counterclaim he alleges that plaintiffs unlawfully and in violation of the contract closed out certain purchases made by them for the defendant, for which he claims $3,000 as damages. As a third counterclaim he alleges that plaintiffs had unlawfully and wrongfully brought suit in New York for the same cause of action as they allege herein, and wrongfully and maliciously sued out a writ of attachment "for the purpose of injuring, harassing, and embarrassing defendant, and not for the purpose stated in the writ, but to force defendant to pay a debt to them which he did not owe, and which was not collectible in law or in equity." He alleges further in the counterclaim "that defendant had no property or effects in New York at the time the warrant of attachment was issued, and at the time of its alleged service, which was subject to levy or attachment for the said cause of action of the plaintiffs, and this was well known to them." He then alleges that the court of New York had no jurisdiction of plaintiff's action, and there was no service of the process in the same. He asked that plaintiffs be restrained and enjoined in this action from prosecuting the New York suit, in order to prevent circuity and multiplicity of actions and useless expense.

Plaintiffs demurred to the several counterclaims, and upon the ground that they were invalid and did not state any cause of action against them, or any which could be prosecuted in this action, and they asked to be allowed to take a nonsuit. The court sustained the demurrer as to the first and second of the counterclaims, from which defendant did not appeal, and overruled it as to the third counterclaim, and refused the plaintiffs' leave to take a nonsuit, and to each of these rulings the plaintiffs excepted, and appealed.

*Joseph E. Johnson and Manly, Hendren & Womble for plaintiff.*
*Louis M. Swink for defendant.*

(554) WALKER, J., after stating the case: We need consider but the single question, whether the third counterclaim is a good one in

law, assuming the truth of the facts alleged, and not any conclusion of law from them which is therein stated, for if the facts as alleged do not constitute a valid counterclaim, the demurrer should have been sustained, and this would clear the way for plaintiff's voluntary retirement from the court by way of a nonsuit, which it was his right to do, there being nothing left in the answer requiring his further presence, except the prosecution of his own cause, which he had a right to abandon by entering a *non sequitur,* as no other affirmative relief was prayed against him. The action is really not one for an abuse of process, but for a malicious prosecution of the New York action and the wrongful suing out of the attachment. An abuse of process is some unlawful use of the process for the accomplishment of some end foreign to the purpose for which it may be issued. This subject has been fully and exhaustively considered by this Court in several cases. *R. R. v. Hardware Co.,* 138 N. C., 174; *Jackson v. Tel. Co.,* 139 N. C., 356; *R. R. v. Hardware Co.,* 143 N. C., 54; *Ludwick v. Penny,* 158 N. C., 104; *Wright v. Harris,* 160 N. C., 542.

In *R. R. v. Hardware Co.,* 143 N.C. at p. 58, the *Chief Justice* said: "It may be well to note here the distinction between an action for malicious prosecution and an action for abuse of process. In an action for malicious prosecution there must be shown (1) malice and (2) want of probable cause, and (3) that the former proceeding has terminated. *R. R. v. Hardware Co.,* 138 N. C., 174. In an action for abuse of process it is not necessary to show either of these three things. By an inadvertence it was said in the case last cited that want of probable cause must be shown. 'If process, either civil or criminal, is willfully made use of for a purpose not justified by the law, this is an abuse for which an action will lie.' 1 Cooley Torts (3 Ed.), 354. 'Two elements are necessary; first, an ulterior purpose; second, an act in the use of the process not proper in the regular prosecution of the proceeding.' *Ib.,* 355; 1 Jaggard Torts, sec. 203; Hale on Torts, sec. 185. 'An abuse of legal process is where it is employed for some unlawful object, not the purpose intended by law. It is not necessary to show either malice or want of probable cause, nor that the proceeding had terminated, and it is immaterial whether such proceeding was baseless or not.' *Mayer v. Walter,* 64 Pa. St., 283. The distinction has been clearly stated. *Jackson v. Tel. Co.,* 139 N. C., 356." Judge Cooley tells us that a suit for malicious prosecution will lie.

We said in *Wright v. Harris, supra,* that an abuse of process consists in its employment for some unlawful purpose, which it was not intended by the law to effect, and amounts to a perversion of it, and that the illegality or maliciousness of the proceeding leading up to it does

(555) not determine its abuse in law as much as the unlawful or oppressive use of it, after it is issued, for the purpose of coercing or harassing the defendant in some way, citing numerous cases; and, referring to *Ludwick v. Penny, supra,* and to the principle as stated by Judge Cooley, we said: "Speaking of the malicious abuse of process, he (Judge Cooley) distinguishes it from a malicious civil suit, where there is an interference with property or business, as follows: 'If process, either civil or criminal, is willfully made use of for a purpose not justified by the law, this is abuse for which an action will lie. The following are illustrations: Entering a judgment and suing out an attachment for an amount greatly in excess of the debt; causing an arrest for more than is due; levying an execution for an excessive amount; causing an arrest when the party cannot procure bail and keeping him imprisoned until, by stress thereof, he is compelled to surrender property to which the other is not entitled. In these cases, proof of actual malice is not important, except as it may tend to aggravate damages; it is enough that the process was willfully abused to accomplish some unlawful purpose. Two elements are necessary to an action for the malicious abuse of legal process: First, the existence of an ulterior purpose, and, second, an act in the use of the process not proper in the regular prosecution of the proceeding. Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process. In a suit for malicious abuse of process it is not necessary that there should have been a termination of the suit in which the process was issued, nor a want of probable cause for the suit.' Cooley on Torts, p. 354 *et seq.* The distinction is clear: one consists in commencing and prosecuting a suit maliciously and interfering with property or business, and the other consists in the willful, unlawful, and wrongful use of the process itself."

Defendant cannot recover on his last counterclaim for malicious prosecution, as he does not allege the termination of the former suit in New York (*Brinkley v. Knight,* 163 N. C., 194), nor that his person or any of his property has been interfered with, and he cannot recover for malicious (so called) or wrongful abuse of process, because, as it appears, there has been no illegal use of it.

In this connection we find a very good statement of the law in 32 Cyc., 541, 542, 543, which we reproduce substantially: Courts will never permit the wrongful use of their process; and in case such use is attempted, the party will not be permitted to gain an advantage by reason of such wrongful act. But the law goes further, and gives the person aggrieved by the wrongful act a cause of action against the offending party. This action for the abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it to issue. It has been

said that two elements are necessary, an unlawful and ulterior purpose and also an act done in the use of the process not proper (556) in the regular prosecution of the proceeding. But it seems doubtful whether both of these elements must always be present. It has been held that "a malicious abuse of legal process consists in the malicious misuse or misapplication of that process to accomplish some purpose not warranted or commanded by the writ." And it has also been said that "whoever makes use of the process of the court for some private purpose of his own, not warranted by the exigency of the writ or the order of the court, is answerable to an action for damages for an abuse of the process of the court." . . . "Similar expressions occur in many cases. None of these statements include the second element above set forth. On the other hand, the second element alone has been held sufficient to impose liability, as where a writ is executed against property in an unreasonable and oppressive manner; where, after arrest upon civil or criminal process, the party arrested is subjected to unwarrantable insult or indignities, is treated with cruelty, is deprived of proper food or shelter, or is otherwise treated with oppression and undue hardships; or where a summons is served in an unreasonable, cruel, and oppressive manner. Although some cases hold that malice is a fact necessary to be shown in an action for abuse of process, and while the action is often denominated one for the "malicious abuse of process," it is probable that malice is not an essential element of the cause of action, and becomes important only when exemplary damages are sought. The act constituting the abuse must, however, be shown to have been willful. Under no circumstances will malice alone give a right of action. Nor will the action lie against one who in good faith has sought to properly enforce a supposed right. The action is distinguished from one for malicious prosecution in that it is founded upon the use, not the issue, of the process; it need not appear that the action was instituted without probable cause, and it need not appear that the action has terminated, but these distinctions are not observed by all the courts."

We refer to this statement for the purpose of remarking that the doubt expressed as to the necessity for the coexistence of both elements named may be removed if we regard the unlawful and wrongful use of the process as implying the illegal and ulterior purpose to be subserved, if that be essential to create the actionable wrong. But we need not enter more at large into a discussion of this question, as we are satisfied that plaintiffs have not been guilty of abuse of the process issued in their New York action, upon defendant's own showing.

"An action for damages," says Jaggard (1 vol., pp. 632, 634), "lies for the malicious abuse of lawful process, civil or criminal, even if such

process has been issued for a just cause, and is valid in form, and the proceeding thereon was justified and proper in its inception, but (557) injury arises in consequence of abuse in subsequent proceedings." *Jackson v. Tel. Co.*, 139 N. C., 347. There must, therefore, be an abuse of the process itself, and it is not sufficient to show merely a bad intent or a wicked purpose, if the process be dealt with in a perfectly lawful way. The bad intent must finally culminate in the abuse, for it is only the latter which is the gist of the action.

Applying these principles, we find that the plaintiff was prosecuting his suit in the New York court in a regular way and according to the established procedure of the court. There was nothing done abnormally or out of the ordinary. It may be that by the law of that State the cause of action was a valid one. Nothing appears to show the contrary. Defendant sets up our statute, but it has no extraterritorial effect. It also may be that it is illegal there. The law of that State governs, as the contract was made there, was enforcible there, and the action to recover upon it was pending there. It would be an anomaly to hold that we could, in an action pending here, declare an action pending there to be illegal, because the cause of action, though perhaps good there, is illegal here. Our statute may declare it illegal, and if so, we would not enforce it in our courts. The validity of a contract, or the question whether the contract is a legal or an illegal one, is judged by the law on the subject in the State or country in which the contract is entered into, the general rule being that a contract good where made is good everywhere, and a contract invalid where made is invalid everywhere. The general doctrine that a contract valid where made is valid also in the courts of any other country or State where it is sought to be enforced, even though had it been made in the latter country or State it would be illegal and hence unenforcible, is subject to several exceptions: (1) Where the contract in question is contrary to good morals; (2) where the State of the forum or its citizens would be injured by the enforcement by its courts of a contract of the kind in question; (3) where the contract violates the positive legislation of the State of the forum, that is, is contrary to its Constitution or statutes; and (4) where the contract violates the public policy of the State of the forum. 9 Cyc., pp. 672, 674.

"It may be laid down as the settled doctrine of public law that personal contracts are to have the same validity, interpretation, and obligatory force in every other country which they have in the country where they were made. The admission of this principle is requisite to the safe intercourse of the commercial world, and to the due preservation of public and private confidence; and it is of very general reception among nations. Parties are presumed to contract in reference to the laws of

the country in which the contract is made, and where it is to be paid, unless otherwise expressed; the maxim is, that *locus contractus regit actum,* unless the intention of the parties to the contrary be clearly shown. The rule stated in Huber relative to contracts (558) made in one country and put in suit in the courts of another is the true rule, and one which the courts follow, viz., the interpretation of the contract is to be governed by the law of the country where the contract was made; but the mode of suing and the time of suing must be governed by the law of the country where the action is brought. It is, however, a necessary exception to the universality of the rule, that no people are bound or ought to enforce, or hold in their courts of justice, any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates a public law." 2 Kent's Commentaries (13 Ed.), p. 458.

"It is a familiar principle of the common law that the *lex loci* is the general rule adhered to by courts in construing contracts, questions of marriage, legitimacy, and rights of succession to property. It has been adopted by so many States that it now constitutes an essential portion of what is denominated international jurisprudence. It has lost none of its efficacy as a rule by this; but, on the contrary, it has made thereby a bond of amity between nations; yet it is subject to a great controlling idea, that upon comity it will not be enforced if it involves anything immoral, contrary to general policy, or violative of the conscience of the State called on to give it effect. With this subordination, comity requires that we should give effect to the laws of any other State; not otherwise." *Eubanks v. Banks,* 34 Ga., 415.

The pleadings in the case are not before us, nor is the law of New York, and we cannot, therefore, say whether the contract, as alleged therein, is violative of the law of that State or of the common law, which is presumed to exist there, in the absence of proof that it is not. It may be void at the common law (*Williams v. Carr,* 80 N. C., 295), or it may be valid by the same law as there construed, or the plaintiff may be able to show that the contract was not a gambling one, but that the rules of the Cotton Exchange required actual delivery. Its validity, as we have seen, does not depend upon the provisions of our law which defendant pleads and upon which he relies.

But we need not decide upon these questions, as the court of that State, upon the papers, issued its process regularly. The plaintiff was entitled to an attachment or garnishment in order to secure the payment of his alleged debt in case he recovered in the action, the proceeding being merely ancillary, and he may have obtained judgment in the action if the contract was valid there, or if not, and the defendant failed to plead

its invalidity. The decisive and concrete question is this, Did the plaintiff wrongfully abuse the process *after* it was duly issued, and of this we find no sufficient allegation, and it looks as if defendant cautiously avoided making one. There was no arrest of his person, or inter-
(559) ference therewith, nor was there any taking of his property or obstruction of his full enjoyment thereof. The intent to arrest or to attach, or even to garnish, will not do, unless it is executed, nor will an attempt answer the purpose, unless carried out, or unless, in the course of the attempt to do the wrong, there is at least some tangible or appreciable invasion of his personal or property rights. We see nothing of the kind here, but, on the contrary, this is nothing more than a suit for the malicious prosecution of an action where there has been no illegal interference with the person or the property. Such a suit will not lie. It is said in 26 Cyc., 14: "In harmony with the English view of the remedy, some American authorities hold that no action will lie for merely commencing a civil action, however unfounded the suit may be, in the absence of interference with person or property or of special grievance differentiated from and superadded to the ordinary expenses of the suit. The usual reasoning is that the remedy of a person sued is to tax his costs, whereby he will not be stimulated to interminable litigation based upon constructive harm." Our Court is assigned to the class holding to this doctrine and following the English rule. In *Ely v. Davis,* 111 N. C., 24, this Court announced the true principle, and when "substantially the same action," as stated by it, was again before this Court, under the title of *Terry v. Davis,* 114 N. C., 31, *Justice MacRae,* with his usual force and clearness, and also with some positiveness, thus restated the rule, at p. 32: "We then sustained the demurrer upon the ground that there was no allegation in the complaint of want of probable cause, nor statement of facts which, if proved, would establish the want of probable cause in the alleged malicious charge of fraud and false representation. We proceeded further to intimate (in that case), in order that the plaintiffs might understand that this litigation ought to cease, our opinion that an action will not lie for malicious prosecution in a civil suit unless there was an arrest of the person or seizure of property, as in attachment proceedings at law, or their equivalent in equity, or in proceedings in bankruptcy or like cases where there was some special damage resulting from the action and which would not necessarily result in all cases of the like kind." The case of *Davis v. Gully,* 19 N. C., 360, is criticised in *Ely v. Davis,* and overruled so far as it conflicted with the rule as therein stated; but when what was called the "broad statement of the Court" in *Davis v. Gully* is examined, we do not think it was intended to have so wide a scope, but to be restricted

within the correct limit, and this will appear when we consider that the action in *Davis v. Gully* was upon a bond given by the complainant in a suit in equity, and upon his suing out a writ of sequestration, the condition of which was that he would pay respondent "all damages which shall be *recovered* against plaintiff *in any suit or suits which may be brought against him* for wrongfully suing out such writ." When *Judge Gaston* said, in passing, "that an action on the case lies (560) against any person who maliciously and without probable cause prosecutes another, *before any tribunal,* and thereby subjects him to an injury, either in his person, property, or reputation," he undoubtedly was referring to actions of the kind he was then dealing with, and in which there had been such an actual injury to or interference by sequestration with one of the enumerated rights entitled to the protection of the law. He could not have referred to an ordinary action, where there is no such element, and where the loss or injury, if any, is compensated only by the taxation of costs against the losing party, and otherwise is *damnum absque injuria.* Broom's Legal Maxims (6 Am. Ed., 1868), pp. 159, 160. How it would be if one, by prosecuting an ordinary action, maliciously attempts to put a cloud upon defendant's title, or to blacken or malign his character, we need not decide. The general law of slander and libel may sufficiently deal with such cases.

There is not the slightest foundation, in law, for this counterclaim to rest on. Plaintiff commenced and prosecuted in the court of another State an ordinary action upon a promise to pay money in advance, it may be upon an unlawful transaction, but he may have anticipated, and not unreasonably, that defendant would not plead the illegality, but would act upon that kind of honor which is supposed, by a sort of tacit consent, to prevail in such case, and to operate as a deterrent and preventive of such a course. The law permits the defendant to set up such a defense, and being true to itself, even encourages it, in order to punish a violation of its own mandate and as an example to others who are disposed to commit such offenses; but this is not done for the defendant's sake, but for its own, as he is regarded as being equally in fault with the other offender—*particeps criminis.* Both parties are gamblers by the moral standard and in the view of the law, and neither is entitled to any of its consideration, and gets none, except in so far as one of the guilty parties may receive an incidental benefit, and the other suffer a loss, from the enforcement of its penalties or forfeitures.

We have not discussed the question whether the alleged counterclaim, sounding in tort, can be set up "as arising out of the contract, or transaction, set forth in the complaint, as the foundation of the plaintiff's claim or connected with the subject of the action." Revisal, sec. 481,

subsec. 1. Plaintiffs say it is not, and cite *Kramer v. Light Co.*, 95 N. C., 277; *Smith v. French*, 141 N. C., 9; *Arthur v. Thompson*, 97 Ky., 210, and *Davidson v. Land Co.*, 121 N. C., 146; but it is sufficient to let our decision rest upon the other clear and sound view of the case, without deciding this question.

The court should have sustained the demurrer throughout, and then permitted the plaintiff to take the nonsuit, and this judgment will (561) be entered in the court below, without permitting any amendment, as plaintiff had already asked for the nonsuit, and cannot now be deprived of it by any change in the answer. He cannot be called back after once he has asked to depart and is entitled, at the time, to do so.

Reversed.

*Cited: Jerome v. Shaw*, 172 N.C. 862, 864 (1c); *Shute v. Shute*, 180 N.C. 388 (1c); *Overton v. Combs*, 182 N.C. 6 (1c); *Stancill v. Underwood*, 188 N.C. 478 (1c); *Horney v. Mills*, 189 N.C. 728 (2p); *Winkler v. Blowing Rock Lines*, 195 N.C. 675 (1c); *Wingate v. Causey*, 196 N.C. 72 (1c); *Dickerson v. Refining Co.*, 201 N.C. 93 (1c); *Nassif v. Goodman*, 203 N.C. 456 (1c); *Klander v. West*, 205 N.C. 526 (1c); *Mortgage Co. v. Long*, 206 N.C. 478 (2c); *Sink v. Hire*, 210 N.C. 403 (2c); *Abernethy v. Burns*, 210 N.C. 639 (1c); *Mitchem v. Weaving Co.*, 210 N.C. 735 (1c); *Ledford v. Smith*, 212 N.C. 452 (1c); *Cody v. Hovey*, 216 N.C. 395 (1c); *Miller v. Greenwood*, 218 N.C. 151 (1c); *Ellis v. Wellons*, 224 N.C. 271, 272 (1c); *Ellis v. Wellons*, 224 N.C. 274 (1j); *Melton v. Rickman*, 225 N.C. 703, 704 (1c); *Melton v. Rickman*, 225 N.C. 706 (1j); *Caudle v. Benbow*, 228 N.C. 283 (1c).

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GEORGE WILLIAMSON SMITH v. A. J. HOLMES AND OTHERS.

(Filed 23 December, 1914.)

**1. Trials—Instructions—Directing Verdict—Evidence, How Construed.**

A requested instruction of a party that the judge charge the jury to answer the issues in his favor if they believe the evidence, is equivalent to a demurrer or a motion to nonsuit; and in such instances the evidence should be most strongly construed in favor of the adverse party, and all facts which it reasonably tends to prove for him must be considered as established, the evidence which tends to disprove them being taken as true.

**2. Same—Conflicting Evidence—Timber Contract — Breach — Measure of Damages.**

In this action to recover damages for a breach of contract of defendant to cut timber from plaintiff's land at a certain price, the plaintiff excepted and appealed from the refusal of the trial judge to give certain of his prayers for instruction directing a verdict in a certain sum upon the issue as to the measure of damages, evidently based upon the theory that under the terms and conditions of the contract he should be permitted to recover damages for all the timber upon the entire tract of land which should have been cut by the defendant within the time specified. There was evidence in defendant's behalf tending to show that the plaintiff entered upon the land, stopped the defendant from cutting the timber, and sold it to another party, with further conflicting evidence as to the amount of timber actually cut, etc., and it is *Held*, that the plaintiff's requested prayers were properly refused, and that the case was properly left to the jury. The charge of the court is approved.

APPEAL by plaintiff from *Carter, J.*, at May Term, 1914, of JACKSON.

Civil action, tried upon these issues:

1. Did the defendants breach their contract with the plaintiffs, as alleged in the complaint? Answer: "Yes."

2. What damage, if any, is the plaintiff entitled to recover? Answer: "One cent."

3. Is the plaintiff indebted to the defendant on their counterclaim? Answer: "No."

4. If the plaintiff be so indebted, in what amount? Answer: "Nothing."

From the judgment rendered, the plaintiff appealed. (562)

*Bourne, Parker, and Morrison for plaintiff.*

*Coleman C. Cowan for defendant.*

BROWN, J. This is a civil action, brought by the plaintiff against the defendants, for damages for breach of contract for the purchase and removal of timber belonging to the plaintiff from a certain boundary of land described in said contract. The defendants answered and denied that the terms of the contract were as set out in the complaint, but it is admitted that they entered into a contract with S. Montgomery Smith, brother of the plaintiff, whereby said defendants took over and assumed the performance of a contract that said S. Montgomery Smith had previously entered into with the plaintiff, George Williamson Smith, for the purchase and removal of timber belonging to the latter. They set up, however, that they were induced to enter into this contract with S. Montgomery Smith by his numerous false and fraudulent representations, both as to the quantity of timber on the lands described in said contract

and as to the facilities for the removal of said timber. They also set up a counterclaim against the plaintiff, whose agent they claim said S. Montgomery Smith was in making said representations, and demanded an affirmative judgment against said plaintiff for a large sum of money as damages resulting from said representations.

As the plaintiff, under the rulings of the court, obtained a verdict upon the first, third, and fourth issues, and the defendant did not appeal, the only assignments of error necessarily relate to the second issue, as to damage.

The plaintiff requested the court to charge as follows:

1. "Upon all the evidence in this case, the court charges you that you will answer the first issues 'Yes' and the second '$3,500, together with interest on said sum from 17 July, 1905.'"

2. "The court charges you that the defendants, under the contract sued on, agreed to pay the plaintiff at the rate of $4 per thousand feet for all lumber cut and removed thereunder by 1 January, 1905, from timber on the railroad side of the boundary, and the amount so cut and removed should not be less than at the rate of 300,000 feet per month from 1 September, 1904, and in the aggregate not less than 1,000,000 feet by 1 January, 1905, and that they would resume the cutting after a suspension during the winter period not later than 15 March, 1905, and that they would cut at the rate of not less than 400,000 feet per month, valued in the contract at $4 per thousand on the railroad side of the boundary.

"The court further charges you that the letter of the defendants to the plaintiff, dated 17 July, 1905 (the authorship of which is ad-
(563) mitted by the defendants), constitutes a breach of the contract on the part of said defendants, and there is no evidence in the case that there was any breach thereof on the part of the plaintiff or any act or conduct on his part which would justify or excuse a breach or an abandonment thereof on the part of said defendants.

"That there is evidence, construed most liberally and favorably for the defendants, tending to show that the date for the settlement for the stumpage by them was extended by the plaintiff to 1 July, 1905, but there is no evidence even tending to show any other alteration or modification of the contract; and the court charges the jury that, according to this agreement, there was due, on 15 July, 1905, to the plaintiff by the defendants under all the evidence in this case the sum of $10,400, less the amount of any payments which had been made on said indebtedness by the defendants. That the only payments or credits claimed by the defendants is the sum of $2,100, and this is admitted by the plaintiff to have been made by the defendants and the Spruce Lumber Company.

"It follows that the amount due on 1 July, 1905, under the terms of this contract, according to all the evidence, was $8,300, and the plaintiff would be entitled to recover that sum in this action, but for the fact that he only asks for $3,500 in his complaint, and he is limited in his recovery to the amount so demanded.

"Therefore, the court charges you that the plaintiff, under all the evidence in this case, is entitled to recover the sum of $3,500, with interest on said sum at the rate of 6 per cent per annum from 17 July, 1905, and you should answer the first issue 'Yes' and the second issue '$3,500, with interest, as stated,' and you should not consider the other issues."

His Honor refused to give the above instructions, and such refusal constitutes the only assignment of error in the record.

His Honor charged as follows:

"The law implies nominal damages from the mere breach of a contract. By nominal damages is meant 1 cent, or 5 cents, or 10 cents, or other such trifling and inconsiderable sum; and the court instructs you that if you answer the first issue 'Yes,' you cannot as a matter of law avoid awarding the plaintiff at least nominal damages under the second issue. Beyond that, the plaintiff would, in such state of the case, be entitled, as of right, to recover such substantial damages as he may have proven to your satisfaction, by the greater weight of the evidence, under the rule of damages which I shall state to you.

"The only aspect of substantial damages which you are entitled to consider in this case is that arising upon the plaintiff's allegation that the defendants took off stumpage in excess of the amount paid for by them at the rate of $4 a thousand feet. Now, there is no controversy about the amount of money which the defendants have paid upon (564) stumpage account. It is agreed that that amount is $2,100. At the contract rate, $2,100 would be for 525,000 feet of stumpage.

"Now, if this evidence satisfied you by its greater weight that the defendants took off that boundary more than 525,000 feet of stumpage, it would be your duty to award to the plaintiff, under this second issue, compensation for the excess above 525,000 feet at the rate of $4 per thousand feet.

"The plaintiff contends that the defendants took off stumpage to the amount of 1,133,047 feet. The plaintiff relies in this calculation upon the evidence tending to show the number of trees cut and the size of the trees cut, by a count and measurement of the same, and the plaintiff further relies upon the expert testimony of the witnesses who testified to their knowledge of such matters, that the number of stumps, of the dimensions given, would yield 1,133,047 feet."

His Honor then proceeds to state the evidence of both parties claimed to sustain their contentions.

By this instruction his Honor confined the damages to the contract price for the timber actually cut and removed from the land. It is plain that there was such a conflict of evidence as to the quantity of timber cut and removed from the land that his Honor could not with propriety give the plaintiff's prayers for instruction, and it is to be noted that there is no exception to any part of the charge as given.

Where a party requests the court to charge the jury that if they believe the evidence they should answer the issues in his favor, the adverse party is entitled to have the evidence construed most strongly in his favor, and all facts which it reasonably tends to prove for him must be considered established, and any part of the evidence which tends to disprove the contention must be taken as true, as in case of a demurrer to evidence or motion to nonsuit; and where the evidence on the issue is not all one way, the instruction is not a proper one. *Board of Education v. Makely,* 139 N. C., 31 (38); *Cox v. R. R.,* 123 N. C., 604 (607).

The plaintiff contends that his Honor erred in confining the damages to the contract price of the timber taken from the land. The calculations embodied in the prayer for instruction are evidently based on the theory that the plaintiff is entitled, not only to the value of the timber actually cut, but also to the contract stumpage price for such as could have been cut and removed during the period of the contract.

There is evidence tending to prove that the defendants had an option given them by the plaintiff prior to 17 July, whereby defendants were given the right to pay $16,000 in cash prior to 1 October, 1905, as a minimum in lieu of stumpage; that the defendants were continuing their operations upon the property under an agreement with the plain-
(565) tiff, set out in the evidence, up to the latter part of July, when the plaintiff entered upon the land and stopped them; that after that the defendants cut and removed no more timber, sawing up only such as had already been cut. There is also evidence that the plaintiff, through S. Montgomery Smith, was at the time negotiating a sale of said lands to the Champion Fiber Company, and in May, 1905, had one of said company's men upon the land, inspecting the timber, and soon after the defendants were forced to quit, and after they surrendered possession of said property and removed therefrom the plaintiff sold the said timber to the Champion Fiber Company, and the Champion Fiber Company entered into the possession thereof and cut and removed the same.

If this evidence introduced by the defendant is taken to be true, it is plain that the plaintiff could not recover for the timber that remained

uncut and standing on the land. Therefore, his Honor could not properly give the peremptory instructions requested by the plaintiff. *Rickert v. R. R.*, 123 N. C., 255; *Bank v. Lumber Co.*, 123 N. C., 24.

We have carefully examined the charge of the court, and find it to be a clear and accurate presentation of the case to the jury.

No error.

*Cited: Hemphill v. Gaither,* 180 N.C. 605 (2c); *Fertilizer Works v. Cox,* 187 N.C. 656 (2c).

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AMERICAN LUMBER COMPANY v. DREXEL FURNITURE COMPANY.

(Filed 23 December, 1914.)

**1. Judgments—Default and Inquiry — Breach of Contracts — Lumber — Measure of Damages—Speculative Profits—Appeal and Error.**

A judgment by default and inquiry for the failure to file answer in an action to recover damages for the breach of a contract in the failure of the defendant to deliver lumber sold, the cause of action is established by the judgment, leaving only the inquiry as to damages to be determined; and where the judge has correctly instructed the jury that the rule for the admeasurement of damages was the difference between the contract price and the market price at the place and time appointed by the contract for the delivery, the question is not presented, on the defendant's appeal, as to whether the plaintiff should be permitted to recover speculative profits, and no error is found.

**2. Contracts, Breach of—Measure of Damages—Diminution.**

In this action to recover damages for defendant's breach of contract in not delivering lumber sold, no evidence appears in the record that the plaintiff failed to exercise due care and diligence to prevent loss to defendant after he was aware of its breach, or to diminish the amount of damages, and the Court finds no error upon the defendant's contention in that respect.

APPEAL by defendant from *Carter, J.*, at January Term, 1914, (566) of HAYWOOD.

Civil action to recover $750 as damages for a breach of the contract sued on, in failing to deliver the lumber therein sold to the plaintiff. The action was commenced on 23 June, 1913, returnable to the Jury term of Haywood Superior Court. The complaint was filed on 9 July following. No answer was filed at the July or September terms of the court, nor was any since, and at January term, when the court was about to adjourn for the term, judgment by default and inquiry was rendered. At the following May term of the court the cause came on for trial before

his Honor, *Judge Carter,* at which time judgment was rendered in favor of the plaintiff, upon the verdict of a jury, for the sum of $600. From this judgment the defendant appealed.

*Felix & Alley and Thurman Leatherwood for plaintiff.*
*Ferguson & Silver for defendant.*

WALKER, J., after stating the case: This seems to be a very simple case. As there was a judgment by default, the cause of action was admitted, and it being for a breach of contract of defendant to sell and deliver lumber to the plaintiff, there having been a default by the former, the plaintiff would be entitled to recover under the writ of inquiry, which was then being executed by the jury, at least nominal damages, and such actual or substantial damages as it might show had been sustained. It was alleged in the complaint that plaintiff bought the lumber to resell at a profit, and that this was known to the defendant. The contract was for the "sale and delivery of 150,000 feet of No. 1 common and better oak lumber, to be of the widths and lengths and at and for the prices fully set forth in the said contract, the same to be delivered by the defendant f. o. b. cars at some point in North Carolina taking a rate of freight to High Point not in excess of that from Sevier, N. C." The defendant's brief is directed largely to a discussion of the question as to whether plaintiff is entitled to recover the profits he would have made by the transaction, the contention being that he is not, as they are merely conjectural or speculative, citing *Coal Co. v. Ice Co.,* 134 N. C., 574; *Machine Co. v. Tobacco Co.,* 141 N. C., 284; *Lumber Co. v. Mfg. Co.,* 162 N. C., 395; but we need not enter upon this uninviting subject, as the learned judge properly confined the recovery to the one warranted by the ordinary and familiar rule, which allowed plaintiff to recover only the difference between the contract price and the market price at Sevier, N. C., or "at a point taking a rate of freight to High Point, N. C., not in excess of that from Sevier, N. C.," and at the time stipulated for the delivery. There was evidence that this difference was $5 per thousand, or $750 upon the entire lot, which is the amount (567) for which judgment is asked in the complaint. Under a very clear and faultless charge the jury assessed the damages for the breach at $600, which was $250 less than plaintiff demanded. This verdict was very favorable to the defendant, as the evidence was strong to establish the larger sum as the true amount of the loss by reason of the breach. The court gave correct instructions as to the rule for admeasuring the damages, it being the difference between the contract price and the market price at the place and time appointed by the con-

tract for the delivery. This is the standard of adjustment, as between the parties, where there has been a breach, or failure to deliver, from a very ancient period, and is, we believe, universally adopted as being in reality the only one for our safe guidance, and a very just one, too. *Berbarry v. Tombacher,* 162 N. C., 497; *Lumber Co. v. Mfg. Co.,* 162 N. C., 392; *Roberts v. Benjamin,* 124 U. S., 64; *Coal Co. v. Ice Co., supra; Holmesly v. Elias & Cohen,* 75 N. C., 564; *Oldham v. Kerchner,* 79 N. C., 106, and other cases cited in the *Berbarry case, supra.*

There was no evidence that plaintiff failed to exercise due care and diligence in preventing loss to the defendant after he knew of the breach. The case really does not present that question, as it did in *Hocutt v. Tel. Co.,* 147 N. C., 186. So far as appears, the plaintiff did all that was required to render the damage as little as practicable. *Tel. Co. v. Reid,* 83 Ga., 401. What else he could have done we do not know, and defendant has thrown no light upon the subject by any evidence, so that we might see better what it is.

The case was well tried, and without any error being committed.

No error.

*Cited: Storey v. Stokes,* 178 N.C. 416 (2c); *Hunter v. Gerson,* 178 N.C. 486 (2c); *McCall v. Lumber Co.,* 196 N.C. 602 (2c).

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D. B. WATTS v. GEORGE W. VANDERBILT.

(Filed 23 December, 1914.)

**Abatement and Revivor—Tort Feasor—Personal Injury—Death—Interpretation of Statutes.**

At common law a right of action sounding in tort for personal injuries inflicted does not survive the tort feasor, and the doctrine is not changed by statute, where the injury does not cause death, the exceptions in Revisal, sec. 157, to the provisions of section 156 being expressly to that effect; nor is this interpretation affected by section 415, providing that no action shall abate by death, etc., or that the court may allow the action to continue, etc.; these provisions relating to such actions as survive, and not to actions for personal injuries, which do not survive.

APPEAL by defendant from *Webb, J.,* at Spring Term, 1914, of TRANSYLVANIA.

Civil action to recover damages for personal injuries caused by (568) alleged negligence on the part of G. W. Vanderbilt, heard on demurrer and motion to abate.

G. W. Vanderbilt having died, his executors were made parties defendant. Whereupon, plaintiff filed his complaint that he was injured by negligent conduct of G. W. Vanderbilt while in his employment as stonecutter, engaged in preparing stones for a lodge of defendant in Pisgah Forest, in that he wrongfully and negligently selected inexperienced and unskilled foreman and hands in the work while plaintiff was employed, etc., and by reason of such negligence he was injured, losing sight of one eye, etc. Complaint further alleges death of G. W. Vanderbilt and appointment of defendants as executors. There was demurrer on the ground that no cause of action was stated against the executors, etc.

Judgment overruling demurrer, and defendant excepted and appealed.

*Harkins & Van Winkle and Merrick & Bernard for defendant.*

*No counsel for plaintiff.*

HOKE, J. At common law actions for personal injuries died with the person committing the wrong. *Rippey v. Miller,* 33 N. C., 247; Schouler on Executors (2 Ed.), sec. 370; 3 Williams on Executors, p. 228.

In *Rippey's case, Ruffin, C. J.,* stating the doctrine, said: "An action for tort was lost at common law by the death of either party, the injured or the injurer, upon the maxim, *actio personalis moritur cum persona.*"

This being the recognized principle, the question presented by the appeal is whether, under our legislation on the subject, the right of action will survive as against the executors of the deceased.

Referring, then, to the statutes applicable, section 156 of Revisal of 1905 provides: "Upon the death of any person all demands whatsoever, and rights to prosecute or defend any action or special proceedings, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator, or collector of his estate."

Section 157, enumerating the actions which do not survive, includes among others: "Causes of action for false imprisonment, assault and battery, or other injuries to the person, where such an injury does not cause the death of the injured party."

In several decisions of this Court interpreting this section it has been held that actions for injuries to the person do not survive. *Bolick v. R. R.,* 138 N. C., 370; *Morton v. Tel. Co.,* 130 N. C., 299; *Strauss v. Wilmington,* 129 N. C., 100; *Harper v. Comrs.,* 123 N. C., 118.

This construction is no way affected by section 415 of Revisal, enacting that: "No action shall abate by the death, marriage, or other disability of a party or by the transfer of any interest therein, if the cause of action survive or continue," etc.

By the express wording of this provision, it only applies in case (569) the "cause of action survives," and this, as we have seen, is not true in the presented case. A similar ruling has been made in other courts of recognized authority. *Hegerish v. Keddy,* 99 N. Y., 258; *Munroe v. Bruo,* 70 Fed., 967.

The second paragraph of section 415, to this effect, "That in case of death, except in suits for penalties and for damages merely vindictive, marriage or other disability of a party, . . . the court on motion may allow the action to be continued," etc., is not intended to affect the first paragraph, but only as a regulation of procedure when the action survives.

There was error, therefore, in overruling the demurrer, and, on the facts presented in this record, the same should have been sustained and judgment entered that the action abate.

Reversed.

*Cited: Edwards v. Chemical Co.,* 170 N.C. 557 (j).

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EMMA HARDY v. PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

(Filed 23 December, 1914.)

**Supreme Court—Retaxing Cost—Full Cost of Transcript—Rules of Court.**

Where the defendant is the successful party on appeal, and on his motion to retax costs in the Supreme Court it appears in his written application in this Court that there was no unnecessary or superfluous matter in the transcript, and that the whole thereof was pertinent and necessary to a proper statement of the facts upon which the assignments of error were based, and the allowance specifically made in Rule 31 (164 N. C., 549) was not sufficient to pay for the cost of printing, which is not denied by the other party, it presents a proper instance for the Court to specially order that the full cost of printing the transcript be taxed against the plaintiff and the surety on his prosecution bond, under the further provisions of Rule 31.

*W. F. Evans and Julius Brown for plaintiff.*

*Harry Skinner and Albion Dunn for defendant.*

WALKER, J. This is a motion to retax the costs of this Court, so that the defendant may be allowed the entire cost of printing, instead of merely the amount already taxed, that is, 80 cents a page for sixty pages. It appears from the application, which is in writing, that there was no

unnecessary or superfluous matter in the transcript, but that the whole thereof was pertinent and necessary to a proper statement of the facts upon which the assignments of error were based. The respondent, or appellee, has not answered the motion, but her silence admits the facts.

Rule 31 (164 N. C., 549) provides that the successful party in
(570) this Court shall recover the cost of printing the record at a rate not exceeding 70 cents for sixty pages, and 10 cents a page to the clerk of this Court for each page of the copy made by him for the printer, making 80 cents in all, "unless otherwise specially ordered by the Court." The appellant has brought its application within the rule, and it is a proper case for the exercise of our discretion in its favor by requiring the entire actual costs to be paid. It may be further said that it is perfectly just that the amount paid by appellant for the actual cost of printing should be refunded, for it is in no default, and was compelled to send up and print the entire transcript.

It is, therefore, adjudged that the motion be allowed, and the clerk of this Court will tax the costs accordingly and enter judgment for the same on the prosecution bond of appellee. It is advisable that this rule be fully understood in its practical application.

It is so ordered.

Motion allowed.

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PHILLIPS & CREW CO. v. P. C. HYATT.

(Filed 23 December, 1914.)

**1. Judicial Sales—Purchaser With Notice.**

The general principle that a purchaser at a judicial sale is not bound to look further than to see that the one selling is an officer and employed to do so by a valid execution, etc., does not obtain when the purchaser is one with personal knowledge of defects in the service of summons, as appearing upon the face of the execution, and of other facts and circumstances rendering the sale irregular, if not void, for such purchaser cannot be considered an innocent purchaser for value, etc.

**2. Same—Vendor and Vendee—Judgments—Execution—Summons.**

The plaintiff, a nonresident, made a conditional sale of a piano, retaining title, and after certain payments had been made thereon the piano was seized under one execution issued under two separate judgments of a justice of the peace, in one of which cases only the summons had been served, and the sale ordered on the same day, but postponed for a day or two and made at the home of the purchaser, the defendant, who bought at a price much less than its value, and with personal knowledge of the attendant circumstances. There were six or seven bidders present at the sale. *Held*, the defendant was not an innocent purchaser for value,

and acquired no title to the piano under the sale as against the rights of the plaintiff. Revisal, sec. 648.

APPEAL by defendant from *Carter, J.*, at March Term, 1914, of CHEROKEE.

Civil action. The judge by consent found the facts and rendered (571) judgment. The following are the facts:

1. That on 28 September, 1910, Phillips & Crew Company contracted to one R. L. Peoples the piano described in the complaint, then owned by the plaintiff, upon the following terms: for $375, payable $15 on 10 October, 1910, then $5 per month for three months, then $10 per month thereafter until the whole had been paid, with interest from maturity; all payments to be made at the plaintiff's offices in Atlanta, Ga.; said instrument was not to be removed from the Peoples residence without the written consent of the plaintiff, and all right and title to ownership to remain in the plaintiff until fully paid for.

It was further agreed that if return or surrender of said piano were required and Peoples should have paid them in excess of a rental of $6 per month, and the plaintiff had by their own motion repossessed said piano, plaintiff was to return any excess money above said rental. This instrument was duly registered in Cherokee County on 26 August, 1912.

2. That up to and including 10 June, 1912, said Peoples paid to the plaintiff upon said piano installments amounting to $145, and stored the piano with defendant Hyatt, at his residence, and left the State to engage in business elsewhere; at the same time he stored other personal property in another place in the town of Murphy.

3. That on 24 July, 1912, one N. B. Adams brought before a justice of the peace two actions for an alleged debt of $71.75, summons in which was personally served, and a note of $100, with interest, and the summons was returnable 23 August, 1912; at the date of same he caused the piano to be attached. There was no personal service of summons in other case, but the justice caused notice to be posted at the door of the courthouse in Murphy and four other public places in Cherokee County of the summons and the attachment; on 23 August the justice rendered two personal judgments against the defendant Peoples, directing sale of the attached property to be made on the same date, that is, on the date of the judgments, and on the same date issued one execution on both judgments, for the sale of the piano and other property, to be made on 24 August, 1914; the other property was sold by the deputy sheriff on 24 August, and the sale of the piano was continued until 25 August, to be made at the residence of the defendant Hyatt, at which there was competitive bidding, and six or seven persons were present,

all without advertisement of sale, under said execution; the sale of the piano was made on 25 August at Hyatt's residence, and in a room thereof, at which Hyatt became the purchaser in the sum of $135, paid that sum to the officer and kept the piano, which he yet has. No return of sale was made by the officer on the execution.

(572) 4. On 6 August the defendant Hyatt wrote the following letter to the plaintiff:

I wired you, asking for best cash price on piano sold to Mr. R. L. Peoples, and received your reply, $210 cash. Beg to say, upon investigation, that I find this piano has been attached by Dr. N. B. Adams, this city, for account owed to him by Mr. Peoples, and have examined our register of deeds' office and failed to find that you have ever had your contract recorded covering same, and, therefore, this attachment holds good against the piano. We would like, if possible, to purchase this instrument, and if you will clear the title, and make us a close cash price on same, we will buy it. We understand that Mr. Peoples has paid you $145, leaving a balance of $230 unpaid. Kindly let us hear from you, and also the very best cash offer you are willing to accept for the piano, and oblige, Yours very truly,

PAUL C. HYATT.

On 7 August the plaintiff wrote and acknowledged receipt of the letter, repeating the offer of the piano for $210, and expressing regret that it had been attached, and asking what sum the attachment was for, and stating that it would be a great bargain for the school; also asking for the name of some proper attorney to look after the matter for the plaintiff.

On 8 August the defendant Hyatt wrote the plaintiff as follows:

I have your letter of the 7th, and in reply beg to say that I want this piano for my own personal use, and not for any school or institution. Professor Peoples owes us quite a little sum, and he has left here and owes others, and Dr. N. B. Adams attached this piano for an account against him of $71.75 and for a note of $100 and interest on same since 1910. This attachment was served about ten days ago, and Mr. Peoples will have thirty days in which to receive notice, after which there will be an advertisement of the goods attached and same sold to the highest bidder. In order to protect myself and others that he owes, it will necessitate my taking the piano, if we can come to an agreement, and if we do so, of course, you will have to give me a clear and undisputed title to the same.

I suppose that you have been told by Mr. Peoples that this piano has been levied upon, and of course any assistance that I can render you

will cheerfully do so; as you say, we are brother merchants, and I worked for four years in Savannah in the piano and organ business and know something of the prices of same, and the ups and downs to an installment account.

I refer you to Mr. M. W. Bell, attorney, who will look after the matter for you.

Yours very truly,
PAUL C. HYATT.

5. That plaintiff has not parted with the title to said piano (573) other than by the instrument made to R. L. Peoples.

And upon the foregoing findings of fact, I conclude that the defendant is not an innocent purchaser for value without notice, but undertook to assist and advise the plaintiff in the matter of protecting its rights to the piano.

Wherefore it is considered and adjudged by the court that the plaintiff, Phillips & Crew Company, is entitled to have and recover of the defendant P. C. Hyatt the Krell French piano, Style *Y*, wood mahogany No. 45918, of the value of $375, and to sell the same for balance due to plaintiff by R. L. Peoples under and pursuant to the said contract of sale dated 28 September, 1910.

It is further adjudged that said piano be sold by the sheriff of Cherokee County, at the residence of defendant, to the highest bidder for cash, after advertising such sale once a week for three successive weeks in some newspaper published in Cherokee County, at which sale both plaintiff and defendant may become the bidder and purchaser, and out of the proceeds of sale first pay the costs of advertisement and sale, including 2 per cent to the sheriff as commissions, and next pay the amount due the plaintiff under said contract of purchase made to said Peoples, and pay any residue that may be to the defendant P. C. Hyatt.

FRANK CARTER,
*Judge Presiding.*

The defendant appealed.

*M. W. Bell for plaintiff.*
*Dillard & Hill, Witherspoon & Witherspoon for defendant.*

BROWN, J., We agree with his Honor that the defendant is not an innocent purchaser for value, and that he acquired no title under the sale against the plaintiff.

The whole proceeding was very irregular, if not void, and the defendant had personal knowledge of all the irregularities. One execution was issued on two separate and distinct judgments, in one of which no service had been made, and no jurisdiction acquired over the judgment debtor. The execution directed the property attached to be sold on 23

August, the very day that the judgments were rendered, and the piano was sold on 25 August at this defendant's residence, without any advertisement, in presence of half-dozen persons, and was bid off by the defendant at $135, much less than its value. The defendant had full knowledge of these gross irregularities.

It is true that a purchaser at a sheriff's sale is not bound to look farther than to see that he is an officer who sells, and that he is empowered to do so by a valid execution. *Blount v. Mitchell,* 1 N. C., 85; but (574) this defendant was not an innocent purchaser. He had full knowledge of the invalidity of the execution directing on its face a sale without advertisement. Defendant also knew that in fact no advertisement whatever had been made, and that the sale was made two days after the rendition of the judgment in defendant's own house, and in the presence of only half-dozen persons. That such a sale is void as to him admits of no question. Rev., sec. 648; *Barbee v. Scoggins,* 121 N. C., 143; *Alston v. Morphew,* 113 N. C., 460; *McNeely v. Hart,* 30 N. C., 492.

Affirmed.

J. M. CHILES v. THE UNITED STATES FURNITURE MANUFACTURING COMPANY.

(Filed 23 December, 1914.)

**Corporations—Officers—Compensation—Agreement in Advance—Trials—General Rule—Limitations to Rule—Evidence—Nonsuit.**

In an action brought by an officer against a corporation to recover for services rendered, it is error for the trial judge to nonsuit the plaintiff upon evidence tending to show that the corporation was composed of himself and two others, all of whom were elected officers, with the plaintiff as president, who met and decided that the plaintiff should enter the duties of salesman of the concern at a certain minimum salary, and that the services were accordingly rendered by the plaintiff, the recovery of which is the subject-matter of the action, for from evidence of this character an express promise in advance on the part of the defendant to pay for such services may be reasonably inferred, and presents an issue of fact to be determined by the jury. The principles of law limiting the more general rule that an officer of a corporation may not recover for services rendered when compensation therefor has not been authoritatively agreed upon in advance, etc., discussed by HOKE, J.

APPEAL by plaintiff from *Justice, J.,* at February Term, 1914, of BUNCOMBE.

Civil action to recover for value of services rendered by plaintiff for defendant. It appeared in evidence that plaintiff was president of

defendant corporation and sued for his salary or wages of $500 per month, as due per contract for services in taking orders and making sales of furniture for defendant corporation.

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

*Merrimon, Adams & Adams, Martin, Rollins & Wright for plaintiff.*
*James H. Merrimon for defendant.*

HOKE, J. The cases on the subject very generally hold that (575) an officer of a corporation, for services in the course and scope of his official duties, can only recover when compensation therefor has been authoritatively agreed upon in advance. It is not always required that a definite sum be fixed upon, but there must be a previous agreement for compensation existent or in some way expressed so as to bind the company. For such services there can be no recovery on a *quantum meruit,* as ordinarily understood and applied. *Caho v. R. R.,* 147 N. C., 20, and authorities cited.

There is a line of decisions to the effect that for services outside of an officer's regular duties he may recover for their reasonable value, but, so far as examined, the better considered cases only recognize this position when the services are rendered to the knowledge of the general officers of the company having a right to bind it by contract, or with the knowledge and approval of the directorate having such power, or of the stockholders when in the exercise of the control and management of corporate affairs and when the work is of a kind and under circumstances from which a promise and expectation of pay may be fairly inferred. *Fitzgerald v. Fitzgerald,* 137 U. S., 98; *Martindale v. Wilson Case Co.,* 134 Pa. St., 348; *Brown v. Ice Co.,* 113 Iowa, 615; *Taussig v. R. R.,* 166 Mo., 28; Cooke on Corporations (6 Ed.), sec. 657.

The correct principle is very well stated in the Missouri case as follows: "The rule applicable to such a case, to be deduced from the modern and best considered cases, is, we think, that a party, although a director or other officer of a corporation, may recover the reasonable value of necessary services rendered to a corporation, entirely outside of the line and scope of his duties as such director or officer, performed at the instance of its officers, whose powers are of a general character, upon an implied promise to pay for such services, when they were rendered under such circumstances as to raise a fair presumption that the parties intended and understood they were to be paid for or ought to have so intended and understood."

It is not required in the present case to say how far and under what circumstances this limitation on the more general principle shall be allowed to prevail in this State, for the reason that, in our opinion, there are facts in evidence from which an express promise to pay plaintiff can be reasonably inferred.

Plaintiff, a witness in his own behalf, among other things, testified: That the corporation was organized with plaintiff, a Mr. Gray, and Mr. Hoyt as stockholders; that plaintiff was made president, Mr. Gray vice president, and Mr. Hoyt secretary and treasurer; that at the meeting, in which all were present, it was decided that plaintiff should enter on the duties of salesman for the company and was to receive a (576) minimum salary of $6,000 per year or $500 per month, and a maximum of $13,000 per year; the first to prevail until witness, by his work, should demonstrate what he could do; that he entered on the performance of these duties on 1 January, 1907, and continued to work for the company until June or July, 1908; that his services were of great value to the company during that period, and, in further support of his claim that there was an express promise to pay, he showed the check books of the company, giving indication that he was paid $500 per month for several of the months while he was at work.

On this testimony, we are of opinion that the judgment of nonsuit is erroneous, and plaintiff is entitled to have his cause submitted to the jury.

Reversed.

*Cited: Fountain v. Pitt,* 171 N.C. 115 (c); *Borden v. Goldsboro,* 173 N.C. 663 (p); *Credit Corp. v. Boushall,* 193 N.C. 607 (c).

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TIMMONS BARNETT, BY NEXT FRIEND, v. CLIFFSIDE MILLS.

(Filed 23 December, 1914.)

**1. Negligence—Explosives—Children—Trials — Evidence — Questions for Jury.**

In an action to recover damages for injury caused to an 11-year-old boy in exploding a dynamite cap alleged to have been negligently left on the ground near a well which the defendant corporation had dug on its premises, there was evidence in plaintiff's behalf tending to show that the defendant had used dynamite in digging the well, and the boy found the dynamite cap on the ground or in an uncovered box near by, in an open or uninclosed place, and the injury occurred when he exploded the cap with a hammer; that this place was 8 or 10 steps from a much used

path, 76 yards from the main entrance of defendant's mill where 600 or 700 people worked, and within a short distance of the defendant's store and of the post-office, and where children frequently went, the plaintiff on this occasion having gone upon seeing other children there. *Held*, evidence of defendant's actionable negligence sufficient to be submitted to the jury, and to sustain the charge of the court upon the question of whether the dynamite caps were left on the ground by the defendant's employees, whether the place was a public one, and whether the place or caps were likely to attract children.

**2. Negligence—Explosives—Commensurate Care—Children—Invitation—Trials—Instruction.**

Those who use high explosives in the conduct of their business are held to a degree of care in their use commensurate with the danger of such instrumentalities, and where there is evidence, in an action to recover damages sustained by an 11-year-old boy, that he was injured by bursting a dynamite cap he had found on the defendant's premises, publicly situated and frequented by children, etc., near a well the defendant had been blasting, it is not error for the judge to charge the jury that one who maintains dangerous instrumentalities on inclosed premises, of a nature likely to attract children at play, or permit dangerous conditions to exist, while not liable to an adult under those circumstances, he is liable to children so injured, though a trespasser at the time the injuries were received.

**3. Pleas in Bar—Former Action—Nonsuit.**

The plea of the pendency of the same action in another county will be overruled when it appears that in the former action a judgment of nonsuit has been entered.

APPEAL by defendant from *Harding, J.*, at July Term, 1914, (577) of CLEVELAND.

This is an action to recover damages for personal injury caused by the explosion of a dynamite cap. The material parts of the evidence are stated in the opinion.

The defendant moved to dismiss the action because of the pendency of another action for the same cause in Rutherford County, in which a judgment of nonsuit had been entered. The motion was overruled, and the defendant excepted.

There was also a motion for judgment of nonsuit, which was overruled, and defendant excepted.

His Honor charged the jury, among other things, as follows:

1. "Now, if you find by the greater weight of this evidence that the defendant was constructing a well there, and that they left lying around on the ground, as testified to by plaintiff and some of the witnesses, these highly dangerous explosives, dynamite caps, the court charges you that it is a dangerous instrumentality, that is, if the evidence disclosed this, that they left them there, loose, without any inclosure, no fence around there, nothing to warn the plaintiff of their presence, and that it was

a public place, and that the plaintiff was attracted there by the presence of other children; seeing it lying there and not knowing what it was and its dangerous nature, he took it home, as he contends, and was injured, as he contends—if you find all of that by the greater weight of the evidence, then the court charges you that would be negligence for which the defendant would be liable; and if you find that that negligence was the proximate cause of the plaintiff's injury, then you will answer the first issue 'Yes.'" Defendant excepted.

2. "And in this case, if you find that after using these dynamite caps, defendants, or their employees, went away and left them on the ground, as testified to by the plaintiff, without any inclosure or warning to plaintiff, that would be a negligent act; and if plaintiff, not knowing of its dangerous nature, in the innocence of youth, took it to his home and broke it with a hammer and it exploded and injured him, if you find there was an injury, and that it was the proximate cause upon the facts outlined by the greater weight of the evidence, then you will answer the first issue 'Yes.'" Defendant excepted.

(578) 3. "One who maintains dangerous instrumentalities or appliances on inclosed premises, of a nature likely to attract children at play, or permits dangerous conditions to exist, while not liable to an adult under those circumstances, is liable to a child so injured, though a trespasser at the time the injuries were received." Defendant excepted.

4. "Defendant contends that the defendant's witness testified he was present there with him; plaintiff contends that this is not true, and that he never had any such conversation. It is left you to decide which is correct." Defendant excepted.

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

*O. Max Gardner for plaintiff.*

*Ryburn & Hoey, Quinn & Hamrick, and Cansler & Cansler for defendant.*

ALLEN, J. We will consider together the motion for judgment of nonsuit and the exceptions to the instructions to the jury, as both involve the contentions of the defendant that there is no evidence (1) that the dynamite caps were left on the ground by its employees, (2) that the place where the caps were found is a public place, (3) that the place or caps were likely to attract children; and that if there is evidence of these facts, they and the other circumstances relied on by the plaintiff were not sufficient to carry the case to the jury.

We will first reproduce parts of the evidence introduced by the plaintiff, and then undertake to apply it.

The plaintiff testified: "In the fall of 1907 I lived at Cliffside, N. C. I was 11 years old then and living with my papa and mama. They are here now. They were then living at Cliffside. In November, along about that time, one of my eyes was put plumb out and the other affected so I could hardly see out of it. It was put out with a dynamite cap which I got in front of the post-office at Cliffside, at a well. Mama had sent me for the mail from the post-office, and I saw some little boys and girls playing over the other side. There were some plank in the well. Some of them were standing looking into it. There were a few plank over the well. Nobody was working at the well at that time. I looked into the well, and there was a box sitting there and some dynamite caps lying down there. That is what they said it was. I picked up one and took it home with me. Two or three were on the ground, brass looking, sorter like cartridge hulls. I thought it was an electric wire about 6 inches long in it. I did not know what it was. Where I found the cap is a public place 15 to 20 steps from the post-office and about 100 yards from the cotton mills and about the same distance from the coal chute. About that time I think there were seven or eight hundred hands working in the mill. The mill hands traveled it back and forth (579) to the mill. This mill was on the premises of the Cliffside Mills. I carried the dynamite cap home and took it out where we had been playing, about 40 steps from the house. I exploded it with a hammer, and it put my eye out. The right eye went plumb out; have not been able to see out of it a bit since. The other eye was hurt. I did not know what it was when it exploded."

J. H. Leverette: "I remember when Timmons Barnett got his eye hurt at Cliffside. I was working at the mill there, some of the time. I think they had been blasting at the well at the super's house, Mr. Packard. I do not know whether they were blasting anywhere else on the premises or not. I was helping at the windlass. Kelley Moore, who worked for the company, had me employed; he is outside boss, I think. The company paid me. They used dynamite and dynamite caps to do the blasting. This is the well Timmons Barnett testified to, down by the post-office. I have seen children playing about there."

G. F. Sisk: "I heard blasting at the Packard well. I saw dynamite caps in a box, while they were working at the well. Look like a sort of fuse, with a little tin cap on it. That cap was off a little piece, sorter under the edge, where had laid a plank off the well, to go down, 2 or 4 feet from the well."

Charley Gardner: "I remember Timmons Barnett getting hurt. It was in November, I think, 1907. I saw some dynamite caps in a box at the Packard well before the day the boy was hurt. There was no fence or anything around the well when I passed there. There were children playing close there when I passed that day. That was somewhere in the time of a week before the boy was hurt. I had heard some blasting, and there had been blasting there. There was nobody at the top of the well, and I did not think there was anybody in the well."

Ed. Wood: "I saw the Packard well before Timmons Barnett was hurt; they had been blasting at the well when I was along there. I saw some dynamite there. The dynamite was in a box uncovered, 3 or 4 feet from the well."

Z. D. Barnett: "The Packard well was 8 or 10 steps from the path that went down across to the house, and 40 to 50 yards to the company store, 50 or 75 yards from the main entrance to the mill. I saw children around there frequently. I know they played there when they taught school in the building at the well. Six to seven hundred people employed in the mill. I saw dynamite caps in a box under the floor near the well, under the Packard house, in an open box, 4 to 5 feet from the well. I was down there two or three times, and saw them all the time I was down there."

(580) Mr. Kelley Moore: "I am outside man for the Cliffside Mills. The dynamite at Cliffside is in my charge. I have charge of the magazine. In the Packard well, I think the first shot they made they used caps, and they claim one did not go off. I gave them three dynamite and three caps, the first shot that was made. They shot part of them. Two of them went off, and they bored out the other one. That cap was taken back to the magazine. I have been working at Cliffside fourteen years. I was the first man that went there. I look over the premises when the work is completed; that is part of my duty to look after what is wasted, or left, and take any dynamite caps lying around there. I observe to see what is left. We moved all of the dirt. It covered the ground from the house, back for 20 feet. Part of that dirt was put in front of the old company store. Nitroglycerine is what furnished the power."

The well referred to was being dug for use in connection with the house which the defendant was building for its superintendent.

This evidence was accepted by the jury, and it tends to prove:

(1) That the well was being dug by the defendant.

(2) That dynamite was used for that purpose.

(3) That the dynamite was kept in an uncovered box.

(4) That dynamite caps were left on the ground by the well.

(5) That the well was not inclosed.

(6) That it was within 8 or 10 steps of a much used path, within 75 yards of the main entrance of the mill of defendant, in which six or seven hundred people worked, within 40 or 50 yards of the store of the defendant, and within 15 or 20 steps of the post-office.

(7) That the place had been formerly a playground for children; that children were seen there frequently, and that on the day the plaintiff was injured he went to the well because he saw other children there.

As was said in *Fitzgerald v. R. R.*, 141 N. C., 535: "It is very generally held that direct evidence of negligence is not required, but the same may be inferred from facts and attendant circumstances, and it is well established that if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. Thus, in Shearman and Redfield on Negligence, sec. 58, it is said: 'The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself. Having done this, he is entitled to recover unless the defendant produces evidence to rebut the presumption. It has sometimes been held not sufficient for the plaintiff to establish a probability of the defendant's default; but this is going too far. If the facts proved render it probable that the defendant violated its duty, it is for the jury to decide whether it did so or (581) not. To hold otherwise would be to deny the value of circumstantial evidence.'"

When this principle is applied and the circumstances are considered in connection with the fact that no evidence was introduced of the use of dynamite except by the employees of the defendant, the jury were justified in finding that the dynamite was left by the employees on the ground or in an uncovered box at a place not inclosed and much used by the public, including children; and this would be negligence.

In *Powers v. Harlow*, 53 Mich., 507, *Judge Cooley* says: "Children, wherever they go, must be expected to act upon children's instincts and impulses; and others, who are chargeable with a duty of care and caution towards them, must calculate accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they, in their immature judgment, might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken." In this case it was held that the defendant was guilty of negligence, when it appeared that defendant kept on his premises over which the injured person, a boy, was in the habit of passing,

in an exposed place, certain dangerous explosives, which the boy discovered and exploded with serious injury to his person.

In *Mattson v. Minnesota Ry. Co.,* 95 Minn., 477, *Justice Brown* says: "There is nothing so attractive to young boys as articles of an explosive nature, and the greater the volume of sound that may be produced the greater the attraction. As compared with ordinary turntable, dynamite is vastly more attractive. Young children are incapable of comprehending the dangers in handling or exploding the same, and their natural instincts urge them into experiments with it whenever it comes within their reach. The degree of care required of persons having the possession and control of dangerous explosives, such as firearms or dynamite, is of the highest. The utmost care must be exercised, respecting the care and custody of such instrumentalities, to guard against injury to others. The degree of care must be commensurate with the dangerous nature of the article, and is greater and more exacting as respects young children."

In *Nelson v. McLellan,* 31 Wash., 208, it appeared that defendant placed sticks of dynamite in a box upon a vacant lot, in the vicinity where he was engaged in a public improvement, under contract with the municipal authorities, and where boys were in the habit of playing, without securely covering the same, and he was held liable for injuries to plaintiff, a boy, who found the same and exploded one of the sticks.

In *Makins v. Piggott,* 29 Can. S. C., 188, defendants were constructing a railroad near an unused cemetery, and a boy of 15, while walking near by and through the cemetery, found some fulminating caps,
(582) and, in ignorance of their dangerous quality, was injured by the explosion of one of them. The Court held that, while there was no direct evidence as to how the caps came to be in the cemetery, nevertheless, it would seem to be a fair inference, in the absence of circumstances leading to a different conclusion, to attribute the act of placing the defendant's caps upon the ground to those who alone were shown to have had the handling of them.

In *Harriman v. Pittsburg R. R.,* 12 N. E., 451, defendant left an unexploded torpedo on its track at a place which had been used as a crossing. The torpedo was picked up by a boy of 9 years, and carried by him into a crowd of boys near by, and they attempted to open it. The torpedo exploded and plaintiff was injured, and it was held that negligence of company's servants was the proximate cause of injury, and that the act of the boy in carrying the torpedo from where it was found was but a contributing condition, which defendant's servants ought to have anticipated as a probable consequence of their negligent act or omission.

In *Olson v. Home Investment Co.*, 27 L. R. A. (N. S.), 884, it was held that the act of boys in stealing or attempting to explode dynamite negligently left unguarded in an unlocked shanty on a vacant city lot is not such an intervening cause of injury to one of them by an explosion as will, as a matter of law, relieve the owner from liability for the injury, if the boys might have been found, from their age, experience, and knowledge of right and wrong, to have been governed by unreasoning and natural impulses.

In *Wells v. Gallagher,* 3 L. R. A. (N. S.), 762, a cartridge or bomb was swept by a janitor into an alley. A child picked it up and exploded it to his injury, and the Court says: "The law clearly implies a duty not to place or cause to be placed, or cause to remain, in the public highway a bomb or explosive capable of inflicting injury by being exploded. It is unimportant how long the bomb remained in the public alley, if it remained long enough to cause injury, and it is equally unimportant whether the plaintiff, a boy of 14 years of age, exploded the bomb in the public alley, where it is alleged to have been negligently placed, or whether he carried it to an adjacent yard and there exploded it. In either case the alleged injury is the proximate consequence of the alleged negligence."

We are not without authority in our own Court.

In *Brittingham v. Stadiem,* 151 N. C., 302, *Justice Manning* quotes with approval from *Mattson v. R. R., supra:* "The degree of care required of persons having the possession and control of dangerous explosives, such as firearms or dynamite, is of the highest. The utmost caution must be used in their care and custody, to the end that harm may not come to others from coming in contact with them. The (583) degree of care must be commensurate with the dangerous character of the article"; and the same case is cited by *Justice Brown* in *Wood v. McCabe,* 151 N. C., 458, in support of the proposition that "All courts and writers agree that the degree of care required by persons using such dangerous instrumentalities as dynamite in their business is of the highest, and what might be reasonable care in respect to grown persons of experience would be negligence as applied to youth and children. 7 A. and E., 411; *Mattson v. R. R.,* 111 Am. St., 487."

In *Ferrell v. Cotton Mills,* 157 N. C., 538, *Justice Walker* says: "In *Akin v. Bradley,* 92 Pac., 903, defendant had thrown some dynamite caps on a vacant lot in rear of its place of business. A path ran through this vacant lot, and school children used the path. Plaintiff was a boy of 11 years of age. The Court said: 'We think that when the respondent left these dangerous explosives by the wayside, where it knew that children, naturally attracted by such things, were constantly passing and

repassing and playing therewith, it must be held to have known that such children were liable to cause some of said caps to explode in a manner likely to cause them serious injury, and that the explosion of such a cap by a dry battery in the manner shown herein did not constitute an intervening cause that should relieve respondent from liability.' In *Stollery v. R. R.*, 90 N. E., 709, a boy of 10 years was killed, and his body found beside a conveyor operated by defendant on a vacant lot in a city. *Held,* 'Under the decisions of this State, unguarded premises supplied with dangerous attractions to children are regarded as holding out an implied invitation to them, which will make the owner of the premises liable for injuries to them, even though the children be technically trespassers.' This case also holds: 'The rule of law is, as already stated, that the proof of negligence on the part of the appellee's intestate, as well as all the other elements of the action charged in the declaration, may be established by circumstantial evidence.' The principle of the law of negligence laid down in the foregoing cases, as well as in others too numerous to cite, is both just and humane"; and in *Robinson v. Mfg. Co.*, 165 N. C., 497, the *Chief Justice* said: "Dynamite is often used, and is harmless if not tampered with. But it would surely be negligence to leave it lying on the floor where any ignorant or thoughtless person might cause it to explode with fatal consequences to his coemployee."

The case of *Briscoe v. Power Co.*, 148 N. C., 396, recognizes this principle, and the other authorities relied on by the defendant are not, we think, in point, except perhaps the case from Rhode Island, although it appeared in that case that the dynamite was in a tin box with a string around it, and this box was kept in a large tool chest.

(584) In *Hughes v. R. R.*, 71 N. H., 279, and in *Carter v. R. R.*, 19 S. C., 20, the injury was caused by the explosion of a torpedo placed on the track as a signal, and the party injured in the last case was a full-grown man, and in *Chambers v. Coal and Railway Co.*, (Ala.) 30 So., 170, the powder house, which it was alleged was negligently located, was 150 yards from the road and near a path seldom traveled.

We are, therefore, of opinion there was evidence of the facts referred to in the charge, and of negligence, which ought to have been submitted to the jury.

The plea of the pendency of the action in Rutherford County was properly overruled, because that action had been dismissed by judgment of nonsuit. *Cook v. Cook,* 159 N. C., 48; *Brock v. Scott,* 159 N. C., 513; 1 Corpus Juris, 60 and 94.

In *Pettigrew v. McCoin,* 165 N. C., 472, both actions were pending, and the only question involved was when the action should be tried.

Upon a review of the whole record, and after a careful examination of the briefs, which have been a great aid to us and from which we have taken most of the authorities we have quoted, we find

No error.

*Cited: Karchanake v. Mfg. Co.*, 175 N.C. 442 (1cc); *Rankin v. Oates*, 183 N.C. 524 (3j); *Stevens v. Lumber Co.*, 186 N.C. 750 (1p); *Richardson v. Libes*, 188 N.C. 113 (1cc); *Hight v. Harris*, 188 N.C. 331 (3c); *Campbell v. Laundry*, 190 N.C. 653 (1c); *Stephens v. Lumber Co.*, 191 N.X. 27, 28, 29, 32 (1d); *Reed v. Mortgage Co.*, 207 N.C. 30 (3c); *Luttrell v. Mineral Co.*, 220 N.C. 790 (1d); *Hedgepath v. Durham*, 223 N.C. 824 (1d); *Moore v. Moore*, 224 N.C. 556 (3d).

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W. W. HYDER v. SOUTHERN RAILWAY COMPANY.

(Filed 9 December, 1914.)

**1. Removal of Causes—Extension of Time to Plead—Petition—Time to File—Interpretation of Statutes.**

An order of the trial judge extending time within which to file pleadings, under our statute, has the same force and effect as if the extended period had originally been allowed by the statute; and where a nonresident defendant is sued by a resident plaintiff in our courts for an amount cognizable in the Federal court, and the plaintiff fails to file his complaint within the time allowed, and obtains an extension of time to file pleadings duly excepted to by the defendant, which upon notice given files its petition and bond for removal to the Federal court and moves thereon at the first available term of the Superior Court wherein the action was commenced, it is held that the defendant's motion was in time, and should be allowed, if the cause is otherwise removable.

**2. Removal of Causes—Foreign Corporations—Lessee Railroads.**

The leasing and operating of a domestic railroad by a foreign railroad company cannot have the effect of making the lessee road a domestic corporation, or prohibit it from removing a cause to the Federal court under the Federal act permitting it. *Herrick v. R. R.*, 158 N. C., 310; *Hurst v. R. R.*, 162 N. C., 368, cited and distinguished.

**3. Removal of Causes—Citizenship—Issue of Fact—Jurisdiction—Federal Courts.**

An issue of fact raised by the complaint and petition as to whether a corporation, seeking to remove a cause brought against it by a resident plaintiff, to the Federal court, is a foreign corporation and entitled to have its motion granted for diversity of citizenship, is one for the determination of the Federal court where the petition upon its face is regular

and sets forth facts sufficient for the removal of the case, and the bond accompanying it is a proper one.

(585) APPEAL by defendant from *Webb, J.,* at October Term, 1914, of HENDERSON.

This was a civil action heard on a motion to remove the cause to the District Court of the United States for the Western District of North Carolina. The summons was issued 12 May, 1914, returnable on the twelfth Monday after the first Monday in March, 1914, towit, 25 May, 1914. The summons was served 12 May, 1914, on the defendant. At the May term of the court, 28 May, 1914, the defendant moved to dismiss the action for failure of the plaintiff to file the complaint within the first three days of the term. This motion was overruled, and the plaintiff allowed sixty days to file complaint and the defendant sixty days thereafter to file answer or otherwise plead. The defendant excepted. The complaint was not filed within the sixty days allowed by the court, but was filed 6 August, 1914. The sixty days expired 28 July, 1914. The complaint alleged damages in the sum of $20,125. On 7 September, 1914, the defendant served notice of a motion to remove the cause to the United States District Court. This motion was made and heard at the next term of the court after the complaint was filed, towit, October Term, 1914. The petition to remove was in the usual form, and alleged that the plaintiff was a citizen and resident of the State of North Carolina, and the defendant Southern Railway Company a corporation organized under the laws of the State of Virginia, and a citizen and resident of the State of Virginia, and not a citizen and resident of the State of North Carolina. The judge refused to remove the cause and entered an order denying the defendant's motion. The defendant thereupon excepted and appealed.

*Staton & Rector for plaintiff.*
*Martin, Rollins & Wright for defendant.*

WALKER, J., after stating the case: The defendant certainly did all that it could, under the law, to preserve its right of removal. It objected to the enlargement of time to plead. Could it do more? If the court ruled against its objection, it surely was not in fault. The plaintiff was delinquent even after receiving this favor from the court, as he did not file his complaint until after the extended time had expired.

(586) The defendant filed its written notice to remove with sufficient promptness, just thirty days after the complaint was filed. The answer was not due until the end of the ensuing term of court, under our statute and the construction thereof by this Court, *Brown v. Rhine-*

*hardt,* 112 N. C., 775, 776; *Roberts v. Allman,* 106 N. C., 391; so that the petition to remove to the United States Court was filed before the time for answering had expired under the law or any general or standing rule of the court. It seems to have been overlooked, in passing upon cases of removal from the State to the Federal court, that our statute authorizes the judge of the Superior Court to enlarge the time for filing pleadings, and this surely should have the force and effect of a general or standing rule of court, as in equity causes in the Federal courts. The time is extended with the same force and effect, as it seems to us, as if the extended period had originally been allowed by the statute for filing the pleading.

If we should adopt the plaintiff's view, the defendant could, by his procrastination and delay, be rendered practically helpless to remove a cause.

The petition alleged that the defendant was a corporation created and organized under the laws of the State of Virginia and a citizen and resident of the State of Virginia, and that the plaintiff was a citizen and resident of the State of North Carolina. Upon such an allegation the judge of the Superior Court had no duty to perform other than to make the order to remove the cause. *Herrick v. R. R.,* 158 N. C., 310, and cases there cited.

Plaintiff, however, took the position in the court below that, as he had alleged that the Transylvania Railroad Company, a corporation organized under the laws of North Carolina, owned the railroad where the plaintiff's intestate was killed, and had leased the same to the Southern Railway Company, the Southern Railroad Company thereby "became the successor of said Transylvania Railroad Company, and was, therefore, at the time of the grievances hereinafter complained of, and at the time of the commencement of this action, and still is, a corporation under the laws of the State of North Carolina." The answer is that the mere leasing of a railroad, which is the property of a North Carolina corporation, does not make the lessee a corporation of this State. There is no statute to that effect, and, so far as we have been able to find, no decision of this Court holding any such thing. The decision of a majority of this Court in *Hurst v. R. R.,* 162 N. C., 368, and the decision of the Court in *Coal and Ice Co. v. R. R.,* 144 N. C., 732, are based on section 697 of The Code, brought forward in section 1238 of the Revisal of 1905. That statute, however, in terms applies not to a lease of the property of a domestic corporation, but to a purchase outright under an execution or judicial sale of all the property, rights, and franchises of (587) such a corporation. The citation of authorities on this question is not necessary, as the statute itself is plain.

The fact that the plaintiff alleged in his complaint that the Southern Railway Company was a domestic corporation, and also alleged the facts out of which he contends such corporate existence arose, makes this a different case from the *Hurst case* or the *Ice and Coal Co. case* above referred to; but even if that were not true, and if plaintiff had alleged directly, without stating the facts, that the Southern Railway Company was a domestic corporation and a citizen and resident of the State of North Carolina, when the defendant appeared, filed its petition to remove, and alleged that it was a citizen and resident of the State of Virginia, then a question arose which was determinable only by the United States court. *Herrick v. R. R.*, 158 N. C., 310, and also the several cases cited in *Hurst v. R. R.*, 162 N. C., 368.

There is no statute in North Carolina regulating leases of railroads. It cannot be said that the principle of law laid down in *Logan v. R. R.*, 116 N. C., 940, applies to this case. It was held in that case that the lessor company could not, by leasing its property and franchises, relieve itself of the obligations imposed by its charter, and in consequence that such lessor company was liable for the torts of the lessee, while carrying on the business for which the lessor was organized. That principle, however, has nothing to do with this case. The lessor company was not sued, and there was but one defendant, which was a corporation organized under the laws of Virginia, as alleged in its petition.

It cannot be said in North Carolina that a railroad company has no power to lease its property. That is not an open question, but it has been expressly decided otherwise in the cases of *S. v. R. R.*, 72 N. C., 634; *Hill v. R. R.*, 143 N. C., 539.

The charter of the lessor company, chapter 360, Public Laws of 1901, sec. 3, declares that said company "is vested with all the rights, privileges, immunities, and powers conferred upon railroad companies by chapter 49 of The Code of North Carolina." This charter was amended by chapter 211, Private Laws of 1901, but such amendment merely continues the corporate existence and rights of the original corporation.

The decisions of this Court in the *Hurst case* and in the *Ice and Coal Co. case, supra,* have no bearing on this controversy, for the reason that those cases grew out of a cause of action against the Western North Carolina Railroad, and this cause of action arose on the line of a railroad entirely separate and distinct, being the railroad extending from Hendersonville to Lake Toxaway, and referred to in the complaint as the property of the Transylvania Railroad Company.

(588) At no stage of this case has the defendant been in fault. It has done all that it could do to save its rights. The law does not require the performance of the impossible, neither will it permit the

plaintiff to take advantage of his own wrong, which was his delay to file his complaint. The extension of time was duly objected to, and the defendant can lose nothing by the adverse ruling of the court allowing it. The act of the law (and the act of the court is practically the same thing) shall be allowed to hurt no man. This is a cardinal maxim of the law, and was applied to similar facts in *Isler v. Brown,* 66 N. C., 557.

Having decided that the petition was filed in due time, the only remaining question is whether the cause is removable upon the face of the petition, the defendant having filed the proper bond. This is a short way of stating the real question in these removal cases. The question thus put by us must be decided in the Federal court, because the Federal law so requires and the highest Federal court has so decided, and it is our solemn and bounden duty to abide by its construction of the act of Congress. Why do the futile thing of ignoring the decision of that exalted tribunal in a matter that pertains, not to ours, but to its jurisdiction?

Reversed.

*Cited: Cogdill v. Clayton,* 170 N.C. 528 (3c); *Dills v. Fiber Co.,* 175 N.C. 51 (1d); *Public Service Co. v. Power Co.,* 180 N.C. 357, 358, 359 (3c); *Powell v. Assurance Society,* 187 N.C. 597 (1d); *Crisp v. Fibre Co.,* 193 N.C. 84 (3c).

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JULIA F. HOWELL v. J. N. SOLOMON.

(Filed 2 December, 1914.)

**1. Parent and Child—Support of Child—Willful Abandonment—Trials—Evidence—Burden of Proof.**

In an action against a father to recover for the support, tuition, etc., of his minor children furnished by their grandmother, the plaintiff, there was evidence in behalf of the defendant tending to show that the plaintiff took possession of his children against his will and prevented him from having access to them or performing his parental duty as to their support and maintenance, and had then voluntarily surrendered them to him; as well as evidence to the contrary. *Held,* the burden of proof was on the plaintiff to show that she supported and maintained the children, and on the defendant that he was prevented by plaintiff from performing the duty himself, and when the verdict of the jury has been rendered, under proper instructions from the court, in defendant's favor, the case does not fall within the meaning of Revisal, sec. 180, providing that the parent shall be deemed to have forfeited all rights and privileges with respect to the care, custody, and services of his children whom he has willfully abandoned.

**2. Same—Contract Implied—Torts—Damages.**

Where a grandmother seeks to recover in an action against the father for the tuition, board, etc., of his minor children, and the jury by their verdict, under proper instructions, have found that the plaintiff had deprived the defendant of their care and custody against his will during the time in question and should recover nothing, though ordinarily a recovery may be had as upon a *quasi* contract for services rendered, etc., the verdict will not be disturbed for the plaintiff will not be permitted to take advantage of her own wrong.

**3. Evidence — Depositions — Agreements — Objections and Exceptions — Trials—Leading Questions—Court's Discretion.**

*Semble*, an agreement to waive all irregularities in the taking of depositions, and that they should be opened and read subject to objections and exceptions, does not confine the party thus agreeing to the objections and exceptions already noted in the depositions; but when it sufficiently appears that upon the trial the judge ruled upon the objections and exceptions then taken, exceptions to his not having done so cannot be sustained, especially when they relate chiefly to the leading character of the questions asked, which are directed to the sound discretion of the trial judge, and are not reviewable on appeal in the absence of its abuse.

**4. Court's Discretion—Verdicts—Motions—Weight of Evidence.**

A motion to set aside a verdict of the jury as being against the weight of the evidence is addressed to the sound discretion of the trial judge, and in the absence of evidence of its abuse is not reviewable on appeal.

(589) APPEAL by plaintiff from *Hardin, J.*, at February Term, 1914, of ROWAN.

This action was brought to recover, first, compensation for the support and maintenance of defendant's two children, Lucile Solomon and James E. Solomon, who are the grandchildren of the plaintiff, being the children of her deceased daughter, Cora (Howell) Solomon, as for money paid to the use of the defendant, and, second, to recover damages for wrongfully taking them from the custody of the plaintiff at Salisbury, N. C., and carrying them to Richmond, Va., where they now are, living in comfort and happiness with their parent.

With reference to the first cause of action, the court gave the following instructions, among others, to the jury:

"1. The obligation rests upon a parent to maintain and support his children, and it does not make any difference whether you find that this defendant abandoned his wife and children, or did not abandon them. If he went off in good faith because he could not stay at home, and left the home of his mother-in-law, it did not relieve him of his responsibility of maintaining and providing for his children, and it was his duty to provide for them as best he could out of the maintenance and support he got. The law does not require that he should maintain and support

his children in a style of life that he is not able to support them in, but that he should give them reasonable support and maintenance for the station of life in which they lived, provided he is able to do so.

"2. If you find from the greater weight of this evidence that (590) the defendant failed, during the years from 1901 to 1911, to maintain and support his children, whether he abandoned them or did not abandon them, and that the plaintiff maintained and supported the children during the ten years, then the plaintiff would be entitled to recover of the defendant what you shall find is a reasonable amount for clothing and food, and such reasonable incidental expenses, such as medical bills, school books, and things of that kind that were reasonably necessary for the maintenance and comfort of those children in the station of life in which they were being reared."

The court then instructed the jury that if they found that plaintiff did not prevent the defendant from performing his duty to the children by her own misconduct, and supported them herself, she would be entitled to their verdict, the burden of proof being upon the plaintiff to show that she supported and maintained them, and upon defendant to show that he was prevented by her acts from performing the service himself. There was evidence to warrant these instructions.

The court nonsuited the plaintiff as to her second cause of action, and the case proceeded to a verdict for the defendant as to the first cause of action, and plaintiff appealed from the judgment thereon.

*Clement & Clement and R. Lee Wright for plaintiff.*

*W. H. Woodson and Abner C. Goode for defendant.*

WALKER, J., after stating the case: We think the last ruling was a proper one, as it does not appear that plaintiff has brought her case within the terms or spirit of the Revisal, sec. 180, which is as follows: "In all cases where the surviving parent of any orphan child shall have willfully abandoned the care, custody, nurture, and maintenance of the child to kindred, relative, or other person, the parent shall be deemed to have forfeited all rights and privileges with respect to the care, custody, and services of such child." There was no evidence that defendant was a *surviving* parent who had *willfully* abandoned his children. When he left his home, under compulsion, as he alleged, his wife was living, and continued to live for some time. When she died, the plaintiff took the two children into her own custody and, as the jury must have found, if we construe the verdict in the light of the evidence and the charge of the court, she prevented the defendant from having any access to them or from performing his parental duty of support and maintenance.

The case of *Howell v. Howell,* 162 N. C., 283, cited by the plaintiff's counsel, is not in point, as it appeared there that the defendant had assisted his daughter, Mrs. Howell, in abducting the child, Lucy Howell, so that the plaintiff, her father, was thereby deprived of his right-
(591) ful custody of her, to his injury and damage. Here a third party is suing the father, who is entitled to the custody of his child unless he has in some way lost the right, and such is not the case here. *Newsome v. Bunch,* 144 N. C., 15. The last case is much like this one in its general features. Many other authorities are to the same effect. 1 Blackstone (Sharswood's Ed.), 452, and note 10; 21 A. and E. Enc., 1036; *In re Turner,* 151 N. C., 474; *In re Jones,* 153 N. C., 312; *Littleton v. Haar,* 158 N. C., 566; *Howell v. Howell, supra.* This right of the father continues to exist until the child is enfranchised by arriving at years of discretion, "when the empire of the father gives place to the empire of reason." 1 Blackstone, 453; *Newsome v. Bunch, supra.* Where there is a contest for the custody of the child between those asserting conflicting rights to the same, the courts have, in modern times, adopted the rule stated by the great *Chancellor Kent:* "The father, and on his death the mother, is generally entitled to the custody of the infant children, inasmuch as they are their natural protectors, for maintenance and education. But the courts of justice may, in their sound discretion and when the morals or safety or interests of the children strongly require it, withdraw the infants from the custody of the father or mother and place the care and custody of them elsewhere," which was approved by this Court in *Latham v. Ellis,* 116 N. C., 30. See *In re Turner, supra.* The father may forfeit or surrender his right, as the above authorities declare, but there has been no such loss or abdication of his right in this case, as appears from the facts in the record. Plaintiff alleges, and testified, that instead of surrendering his right to plaintiff, she had given up the children voluntarily to him and he carried them away with her free consent.

As to the first cause of action, plaintiff objected to the deposition of the defendant being read, because of an agreement that she should waive all irregularities in the taking of it, and that it should be opened and read subject to her objections and exceptions. It may be admitted that this condition extended to objections made at the trial, and was not restricted to those already noted in the deposition, and we are inclined to think this is correct; but if it is so, the plaintiff was given the full benefit of this construction of the stipulation. The objections were noted, passed upon, and overruled. They were directly chiefly to the leading character of the questions. It was a matter addressed to the sound discretion of the court whether this kind of examination should be per-

mitted, under the peculiar circumstances, and the exercise of this discretion is not reviewable, except in case of gross abuse, which does not appear in this instance. Jones on Evidence (2 Ed.), sec. 819 (319), where the author says, quoting and indorsing what had been said in Best on Evidence (10 Ed.), sec. 641: "It should never be forgotten that 'leading' is a relative, not an absolute, term. There is no such thing as 'leading' in the abstract, for the identical form of ques- (592) tion which would be leading of the grossest kind in one case or state of facts might not only be unobjectionable, but the very fittest mode of interrogation in another. The subject is one of judicial discretion, and the allowing or refusing leading questions is *not generally a ground for appeal.* If, however, there appears a clear *abuse of discretion,* it is ground for exception and reversal." *N. Pac. Ry. Co. v. Aslin,* 158 U. S., 271; *Crenshaw v. Johnson,* 120 N. C., 270. And it is said to be especially a matter of discretion where the witness is examined on written interrogations. *Holmes v. Clisby,* 131 Ga., 241. See, also, Jones on Evidence, sec. 819, and notes, where many cases upon this subject are collected.

In the first cause of action plaintiff sought to recover, as upon a *quasi* contract, for services rendered and money expended in the support, education, and maintenance of the two children of the defendant, a duty which was owing by him to them, and as she had performed this legal obligation for him, she claims that the law raises an assumpsit on his part to reimburse her. If these were all of the facts, her conclusion would not be questioned. But there are other important and material facts which the jury have evidently found against the contention of the plaintiff. The general doctrine stated by plaintiff's counsel is fully sustained by the authorities discussed in their well prepared brief. 2 Kent Com., 193; Tyler on Infancy, 114; 29 Cyc., 1609; *Hagler v. McCombs,* 66 N. C., 346; *Honeycutt v. Thompson,* 159 N. C., at p. 31; *Dennis v. Clark,* 2 Cush. (Mass.), 347; *Johnson v. Barnes,* 69 Iowa, 643; *Courtwright v. Courtwright,* 40 Mich., 633; *Van Valkinborough v. Watson,* 13 Johns. (N. Y.), 480; *Gilley v. Gilley,* 79 Me., 292; *McCarthy v. Hinman,* 35 Conn., 538; 5 Wait Aclin and Def., 50; 28 A. and E. Anno. Cases, 296, 1913 C.; 1 Blackstone, 446; *Porter v. Powell,* 7 L. R. A. (O. S.), 176, and notes. These citations fully explain and fairly illustrate the principle. But the court, as will be seen by referring to the extract from the charge given above, instructed the jury, not only fully, but carefully, and in exact accordance with the conceded principle concerning the legal duty of a father towards his children in respect of their support, maintenance, and education. The ground of his liability could not well have been more completely covered. The plaintiff should have

found fault with the verdict, and not with the charge, and this is the course she pursued, as she moved to set aside the verdict; but whether this should be done when it is against the weight of the evidence is a matter entirely within the discretion of the lower court, and we have no power to do so, nor generally to review the ruling of the trial judge. The question of defendant's liability was fairly submitted to the jury, under correct instructions, and the verdict must stand, as being a final decision upon the facts.

(593) It may be that the verdict should have been otherwise than it is, and that the defendant should have been held liable to the plaintiff for something; but we cannot come to the aid of plaintiff under the circumstances, although the evidence may have left that impression upon us, for we have only to do with the law, leaving the facts to be found by that tribunal which has been so wisely and fortunately appointed by the law for the purpose. The defendant alleged and testified that he was perfectly willing to support and maintain his children, but was actually prevented from doing so by the gross misconduct of the plaintiff, due to her infirmity of disposition, or temper, and her unjust and gratuitous interference with his domestic affairs, driving him from his home, which she had made unhappy by her intolerance, quarrelsome disposition, and complete domination, and that she, in various ways, not only obstructed him, but rendered it impossible for him to get possession of his children, or communicate with them, so that he could perform his legal duty to them, when he was at all times ready and willing to do so. If this is true, and the jury found it to be so, she will not be permitted to take advantage of her own wrong. There was also evidence of a rather convincing character that she had not taken good care of the children, and by reason of her indifference to and neglect of their educational, moral, and religious training, she was not a proper person to have their custody. They roamed about the streets, poorly clad, and without any show of restraint, where their morals were apt to be corrupted by association with evil-minded persons, and in other respects they failed to receive that attention and oversight which was so essential, especially at their tender age, to the proper formation of their character and to their education and correct discipline. There was also evidence that they now have a good home with their father, where they are contented and happy and receiving the benefit of a father's care and devotion. The jury were doubtless greatly influenced by these considerations in returning the verdict which is now attacked, and perhaps it is a just and righteous one. There is a strong presumption that it is so. It may be that the father, not willing to act longer in resentment towards the plaintiff, and while not legally bound to do so, will yet make some fair

allowance for her care of his children, as a moral obligation resting upon him, actuated more by a generous and chivalrous spirit than a mere insistence upon his strict legal rights. This obligation, if it really exists, we cannot enforce, but her services have been of some benefit to his children and to him, and it is not improper to remind him that our legal is not always commensurate with our moral duty.

We have found no error in the rulings and charge of the court to which exceptions were taken.

No error.

*Cited: In re Fain,* 172 N.C. 795 (1j); *Little v. Holmes,* 181 N.C. 415 (1c); *In re Hamilton,* 182 N.C. 49 (1j); *S. v. Buck,* 191 N.C. 528 (3c); *S. v. Noland,* 204 N.C. 333 (3c); *McKay v. Bullard,* 219 N.C. 594 (3c); *Wells v. Wells,* 227 N.C. 618 (1c).

(594)

AMELIA HOKE ET AL. v. E. B. GLENN AND CLARENCE BARKER MEMORIAL HOSPITAL.

(Filed 23 December, 1914.)

1. **Pleadings—Interpretation—Cause of Action.**

Under our Code system of pleading, actions should be tried upon their merits, construing every intendment in favor of the pleader; and a complaint may not be overthrown by demurrer if in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, however inartificially it may have been drawn, or uncertain, defective, or redundant may be its statements.

2. **Same—Charitable Hospitals—Selection of Employees—Ordinary Care—Demurrer.**

A hospital maintained for charitable purposes is liable in damages caused by its failure to use ordinary care in the selection of its employees, and where one who has been received as a patient therein alleges in his complaint, in an action to recover damages, that he has been injured by reason of the failure of the defendant to exercise the care required in this respect, a demurrer thereto on the ground that the complaint does not state facts sufficient to constitute a cause of action is bad.

HOKE, J., did not sit.

APPEAL by defendant from *Justice, J.,* at September Term, 1914, of HAYWOOD.

Action to recover damages, caused, as the plaintiff alleges, by the negligence of the defendants E. B. Glenn, a physician, and the Clarence Barker Memorial Hospital.

It appears from the complaint that plaintiff was the patient of the defendant Glenn, and that he placed her in the defendant hospital for treatment, where she was at the time of her injury.

The defendant, the Clarence Barker Memorial Hospital, filed a demurrer to the complaint, which was overruled, and it appealed.

*Smathers & Clark and Gilmer & Gilmer for plaintiff.*

*Harkins & Van Winkle for defendant hospital.*

ALLEN, J. It is the purpose of the Code system of pleading, which prevails with us, to have actions tried upon their merits, and to that end pleadings are construed liberally, every intendment is adopted in behalf of the pleader, and "a complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn or however (595) uncertain, defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient." *Brewer v. Wynne,* 154 N. C., 472.

Applying these principles to the pleadings, we are of opinion the demurrer was properly overruled, conceding that the defendant hospital is a charitable institution, and cannot, therefore, be held responsible for the negligent acts of its agents and employees, because the complaint alleges that the hospital, as a corporation, was negligent in that it failed to exercise ordinary care in the selection of its agents, and that the plaintiff was injured by this negligence, and these facts are admitted by the demurrer.

We had occasion at this term, in *Green v. Biggs, ante,* 417, to consider the liability of private hospitals, maintained for profit and gain, to persons committed to their care, and preliminary to the discussion stated as the result of our investigations that "The principle seems to be generally recognized that a private charitable institution, which has exercised due care in the selection of its employees, cannot be held liable for injuries resulting from their negligence, and the rule is not affected by the fact that some patients or beneficiaries of the institution contribute towards the expense of their care, where the amounts

so received are not devoted to private gain, but more effectually to carry out the purposes of the charity."

The clear inference from this statement of the law is that there is liability if due care is not exercised in the selection of agents and employees, and this is in line with the weight of authority. *McDonald v. Hospital,* 120 Mass., 432; *Joel v. Woman's Hospital,* 96 N. Y., 74, and cases collected in note to *Duncan v. Hospital,* Anno. Cases, 1913 E.

The reasons assigned for the nonliability of charitable institutions for the negligent acts of their employees vary greatly, and are stated very fully in the note to *Parks v. Northwestern University,* 4 A. and E. Anno. Cases, 105, from which we quote: "In *Powers v. Massachusetts Homeopathic Hospital,* (C. C. A.) 109 Fed. Rep., 294, it was said: 'One who accepts the benefit either of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants. To paraphrase the illustration put by the learned judge before whom this case was tried, it would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able not only to provide for one wounded man, but to establish a hospital for the care of a thousand, it would be no less intolerable that he should be (596) held personally liable for the negligence of his servant in caring for any one of those thousand wounded men. We cannot perceive that the position of the defendant differs from the case supposed. The persons whose money has established this hospital are good Samaritans, perhaps giving less of personal devotion than did he, but, by combining their liberality, thus enabled to deal with suffering on a larger scale. If in their dealings with their property, appropriated to charity, they create a nuisance by themselves or by their servants; if they dig pitfalls in their grounds and the like, there are strong reasons for holding them liable to outsiders like any other individual or corporation. The purity of their aims may not justify their torts; but if a suffering man avails himself of their charity, he takes the risks of malpractice, if their charitable agents have been carefully selected.' In *Union Pacific R. Co. v. Artist,* (C. C. A.) 60 Fed. Rep. 365, it was said: 'If one contracts to treat a patient in a hospital—or out of it, for that matter—for any disease or injury, he undoubtedly becomes liable for any injury suffered by the patient through the carelessness of the physicians or attendants he employs to carry out his contract. If one undertakes to treat such a patient for the purpose of making profit thereby, the law implies the

contract to treat him carefully and skillfully, and holds him liable for the carelessness of the physicians and attendants he furnishes. But this doctrine of *respondeat superior* has no just application where one voluntarily aids in establishing or maintaining a hospital without expectation of pecuniary profit. If one, out of charity, with no purpose of making profit, sends a physician to a sick neighbor or to an injured servant, or furnishes him with hospital accommodations and medical attendance, he is not liable for the carelessness of the physicians or of the attendants. The doctrine of *respondeat superior* no longer applies, because by fair implication he simply undertakes to exercise ordinary care in the selection of physicians and attendants who are reasonably competent and skillful, and does not agree to become personally responsible for their negligence or mistakes. The same rule applies to corporations and to individuals, whether they are engaged in dispensing their own charities or in dispensing the charitable gifts of others intrusted to them to administer.' . . . In *Downes v. Harper Hospital,* 101 Mich., 555: 'If the contention of the learned counsel for the plaintiff be true, it follows that the charity or trust fund must be used to compensate injured parties for the negligence of the trustees, or architects and builders, upon whose judgment reliance is placed as to plans and strength of materials; of physicians employed to treat patients, and of nurses and attendants. In this way the trust fund might be entirely destroyed, and diverted from the purpose for which the donor gave it. Charitable bequests (597) cannot be thus thwarted by negligence for which the donor is in no manner responsible. If in the proper execution of the trust a trustee or employee commits an act of negligence, he may be held responsible for his negligent act; but the law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution. The trustees of this fund could not by their own direct act divert it from the purpose for which it was given, or for which the act of the Legislature authorized the title to be vested in the defendant. It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such acts result in damage to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition.' "

The Supreme Court of Rhode Island, in a very able and learned opinion in *Basabo v. Salvation Army,* 85 Atl., 123, holds that a charitable institution is liable for the negligence of its employees, but the party injured in that case was not a patient; and the Supreme Court of Missouri, in an opinion equally strong and persuasive in *Adams v. University,* 99 S. W., 453, absolves such an institution from all liability for

negligence, whether the result of the acts of its employees or of failure to exercise due care in their selection.

We prefer to adopt the middle course, which exempts from liability for the negligence of employees and requires the exercise of ordinary care in selecting them, as more consonant with authority and with the purposes for which such institutions are established.

The beneficiaries of charitable institutions are the poor, who have very little opportunity for selection, and it is the purpose of the founders to give to them skillful and humane treatment. If they are permitted to employ those who are incompetent and unskilled, funds bestowed for beneficence are diverted from their true purpose, and, under the form of a charity, they become a menace to those for whose benefit they are established.

It is, therefore, better for those committed to their care and for the institutions, and necessary to effectuate the purpose of their creation, to require the exercise of ordinary care in selecting employees, and in supervising them.

In the application of this principle the distinction between the negligent act of the employee and the negligence of the corporate body in selecting employees must be kept steadily in view, as it is only the latter which creates liability.

Affirmed.

HOKE, J., did not sit.

*Cited: Foy v. Stephens,* 168 N.C. 439 (1c); *Sandlin v. Wilmington,* 185 N.C. 259 (1c); *Wiggins v. Motor Co.,* 188 N.C. 319 (1c); *S. v. Trust Co.,* 192 N.C. 248 (1c); *Richert v. Supply Co.,* 194 N.C. 15 (1c); *Meyer v. Fenner,* 196 N.C. 477 (1c); *Johnson v. Hospital,* 196 N.C. 612 (2c); *Cowans v. Hospitals,* 197 N.C. 42 (2p); *Walker v. Walker,* 198 N.C. 826 (1c); *Scott v. Ins. Co.,* 205 N.C. 40 (1c); *Leach v. Page,* 211 N.C. 626, 627 (1c); *Sparrow v. Morrell & Co.,* 215 N.C. 454 (1c); *Herndon v. Massey,* 217 N.C. 613, 616 (2c); *Thomas v. R.R.,* 218 N.C. 293 (1c); *Cotton Mills v. Mfg. Co.,* 218 N.C. 563 (1c); *Pearce v. Pearce,* 226 N.C. 309 (1c); *Davis v. Rhodes,* 231 N.C. 74 (1c); *Bryant v. Ice Co.,* 233 N.C. 268 (1c).

(598)

M. L. PRUETT, ADMINISTRATOR, v. CHARLOTTE POWER COMPANY.

(Filed 23 December, 1914.)

**1. Appeal and Error—Removal of Causes—Federal Courts—Order Refusing Removal.**

An appeal presently lies from an order denying an application, upon proper petition and bond, to remove a cause to the Federal court for diversity of citizenship under the Federal removal act.

**2. Same—Trial Courts—New Trial—Interpretation of Statutes.**

Where the defendant has filed a sufficient petition and bond for the removal of a cause from the State to the Federal court on the ground of diversity of citizenship, and appeals from an order of the trial court refusing to remove the cause, the appeal involves the right of the State court to try the action, including in its scope all the issues presented in the record; and pending the appeal it is error for the trial court to proceed with the trial and determine these issues, over the objection of the defendant; and when this is done, and the appeal has regularly been prosecuted in accordance with the rules of law and practice regulating appeals, a new trial will be ordered, though the Supreme Court may have affirmed the order of the trial court, appealed from, retaining the cause. Revisal, sec. 602.

**3. Appeal and Error—Trial Courts—Proceedings Stayed—Interpretation of Statutes.**

An appeal duly taken and regularly prosecuted operates as a stay of all proceedings in the trial court, relating to the issues included therein, until the matters are determined in the Supreme Court. Revisal, sec. 602.

APPEAL by defendant from *Adams, J.*, at March Term, 1914, of MECKLENBURG.

Civil action to recover damages for death of plaintiff's intestate, caused by the alleged negligence of defendant company.

There was verdict and judgment for plaintiff, and defendant excepted and appealed.

*J. Laurence Jones, Stewart & McRae, Shannonhouse & Jones for plaintiff.*

*Osborne, Cocke & Robinson for defendant.*

HOKE, J. From a perusal of the facts in evidence, it appears that this cause was instituted by issuance of the summons on 5 August, 1912.

At November Term, 1913, on petition duly verified and accompanied by proper bond, defendants applied for removal of cause to the Federal court on the ground of diversity of citizenship, and the application having been denied at said term, defendants appealed to Supreme Court, filing proper bond, the record constituting the case on appeal.

The appeal was duly docketed in the Court on 2 April, 1914. The same was heard in the week assigned to causes of Fourteenth District, beginning 21 April, and was decided some time there- (599) after, the Court, in an opinion by *Chief Justice Clark,* sustaining the judgment of the lower court. See cause reported in 165 N. C., 416. The present trial and judgment was had at March Term, 1914, of the Superior Court of Mecklenburg County, and the case on appeal states that when the cause was called for trial at said term and before the jury were impaneled, counsel for defendants informed the court of the "pending appeal" and insisted on their petition to remove, and stated that they did not waive their rights under said petition. In their case on appeal it is formally assigned for error: "That his Honor proceeded with the trial pending the appeal," etc.

It is well recognized in this jurisdiction that from an order denying an application to remove a cause to the Federal court an appeal presently lies. (*Howard v. R. R.,* 122 N. C., 944; *Pipe Co. v. Howland,* 99 N. C., 202; *Fitzgerald v. Allman,* 82 N. C., 492); and on these, the facts chiefly relevant, we are of opinion that the court was without power to hear and determine the issues arising on the pleadings, and that the verdict and judgment thereon rendered at March term must be set aside.

Our statute on this subject, Revisal, sec. 602, in part provides: "That whenever an appeal is perfected, as provided by this chapter, it stays all further proceedings in the court below upon the judgment appealed from or upon the matter embraced therein, but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from," etc.

In various cases where the construction of this statute was directly or indirectly involved, the Court has held that an appeal is not to be considered as perfected until it is duly docketed in the Supreme Court; but in all of them, so far as examined, the questions presented were either on the right of this Court to take cognizance of some matter embraced in the appeal before docketing the record or the time within which the appellant had the right to docket had expired, and the parties were allowed to proceed in the court below on the idea that the appeal had been either temporarily or finally abandoned or there was some omission or laches on the part of the appellant which were considered as a waiver of his rights in the premises. But in this present case no such facts are presented. The defendants, having applied for a removal of the cause to the Federal court, had presently appealed from a judgment denying the motion. The application was on the ground of diversity of citizenship, and the appeal involved the right to the State court to try the cause, and therefore included within its scope and effect all the issues

presented in the record. Bond was filed in apt time; the record constituted the case on appeal, and nothing remained to be done but the filing of a proper transcript within the time required.

(600) This was primarily the duty of the clerk of the Superior Court, and while we have held that the appellant must see to it that such a transcript is duly filed, as a matter of fact it was filed in the present instance in ample time within the statute and the rules of this Court, and the cause was regularly heard and determined on the call of the district.

The defendant being in no default, and insisting on the rights guaranteed him under the law and the rules of this Court, is entitled to be protected from the costs and harassments of a trial until the matter is determined, and, under the circumstances as stated, we must hold that an appeal, docketed within the time and regularly prosecuted, relates back to the time of trial; that it operates as a stay of proceedings within the meaning of the statute, and brings the present cause within the principle of the cases which hold that the court below is without power to hear and determine questions involved in an appeal pending in the Supreme Court. *Combes v. Adams,* 152 N. C., pp. 64-70; *Greene v. Griffin,* 95 N. C., 50; *McRae v. Comrs.,* 74 N. C., 415; *Bank v. Stilling,* 32 S. C., 102.

This will be certified, that the verdict and judgment rendered be set aside and a new trial had.

New trial.

*Cited: Likas v. Lackey,* 186 N.C. 400 (2cc, 3c); *Bohannon v. Trust Co.,* 198 N.C. 703 (2c, 3c); *Goodman v. Goodman,* 201 N.C. 795 (2d, 3d); *Dixon v. Osborne,* 204 N.C. 488 (3c); *Griffin v. Bank,* 205 N.C. 254 (2c, 3c); *Wilson v. Allsbrook,* 205 N.C. 598, (2c, 3c); *Veazezy v. Durham,* 231 N.C. 363 (3c); *Harris v. Fairley,* 232 N.C. 556 (3c).

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SYKES AND CLEMENTS, TRUSTEES, v. R. O. EVERETT.

(Filed 25 November, 1914.)

**1. Appeal and Error—Objections and Exceptions—Parol Evidence—Written Contracts.**

The rule that parol evidence is inadmissible to vary or contradict a written instrument, etc., must be invoked in some proper way; and it is not available to the party relying thereon when he is not the appellant in the action.

**2. Bills and Notes—Indorsement in Blank—Parol Agreements—Statute of Frauds—Evidence—Holders in Due Course.**

A parol agreement made between an indorser of a negotiable instrument in blank and his transferee may be shown between the immediate parties to the transaction by parol evidence, and is not objectionable as a contradiction of the liability of an indorser implied by law, except as to subsequent holders in due course without notice.

**3. Same—Notice—Assignment for Creditors—Trusts and Trustees.**

A trustee in a general assignment for the benefit of the trustor's creditors acquires a negotiable instrument, belonging to his trustor, indorsed to him in blank and upon which the indorser is liable under certain conditions resting in parol, with notice of the qualifications under which the indorser has signed; certainly when he acquired them, as such trustee, after maturity.

**4. Same—Guarantors of Collection—Liability.**

The defendant, the holder of certain notes secured by the assignment of the interest of the maker in an unsettled estate, assigned them in blank for a valuable consideration to the plaintiffs upon the parol agreement that if the maker did not pay them and the money was not realized on the assignment of his interest in the estate, the defendant would be ultimately responsible for their payment, and that the defendant would not be called on to make payment until the estate had been exhausted, promising to employ attorneys, etc., in certain events, which he fully performed. Thereafter the plaintiffs acquired the notes from the defendant's transferee in a general assignment for the benefit of the latter's creditors. *Held,* (1) the trustees under the deed of assignment took subject to the defendant's rights under the agreement with their trustor; (2) the defendant's rights being analogous to a guarantor of collection, it was necessary for the plaintiffs to show that the security given for the notes sued on was worthless, or had been first exhausted, in order to bind the defendant to their payment under the terms of the agreement; and failing in this, the action will be dismissed.

**5. Bills and Notes—Indorsement in Blank—Parol Agreements—Consideration—Time of Payment—Expression of Opinion—Fraud.**

Where a parol agreement between the indorser and indorsee of a negotiable instrument in blank is that the indorsee shall first exhaust certain securities given with the note before the indorser shall become liable thereon, the securities consisting in the interest of the maker of the note in certain unsettled estates, the agreement is founded upon a sufficient consideration, the time within which the indorser's liability should attach being as definite as it could have been made; and the representations made by the indorser in this case, when the agreement was made, as to the time wherein the estate would be settled, was merely an expression of his opinion or expectation, and is held to raise no suspicion of fraud and to be immaterial.

APPEAL by defendant from *Lyon, J.,* at May Term, 1914, of (601) DURHAM.

This action was brought to recover the sum of $10,144.50, as due upon four several notes indorsed in blank by the defendant. The case was referred to Hon. Howard A. Foushee, who made his report, in which, after finding the facts and stating his conclusions of law therefrom, recommended that judgment be rendered in favor of the plaintiffs, and against the defendants, for $10,144.50, the amount due on the notes, with interest on $7,144.50 from 20 March, 1911, and on $3,000 from 8 April, 1911, until paid, together with the costs of the action; and further recommended that no execution be issued on said judgment until 1 May, 1915, and that the three F. A. Moore notes, and the assignment from him securing the same, and the Louis Moore note with the assignment securing the same, should all be delivered by the said trustee to the clerk of the Superior Court of Durham County, State of North Carolina, to be held by him until such time as said R. O. Everett pays said judgment, at which time the same shall be delivered to him. Defendant excepted to the conclusions of law of the referee.

(602) The material facts are as follows:

On 20 March, 1911, F. A. Moore executed and delivered to the defendant R. O. Everett three demand notes aggregating $7,144.50, and the same are set out in the record. As stated, the notes were payable on demand and were secured by an assignment of an interest of F. A. Moore in his share and portion of the estate of John Annin of New York City. This assignment, which was deposited with R. O. Everett as collateral for the payment of said notes, in addition to transferring and assigning an interest to secure said notes, constituted and appointed the defendant R. O. Everett, or any person whom he might substitute, as his lawful attorney to collect said interest in said estate and apply the same to the discharge of said indebtedness.

On 8 April, 1911, Louis Moore executed and delivered to R. O. Everett and G. C. Farthing his promissory note for $3,000, payable on 1 September, 1911, and to secure said indebtedness transferred and assigned to R. O. Everett an interest in the estate of John Annin, and appointed R. O. Everett, or any person whom he might substitute, as attorney to collect the same and discharge said indebtedness. The Louis Moore note and the assignment appear in the record. On or about 11 April, 1911, R. O. Everett, by indorsement, duly transferred and delivered to G. C. Farthing, for valuable consideration, the four notes above referred to, together with his interest in said assignments, which were given as collateral therefor. At the time these four notes were so indorsed and transferred to G. C. Farthing there was an agreement between R. O. Everett and G. C. Farthing that if F. A. Moore and Louis Moore did not pay and the money was not realized on the assignments of their interest in

the Annin estate, R. O. Everett would be ultimately responsible for the payment of said notes, but he would not be called upon to pay the same until the estate of John Annin had been exhausted. G. C. Farthing held the notes so indorsed to him from 11 April, 1911, until 23 August, 1912, when the said Farthing executed and delivered to R. H. Sykes and W. P. Clements, trustees, a deed of trust conveying his property to them, and, among other things, all the right, title, and interest of G. C. Farthing in and to the above described notes and collateral assignments, and on said date the trustees took possession of said papers and retained them until the commencement of this action. Said trustees of G. C. Farthing made demand upon F. A. Moore and Louis Moore, but they failed to pay said notes, and the estate of John Annin has not been wound up. Demand was then made by the plaintiffs, Sykes and Clements, trustees, upon R. O. Everett for payment, and he declined to pay, upon the ground that he was not liable until the Annin estate had been exhausted.

The referee made the following findings of fact, among others:

7. That at the time said three F. A. Moore notes were in- (603) dorsed to G. C. Farthing, towit, 11 April, 1911, it was done upon an agreement between R. O. Everett and G. C. Farthing that he would be ultimately responsible for the payment of said notes, but that he (Everett) would not pay the same until the estate of John Annin had been exhausted. In the event there was any trouble about the collection of said notes, that he (Everett) would procure and pay for the services of an attorney and that he (Everett) would hold Farthing harmless against the cost and expenses of any litigation incident to the collection of said notes. That Farthing did not know anything about the Annin estate, and that Everett told Farthing he had been to New York and he expected the same to be closed up in sixty or ninety days, and that the notes were perfectly good. That Farthing relied upon the representations of R. O. Everett and took over said notes without investigation.

9. That at the time said Louis Moore note was transferred to G. C. Farthing, as aforesaid, towit, 16 April, 1911, it was agreed between Farthing and Everett that he (Everett) would be ultimately responsible for the full face value of said note, but that Farthing should not call on him to pay the same until the collateral was exhausted, and that if any attorney was needed to collect the Louis Moore note, that he (Everett) would pay the expenses of same, and that Farthing should be held harmless by reason of any litigation concerning the same.

10. That said estate of John Annin has not been wound up; that R. O. Everett has employed counsel and has made repeated trips to New York to see said attorneys and to expedite the winding up of said estate of

John Annin, but so far the end is not in sight, and no one knows when the suits incident to the winding up of said estate will be ended.

The exceptions coming on to be heard before Judge C. C. Lyon, the following judgment was entered thereon:

"This cause coming on now to be heard upon the report of Hon. H. A. Foushee, referee, and the exception filed thereto by the defendant, after hearing argument of counsel, it is ordered, considered, and adjudged that the report of the referee be and the same is hereby in all respects confirmed; and it is further ordered, considered, and adjudged, in accordance with said report, that the plaintiffs R. H. Sykes and W. P. Clements, trustees of G. C. Farthing, as such trustees, recover of the defendant R. O. Everett the sum of $10,144.50, with interest on $7,144.50 from 20 March, 1911, until paid, and with interest on $3,000 from 8 April, 1911, until paid, together with the cost of this action, to be taxed by the clerk of this court; and, in accordance with said report, that no execution issue on this judgment until 1 May, 1915. It is further adjudged that the three F. A. Moore notes, as set out and described in the report of said referee, together with the assignment securing
(604) the same and the Louis Moore note, as set out and described in the report of said referee, together with the assignment securing the same, should all be delivered by said trustees to the clerk of the Superior Court of Durham County, N. C., to be held by him until such time as the said R. O. Everett pays this judgment, at which time the said notes and assignments shall be delivered to the said R. O. Everett."

From this judgment defendant appealed to this Court.

*P. C. Graham for plaintiffs.*

*Bryant & Brogden and Winston & Biggs for defendant.*

WALKER, J., after stating the case: The larger part of the argument before us was taken up with a full discussion of the question whether a blank indorsement by the payee, or one of the payees, to a third party can be explained by oral evidence showing what the special contract between them was, and that it was different from the one implied by law from the mere indorsement of the paper. This is a question of evidence, and the admission of the oral proof could only be incompetent on the ground that it would vary, alter, or contradict the terms of a contract which the parties have reduced to writing as the only expression of their agreement, and would violate the general rule of evidence prohibiting the introduction of such evidence. But there was no exception to the evidence, as there should have been, if that rule was relied upon; but the evidence was admitted without any objection, so far as appears, and the referee found the facts in regard to the special contract. Be-

sides, if plaintiffs had objected, they have not appealed, and the exception to the admission of the evidence would not now be open to them.

But waiving, for the present, this view of the record, and considering the other question argued, we are of the opinion that, by our decisions, although there is some conflict in other States, the evidence is competent. In *Mendenhall v. Davis,* 72 N. C., 150, this Court, after stating that when a payee or regular indorsee thereof writes his name on the back of a note, as between him and a *bona fide* holder for value and without notice the law implies that he intended to assume the well-known liability of an indorser, and he will not be permitted to contradict this implication; "but this rule does not apply between the original parties to a contract which is not in writing, although there may be the signature of one or more parties to authenticate that *some* contract was made. In such cases it must always be a question of fact what contract the signature authorizes to be written above it; in other words, what was the agreement of the parties at the time it was written. There is no written contract to be altered; the whole (except the signature, which by itself does not make a contract) exists in parol, and must be established by such proof." The Court then proceeds to say that the presumption
that one who indorses a note after its delivery by the maker is (605)
a guarantor (under the law as it then existed), is not one of law,
but one of fact only, and may be rebutted; so that it does not affect injuriously the right of a subsequent *bona fide* holder. Several cases are cited to support the position, in which the rule was applied. *Love v. Wall,* 8 N. C., 313; *Gomez v. Lazarus,* 16 N. C., 205; *Davis v. Morgan,* 64 N. C., 570, and *Sylvester v. Downer,* 20 Vt., 855, where *Judge Redfield* said that in the particular case there was a legal implication "that the indorser was a joint promisor, but the signature being blank, he may *undoubtedly* show that he was not understood to assume any such obligation"; and to the same effect are these cases: *Clapp v. Rice,* 13 Gray (Mass.), 403; *Perkins v. Catlin,* 11 Conn., 213; 2 Parsons Bills and Notes, p. 121 and notes (and Ed. of 1871, p. 517), where numerous like cases will be found. This doctrine is so firmly established by a long series of decisions in this State that it is far too late now to question it, as will presently appear. In the more recent case of *Hill v. Shields,* 81 N. C., 250, *Justice Dillard,* who was always careful and accurate in the statement of legal principles, said: "The indorsement being in blank, and the contract implied by law with his indorsee and subsequent holders, giving such unqualified power to dispose of the same, as we have seen, it has been much debated and variously decided as to the competency of the indorser, by parol proof, to rebut the implication of the law, and to annex a qualification when none is expressed. It is settled in this State,

however, that parol testimony may be adduced under a blank indorsement to annex a qualification or special contract as between the immediate parties. *Davis v. Morgan,* 64 N. C., 570; *Mendenhall v. Davis,* 72 N. C., 150. But between an indorser in blank and remote parties without notice the weight of authority is that parol proof is inadmissible, and the contract implied by law stands absolute. 2 Parsons, 23; *Hill v. Ely,* 1 Serg. and Rawle, 362; 1 Daniel on Neg. Inst., secs. 699 and 719." The following cases recognized and applied the principle in a general way: *Comrs. v. Wasson,* 82 N. C., 309; *Adrian v. McCaskill,* 103 N. C., 186; *Cobb v. Clegg,* 137 N. C., 153; *Typewriter Co. v. Hardware Co.,* 143 N. C., 97; *Woodson v. Beck,* 151 N. C., 148.

Two cases, which are apparently relied on by appellee, should be noticed. *Davidson v. Powell,* 114 N. C., 575, is one; but a close reading of that case will show that it is a clear authority in support of our view, as *Justice MacRae,* in the opinion written by him for the Court, says: "In the hands of an original payee an indorsement may be shown to be upon certain conditions; but a *bona fide* holder for value before maturity and without notice is not affected by any equities existing between the original parties. The same rule will apply between the last payee and all subsequent indorsers."

(606) The other case is *Bank v. Pegram,* 118 N. C., 671. This is a still stronger case, as there it was proposed to show by parol evidence that the cashier of the plaintiff bank had informed the indorsee that the maker had sufficient funds in the bank to pay the note, and that he would not be held responsible upon it, his signature on the back of the note being a mere form. The first syllabus of the case is this: "Parol testimony may be adduced under a blank indorsement to annex a qualification or special contract as between immediate parties; but between an indorser in blank and remote parties without notice such parol proof is inadmissible, and the contract implied by law stands absolute." The Court cites and approves *Hill v. Shields, supra, Davidson v. Powell, supra, Mendenhall v. Davis, supra;* and admitting a conflict in the decisions of other courts, it states that here the matter has been settled and closed by numerous decisions. It then cites *Bruce v. Wright,* 10 N. Y., 548, and refers to it in the following language: "It was there held that in an action against any indorser by his immediate indorsee it is a good defense that there was a verbal agreement at the time of the indorsement that the indorsee should not sue the indorsee, and that 'the contract between the two consists partly in the written indorsement, partly in the delivery of the bill to the indorsee, and partly in the actual understanding and intention with which the delivery was made, and that the intention of the parties may be gathered from the words of the parties, either spoken or written."

In commenting upon the very instructive case of *Baxter Natl. Bank v. Talbot,* 13 L. R. A. (Mass.), p. 52, the learned annotator says: "While it is elementary law that parol evidence is incompetent to vary the terms of a written instrument, still it is equally well settled that, as between the original parties to commercial paper, such proof is admissible as will have a tendency to establish the character in which an indorser in blank intended that he should be bound; and proof of this intention will countervail the *prima facie* presumptions which the law indulges with reference to the paper," citing *Riley v. Gerrish,* 9 Cush., 104; *Sylvester v. Downer,* 20 Vt., 355; *Owings v. Baker,* 54 Md., 82; *Nurre v. Chittenden,* 56 Ind., 465; *Pierse v. Irvine,* 1 Minn., 369; *Strong v. Riker,* 16 Vt., 555; *Quinn v. Sterne,* 26 Ga., 224; *Good v. Martin,* 95 U. S., at p. 95 (24 L. Ed., 343). In the last case cited (*Good v. Martin,* 95 U. S., 90), *Justice Clifford* quotes with approval this passage from Story Prom. Notes, sec. 479: "Judge Story says that the interpretation ought to be just such as carries into effect the true intention of the parties, which may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. If the party intended at the time to be bound only as guarantor of the maker, he shall not be an original promisor; and if he intended to be liable only as a second indorser, he shall never be held to the payee as first (607) indorser." It is said in Parson on Bills and Notes, sec. 520: "In a suit between the original parties it is considered that the blank name of the indorser means nothing of itself, but its purpose must be shown, *aliunde.*" And in *Fullerton v. Hill,* 18 L. R. A. (Kan.), at p. 36, it is held, in regard to the liability upon a blank indorsement, that "parol evidence is received to rebut the presumption (arising from the indorsement being in blank) and to show what liability it was intended (by the parties) he should assume, and what relation he should sustain to the paper." The opinion in that case is a well considered one, and in the notes to it many cases are cited that support the text. In order to show that the great weight of authority favors this view, we add the following cases: *Johnson v. Schnabaum,* 17 L. R. S. (N. S.), 838; *Pike v. Sheil,* 1 M. and M., 299 (*Ld. Tenterden*); *Riley v. Gerrish,* 9 Cush., 104; *Collett v. Wright,* 1 Wright (Ohio), 80; *Honck v. Graham,* 106 Ind., 198; *Drummond v. Yager,* 10 Ill. App., 382, citing our cases; *Bank v. Crabtree,* 86 Iowa, 731; *Forepaugh v. Delaware,* 128 Pa. St., 217; *Tankersley v. Graham,* 8 Ala., 247; *Roads v. Webb,* 91 Me., 414; *Taylor v. French,* 2 Lea (Tenn.), 257; *Goodrich v. Stanton,* 71 Conn., 419; *Hirsch v. Kaufman,* 81 Atl. Rep. (R. I.), 66; *Chapze v. Young,* 87 Ky., 480; *True v. Bullard,* 45 Neb., 412; *Doll v. Getchmann,* Anno. Cases, 1913, A-882, and notes; 2 Randolph Com. Paper, sec. 778.

*Moffett v. Maness,* 102 N. C., 457, is relied on by plaintiffs, but the principle there announced has no application, and *Justice Shepherd,* who wrote the opinion in that case, said, in the later case of *Southerland v. Fremont,* 107 N. C., 570: "It is well settled that the agreement upon which the indorser of another's obligation signed, and the liability which he intended to assume, may (at least between the original parties or those parties and holders with notice) be shown by parol evidence, and he will be held only according to such agreement and intention."

On the same theory that parol evidence is admissible as between the first parties to the blank indorsement, it is also applicable as against subsequent holders with notice. 8 Cyc., 266; *Davidson v. Powell, supra.* An assignee, under a general assignment, acquires the property of his assignor, subject to all equities against him. 4 Cyc., 219; *Wallace v. Cohen,* 111 N. C., 103; *Carpenter v. Duke,* 144 N. C., 291. While such a trustee is a purchaser for value under 13 and 27 Eliz. (Revisal 1905, secs. 960, 961), "he takes the property subject to any equity, or *other right,* that attached to the same in the hands of the debtor," as said by *Justice Shepherd* in *Wallace v. Cohen, supra.* See, also, *Potts v. Blackwell,* 56 N. C., 449; *Small v. Small,* 74 N. C., 16; *Day v. Day,* 84 N. C., 408; *Brem v. Lockhart,* 93 N. C., 191, and *Southerland v. Fremont,* 107 N. C., 565.

(608) It may be added that plaintiffs acquired the notes by the assignment to them, after their maturity, and therefore, in law, with notice of all equities and other rights of the indorser, Everett, and consequently, in law, took subject to them. *Causey v. Snow,* 122 N. C., 326; *Bank v. Loughran,* 126 N. C., 814; *Taylor v. Lauer,* 127 N. C., 157; *Brooks v. Sullivan,* 129 N. C., 190. So that plaintiffs, as trustees of Mr. Farthing, are bound by the agreement between defendant and him to the same extent as he was himself.

What, then, was this agreement? It is true, as argued by defendant's counsel, that the taking of collateral security does not suspend the right of action upon the principal debt, in the absence of any stipulation to that effect. Jones on Collateral Security, sec. 590. But that is not the question, by any means, as the agreement did not consist merely in the transfer of collaterals. It was distinctly understood and *agreed* that Mr. Farthing would not look to Mr. Everett for payment until he had *exhausted* the Annin estate. This was a valid agreement, and Mr. Farthing is bound by it, and his trustees as well. It bears a close resemblance to a guaranty of collection. We said in *Cowan v. Roberts,* 134 N. C., at p. 418: "A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself in the first instance liable to such payment

or performance. *Carpenter v. Wall,* 20 N. C., 144. There is a well defined distinction between a guaranty of payment and a guaranty for the collection of a debt, the former being an absolute promise to pay the debt at maturity, if not paid by the principal debtor, when the guarantee may bring an action at once against the guarantor, and the latter being a promise to pay the debt upon the condition that the guarantee diligently prosecuted the principal debtor for the recovery of the debt, without success. *Jones v. Ashford,* 79 N. C., 172; *Jenkins v. Wilkinson,* 107 N. C. 7; 22 Am. St., 172." See, also, *Mudge v. Varner,* 146 N. C., 147. A surety undertakes primarily to pay if the debtor does not; an indorser undertakes to do the same thing, after due notice of dishonor, while a guarantor undertakes to pay if the debtor *cannot.* Randolph Com. Paper (2 Ed.), sec. 849, note 2; *Rouse v. Wooten,* 140 N. C., 557. The distinction may be further illustrated by the statement that a surety is considered as a maker of the note; a guarantor is never a maker. The surety's promise is to pay a debt, which becomes his own, as between him and the creditor, when the debtor fails to pay it, and he may be sued upon it as soon as it is due and dishonored. 2 Parsons Bills and Notes (Ed. 1871), at page 118. The contract of Mr. Everett is, therefore, analogous to a guaranty of collection, as we have said, and though a party to the note and the indorsement, he nevertheless has contracted, as does such a guarantor, that he will pay, not if the Annin estate does not, but if it *cannot,* or not until it is first exhausted, and to (609) the extent only that it does not pay, after being made ot pay whatever it can. That this parol agreement is valid, see also *Breese v. Crumpton,* 121 N. C., 122.

The cases relied on by plaintiffs, holding that a creditor having collateral security for his note may, notwithstanding this fact, sue the debtor without first resorting to the collateral and exhausting it (Jones on Collateral Security, sec. 686; *Silvey v. Axley,* 118 N. C., 959), are clearly not in point, because here the indorser has not only deposited the collateral, but required a further agreement that his indorsee should not proceed against him until it is exhausted; nor are the cases of *Barnard v. Martin,* 112 N. C., 754, and *Hinsdale v. Jerman,* 115 N. C., 152, as it was found in those cases that the collateral had become worthless and the creditor "was not required to do so vain a thing as to seek recovery from an insolvent person, who was liable primarily for the debt, or to enforce payment out of valueless and unsalable stock." Nor is the doctrine as to extension of time, where there is no consideration therefor, for payment, applicable to the facts of this case. Here the time was as definitely fixed as was practicable, they not knowing exactly when the estate would be settled, and the stipulation for the exhaustion of the

Annin estate was founded upon a sufficient consideration, it being the same one which supported the entire contract of indorsement and its several parts, the promises being mutual and reciprocal. Mr. Farthing is presumed to have known what he was doing, being *sui juris,* and able to take care of himself, the parties standing "at arms' length." He thought he was getting a good investment for his surplus money, and it may yet turn out to be so. The agreement was a lawful one, and there is no reason why he should not be bound by it. The ruling below would imply that the contract was thought to impose upon Mr. Everett the duty of exhausting the Annin estate, whereas it is plainly stated that Mr. Farthing must assume that burden. Mr. Everett promised to employ and pay attorneys to assist in the matter, and he has done so. He has performed fully his part of the contract, and it is now incumbent upon his indorsee to do his part, by either exhausting the Annin estate and realizing what he can by law, or by showing that the estate is insolvent. All that appears is that "the end of the settlement of that estate is not in sight"; but this may be due to a lack of diligence on his part, and is not to be imputed to Mr. Everett as the consequence of any default by him. If it would be futile to proceed further against the estate because of its insolvency, the plaintiffs should have shown it, as the burden was upon them and not upon the defendant. Plaintiffs, in their brief, state that there was no exception to the evidence or the findings of fact, but only to the conclusions of law therefrom, and this being (610) the case, they cannot recover, as they have not performed their assignor's part of the contract, which, as we have shown, is valid and binding. The judgment of the court was based entirely upon the wrong theory, and it had no right in law to impose terms upon defendant and require him to exhaust the Annin estate by a fixed time, as the agreement authorizes no such requirement of him.

What defendant said as to the time within which the estate could be settled is not material, as there is no allegation or contention that there was any false and fraudulent representation. It was merely the expression of his opinion or "expectation," and it may have been a correct one, if proper diligence had been used in prosecuting the case against the estate. He is not responsible for the delay. Besides, the court had proceeded upon the theory that the contract is valid, by allowing him more time for the settlement, to which he would not be entitled if there had been any fraud or other equitable ground upon which to set it aside.

This view of the case is not only in accordance with good law, but good morals and manifest justice. When Mr. Farthing accepted the notes from Mr. Everett, he did so with an express agreement, as found by the referee. That agreement was definite and binding, towit, that Everett

should be ultimately responsible if there was failure on the part of the Moores to pay, and on the part of the estate of John Annin to make good the liability. He agreed to bear the expenses of suing them, and has done so. It is now found as a fact that the estate of John Annin has not been wound up, and of course has not been exhausted. It is not even found as a fact that it is insolvent, and we were told on the argument that, as a matter of fact, it is not. Then why should the terms of the agreement entered into between Mr. Everett and Mr. Farthing be varied by the court in order to accelerate the time for payment by the defendant? If Farthing had sued the defendant Everett upon these notes, and this agreement had been shown, the court would not have sustained his action.

It must be declared that there was error, and the judgment will be reversed and the action dismissed.

Reversed.

*Cited: Fowle v. McLean,* 168 N.C. 541 (4p); *Moore v. Harkins,* 171 N.C. 697 (5c); *Edwards v. Ins. Co.,* 173 N.C. 617 (4p); *Horton v. Wilson,* 175 N.C. 534 (4p); *Thomas v. Carteret,* 182 N.C. 379 (2c); *White v. Fisheries Co.,* 183 N.C. 231 (2c); *Gillam v. Walker,* 189 N.C. 191 (2c); *Lancaster v. Stanfield,* 191 N.C. 343 (2c); *Trust Co. v. Boykin,* 192 N.C. 265 (2c); *S. v. Bank,* 193 N.C. 526 (4c); *Fertilizer Co. v. Eason,* 194 N.C. 247 (2c); *Fertilizer Co. v. Eason,* 194 N.C. 250 (4c); *Trust Co. v. York,* 199 N.C. 629 (2c); *Barnes v. Crawford,* 201 N.C. 439 (3c); *Teague v. Furniture Co.,* 201 N.C. 807 (3c); *Carr v. Clark,* 205 N.C. 266 (2d); *Holland v. Dulin,* 206 N.C. 213 (3c); *Weil v. Herring,* 207 N.C. 9 (3p); *Perry v. Trust Co.,* 226 N.C. 670 (2c).

(611)

BERNICE R. BAGWELL AND HUSBAND v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 23 December, 1914.)

**1. Railroads—Excessive Speed—Public Crossings—Negligence — Automobiles—Guests—Last Clear Chance—Trials—Issues—Complex Instructions—Appeal and Error.**

In an action to recover damages of a railway company caused by its train in running upon an automobile in which the plaintiff was riding as a guest, at a public crossing, where the driver of the machine was attempting to cross at the time, there was evidence submitted to the jury upon the question of whether the defendant's train was being run at an unlawful speed, but the case was tried upon the theory, (1) that the defendant had failed to give notice of its approach, and (2) that the

engineer thereon, by the exercise of proper care, could have stopped the train in time to have avoided the injury after he had seen or should have seen the plaintiff's danger. The evidence as to the excessive speed of the defendant's train was not relied on as a distinct ground of action, but in support of the other issues; and construing the charge as a whole it is *Held*, in this case, that the principles of law were correctly charged by the court as applicable to the evidence in their relation to the issues of negligence and last clear chance, and not objectionable as making the plaintiff responsible for any negligent act of the driver of the car; and it is *Further held*, that a new trial will not be awarded on a theory that a charge was more complex than necessary and that the jury did not understand it.

**2. Railroads—Negligence—Warnings—Last Clear Chance—Automobiles—Driver—Concurrent Negligence—Imputed Negligence.**

Where the guest in an automobile driven by another is injured while attempting to cross a railroad track at a public crossing by a collision with the defendant's train, and there is conflicting evidence as to whether the injury was caused by the driver of the machine in attempting to cross at the time, or that of defendant's employees on the train in failing to give proper signals or warnings of its approach, or reasonably endeavoring to stop the train after seeing, or after they should have seen, by keeping a proper outlook, the plaintiff's danger, the liability of the defendant in damages for the consequent injury is properly made to depend upon whether the injury was the proximate cause of its own negligent acts, if established, or concurred with the negligent acts of the driver of the machine, if any, in producing the result, eliminating the question of plaintiff's contributory negligence upon the ground that the negligence of the driver of the machine cannot be imputed to the plaintiff. *Crampton v. Ivie*, 126 N. C., 894, cited and applied.

APPEAL by plaintiff from *Adams, J.*, at May Term, 1914, of MECKLENBURG.

This is an action to recover damages for personal injury, caused, as the plaintiff alleges, by the negligence of the defendant.

(612) The injury occurred at a public railroad crossing by a collision between the train of the defendant and an automobile which was owned and driven by Mr. Jamison and in which the plaintiff was a guest.

The plaintiff offered evidence tending to prove that the defendant failed to give notice of the approach of the train to the crossing, and also, if it did give notice, that by the exercise of ordinary care the train could have been stopped in time to avert the injury.

The defendant introduced evidence tending to prove that it gave notice of the approach of the train to the crossing, and that the automobile went upon the track such a short distance in front of the approaching train that it could not have been stopped in time to avoid injury.

The jury answered the issue of negligence in favor of the defendant, and from the judgment pronounced upon the verdict the plaintiff appealed.

*Morrison and McLain for plaintiff.*

*F. M. Shannonhouse, O. F. Mason, Manly, Hendren & Womble for defendant.*

ALLEN, J. No authority is cited in the brief of counsel for appellant, for the reason that there is very little difference of opinion as to the principles of law controlling the trial of the case, the real controversy being as to the correct application of those principles, and whether his Honor gave the instructions to which the plaintiff was entitled.

The first impression is that he did not do so, and that he gave undue prominence to the negligence of Mr. Jamison, the driver of the automobile in which the plaintiff was a guest at the time of her injury, and that the jury might infer that he intended this negligence to be imputed to the plaintiff; but when the charge is read and considered more carefully and as a whole, the conclusion cannot be avoided that no principle of law has been erroneously stated or applied, and a new trial cannot be ordered except upon the theory that the charge was more complex than was necessary and that the jury did not understand it, which would be violative of our system of administering justice, which is based upon the idea that jurors are intelligent and honest. *Cooper v. R. R.*, 163 N. C., 150.

The allegations of negligence contained in the complaint are:

1. That the crossing at which the plaintiff was injured was negligently and carelessly constructed and maintained, in that trees, bushes, and shrubbery were permitted to stand upon the banks and obstruct the view of approaching trains, and in that the defendant failed to place and keep ballast between the rails.

2. That at the time of the plaintiff's injury the defendant was running its train at an unlawful rate of speed.

3. That the defendant negligently failed to blow a whistle or (613) ring a bell or give any warning of the approach of its train to the crossing.

4. That the defendant negligently failed to stop its train after discovering the plaintiff upon the crossing, or after it could have discovered her by the exercise of ordinary care.

No evidence was introduced in support of the first allegation of negligence, and while evidence was introduced that the train was run at a high rate of speed, this was not relied on as a distinct ground of action, but in support of the third and fourth allegations.

The case was therefore tried upon the theory that the defendant had failed to give notice of the approach of its train to the crossing, and that after the automobile was upon the crossing the defendant, by the exercise of ordinary care, could have discovered the perilous position of the plaintiff and could have stopped its train in time to avert the injury, and evidence was introduced in support of both of these contentions.

Upon the first of these his Honor charged the jury as follows:

"What duty did the Southern Railway Company owe to those using the crossing?

"It is admitted that the crossing at which the injury occurred was a public grade crossing, at the intersection of the railroad and the public highway, and that it was habitually used by the public. If you find the facts to be as admitted in this respect, it was then the duty of the Southern Railway Company, through its employees in charge of the train, as the train approached the crossing, and before it approached the crossing, to use due care in the operation of its train; due care meaning such care as was commensurate with the dangers reasonably to be anticipated in the operation of the train at or near that place.

"It was its duty to use due care in giving timely warning of the approach of the train, by signals, or by a signal, by sounding the whistle or ringing the bell at the usual and proper place, in order that those approaching the crossing might know that the train was coming. It was the duty of the defendant, the Southern Railway Company, to keep a careful lookout for danger, and to exercise due care, as already suggested, in the general management and operation of its train; and if you find from the evidence, and by its greater weight, that the Southern Railway Company failed to perform this duty, you will find that it was negligent; and if you further find that this negligence was the proximate cause of the plaintiff's injury, you will answer the first issue 'Yes.'

"In the absence of statutory regulation, the mere fact that the train was moving at the rate of 30 miles an hour, if you find from the evidence that the train was moving at this rate of speed, would not necessarily be negligence *per se;* but in passing upon the question whether the Southern Railway Company was negligent in the operation of the train,

(614) you may consider evidence tending to show whether the crossing was habitually used by the public, the extent of its use, the density of the population at or near that place, the rate of speed at which the train was moving, whether the proper signal was given, together with other evidence—all with a view to finding whether the Southern Railway Company used such care as was commensurate with the dangers reasonably to be anticipated in approaching the crossing; and if you find, by the greater weight of the evidence, that it did not exercise such

care, you will then find that it was negligent; and if you further find that in consequence of such negligence the plaintiff was injured, and that the negligence of the Southern Railway Company was the proximate cause of her injury, you will answer the first issue 'Yes.'" And upon the second: "It was the duty of the engineer to keep a careful lookout. Was it the duty of the fireman to do so?

"If you find from the evidence that the engineer, by reason of a curve in defendant's track, and the obstruction of the engine, the smokestack, or otherwise, could not keep a lookout for persons on or near the crossing, or in a perilous situation, it was then the duty of the Southern Railway Company to have its fireman or other person to assist the engineer in keeping such lookout. It was the duty of the Southern Railway Company to keep a careful lookout for danger, the degree of care being such as a prudent person would exercise in endeavoring to perform that duty. There is no contention, of course, that it was the duty of the railway company to stop its train, merely for the purpose of permitting a traveler, attempting to go across the track, to pass in front of the train. That is not the question here. The question is whether, after the plaintiff was in a position of peril, she was seen, or could have been seen by the defendant's employees, and whether, by the exercise of reasonable and ordinary care, the engine could have been stopped or slackened to such an extent that the injury could have been averted.

"If you find from the evidence that Mr. Jamison drove the automobile upon the track of the defendant, at the defendant's crossing, and that the car stopped upon the track, or whether you find that he was negligent or not, if you further find that the plaintiff, as a guest of Mr. Jamison, riding in the automobile, was thereby placed in a perilous situation from threatened contact with the defendant's train, and that the defendant's servants in charge of the train saw, or by the exercise of ordinary care could have seen, her perilous situation, and averted the injury by any available means reasonably consistent with the safety of the train and its crew, it was then the duty of the Southern Railway Company to make use of such available means, to give the proper warning or signal, to lessen the speed of the train if reasonably necessary, and even to bring it to a stop, if reasonably necessary and practicable, to avoid the injury; to use all available means to avert the injury, short of (615) putting in danger the safety of the train and its crew; and if you find that the Southern Railway Company, under these circumstances, failed to perform this duty, you will then find that it was negligent; and if you further find that this negligence was the proximate cause of the plaintiff's injury, you will answer the first issue 'Yes.'"

The charge upon the second allegation is as favorable as the plaintiff was entitled to, and the first is in accord with our authorities.

In *Edwards v. R. R.*, 132 N. C., 100, the Court says: "It is undoubtedly true that the engineer must give such a signal as will be reasonably sufficient to warn persons on highways, that intersect the track, of the coming of the train, and this must be done by ringing the bell or blowing the whistle, as the peculiar circumstances of the case may suggest to be the proper method, and the failure of the engineer to give such a signal would be evidence of negligence. *Hinkle v. R. R.*, 109 N. C., 473; 26 Am. Rep., 581. The warning must be reasonable and timely, but what is reasonable and timely warning must depend upon the conditions existing at the time in the particular case, and we are not by any means prepared to say that the law requires in every case that the signal should be given in any special way. We know of no such hard and fast rule as that laid down by the trial judge in this case. The bell and the whistle are the appliances provided for the purpose of giving signals, and one or the other, as the case may seem to require, must be used for that purpose, and, in cases of emergency or when the peculiar situation seems to demand it, there should perhaps be a resort to the use of both; but it must be left to the jury to decide, upon proper instructions of the court as to the law, what is the proper signal in any given case."

His Honor also instructed the jury that there was no evidence that the plaintiff was guilty of contributory negligence, and that if Mr. Jamison was negligent, his negligence could not be imputed to her, and the only view in which the jury was permitted to consider the negligence of Mr. Jamison was that if it was "the sole, only, proximate cause of the injury, that the plaintiff could not recover," and this, not upon the ground that it showed contributory negligence of the plaintiff, but if the negligence of Mr. Jamison was the sole, proximate cause, then the negligence of the defendant would not be proximate. In other words, there was evidence upon the part of the defendant tending to prove that it gave timely and reasonable notice of the approach of the train to the crossing, and that the automobile went upon the track so short a distance in front of the approaching train that it could not have been stopped by the exercise of ordinary care in time to avert the injury, and if so, the negligent act of driving the car upon the track would be the cause of the injury and there would be no negligence on the part of the defendant.

(616) His Honor further charged the jury: "If you find from the evidence that the Southern Railway Company was negligent, and that Mr. Jamison also was negligent, and that their negligence concurred, and that their concurrent negligence was the proximate cause of the

plaintiff's injury, you will, in that event, find that the railway company is liable, and your answer to the first issue would be 'Yes.' "

The contentions of the plaintiff were stated very fully and at length in the charge to the jury, and the paragraphs which we have quoted from the charge show that correct legal principles were laid down for their guidance.

The case was tried under the authority of *Crampton v. Ivie,* 126 N. C., 894, and upon the principles to be found in the interesting and valuable article on Automobiles in 2 Ruling Case Law, particularly at page 1205 *et seq.,* which deals with injuries at railroad crossings.

We have carefully examined the exceptions relied on, thirty-two in number, and find no error.

We do not consider them *seriatim,* because it would consist largely in comparing instructions prayed for with corresponding paragraphs of the charge, which would require a reproduction of all of the requested instructions and the whole of the charge, and would do no good.

No error.

*Cited: Hunt v. R.R.,* 170 N.C. 444 (2d); *McMillan v. R.R.,* 172 N.C. 855 (2c); *Goff v. R.R.,* 179 N.C. 219 (2c); *Jordan v. Power Co.,* 180 N.C. 664 (2c); *Parker v. R.R.,* 181 N.C. 103, 105 (2c); *Parker v. R.R.,* 181 N.C. 108 (2j); *Busey v. R.R.,* 181 N.C. 142, 143 (2c); *Costin v. Power Co.,* 181 N.C. 202 (2c); *White v. Realty Co.,* 182 N.C. 538 (2c); *Tyree v. Tudor,* 183 N.C. 346 (2c); *Williams v. R.R.,* 187 N.C. 353 (2c); *Rigsbee v. R.R.,* 190 N.C. 233 (2c); *Earwood v. R.R.,* 192 N.C. 29, 30 (2c); *Franklin v. R.R.,* 192 N.C. 719 (2c); *Evans v. Construction Co.,* 194 N.C. 34 (2c); *Pope v. R.R.,* 195 N.C. 69 (2c); *Ballinger v. Thomas,* 195 N.C. 520 (2c); *Redmon v. R.R.,* 195 N.C. 770 (2c); *Ramsey v. Power Co.,* 195 N.C. 793 (2c); *Dickey v. R.R.,* 196 N.C. 728 (2c); *Thurston v. R.R.,* 199 N.C. 498 (2c); *Smith v. R.R.,* 200 N.C. 182 (2c); *Campbell v. R.R.,* 201 N.C. 107 (2c); *Sanders v. R.R.,* 201 N.C. 676 (2c); *Johnson v. R.R.,* 205 N.C. 132 (2c); *Keller v. R.R.,* 205 N.C. 278 (2c); *Brown v. R.R.,* 208 N.C. 59 (2c); *Harvell v. Wilmington,* 214 N.C. 613 (2c); *Sample v. Spencer,* 222 N.C. 584 (2c); *Rattley v. Powell,* 223 N.C. 137 (2j).

A. B. ZAGIER v. M. & L. ZAGIER.

(Filed 23 December, 1914.)

**1. Injunction—Trade Name—Name of Person—Contracts—Enforcement.**

A man has the right to the use of his own name in connection with his business, provided he does so honestly and does not resort to unfair methods by which he wrongfully encroaches upon another's rights or commits a fraud upon the public; but he may, by contract, conclude himself from the use of his own name in a given business, and the agreement will be enforced by the courts.

**2. Pleadings—Amendments—Effect—Demurrer.**

Where the complaint in an action sought to restrain the use of the plaintiff's name in a given business is insufficient, and an amended complaint is allowed and filed which makes allegation sufficient to sustain the suit, the amended complaint has the effect of superseding the first, and a demurrer to the complaint should not be sustained.

**3. Pleadings—Trade Names—Injunction—Sufficient Allegations.**

In an action to restrain the use of a name in a given business, a complaint is held sufficient which alleges, in substance, that the defendant had expressly contracted with the plaintiff for a valuable consideration not to do business of a given kind in a certain city under the name of Z.; and that he had wrongfully begun and conducted the business therein under the name of Z., and that the plaintiff, also engaged there in that business under the designated name, had been greatly wronged and damaged in a stated sum.

(617) APPEAL by plaintiff from *Justice, J.*, at April Term, 1914, of BUNCOMBE.

Civil action to restrain the defendants in the use of the name Zagier in connection with the clothing and furnishing business in the city of Asheville.

A demurrer in terms to the complaint was sustained and judgment entered dismissing the action, and plaintiff excepted and appealed.

*Haynes & Gudger for plaintiff.*

*Jones & Williams for defendant.*

HOKE, J. It is recognized in this jurisdiction, and the position is in accord with authority very generally prevailing, that a man has the right to use his own name in connection with his business, provided he does so honestly and does not resort to unfair methods by which he wrongfully encroaches upon another's rights or commits a fraud upon the public. *Bingham School v. Gray*, 122 N. C., 699; *Howe Scale Co. v. Wyckoff*, 198 U. S., 118; *McLean v. Fleming*, 96 U. S., 245; *Blanch-*

*ard Co. v. Simon,* 104 Va., 209; *Hazelton Boiler Co. v. Hazelton Co.,* 142 Ill., 494.

In *Bingham's case, supra,* it was held: "As a rule, a trade-mark cannot be taken in a surname, and any one having the same surname as that under which a business has been long and successfully conducted by another, so as to acquire a reputation therefor, can conduct a like business under the same name, provided there be no intent to injure or fraudulently attract the benefit of the good name and reputation previously acquired by the other."

In *Howe Scale Co. v. Wyckoff, supra,* it was said: "Every man has the right to use his name reasonably and honestly in every way, whether in a firm or corporation, nor is a person obliged to abandon his name or to unreasonably restrict it. It is not the use, but dishonesty in the use, of the name that is condemned," etc. And it is also well established that one may, by contract, conclude himself from the use of his own name in a given business, and the agreement will be enforced by the courts. *Rauft v. Ramers,* 200 Ill., 386; *Frazier v. Frazier,* 121 Ill., 147; *Russia Cement Co. v. LePage,* 147 Mass., 206; *Hall Safe Lock Co. v. Herring-Hall, etc., Safe Co.,* 143 Fed., 231-237.

A very satisfactory statement in reference to both positions will be found in *Russia Cement Co. v. LePage,* opinion by *Devens, J.,* as follows: "A person cannot make a trade-mark of his own name, and thus debar another having the same name from using it in his (618) business, if he does so honestly and without any intention to appropriate wrongfully the good-will of a business already established by others of the name. Every one has the absolute right to use his own name honestly in his own business for the purpose of advertising it, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right to it are subjected is *damnum absque injuria.* But although he may thus use his name, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business, firm, or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name. *Holloway v. Holloway,* 13 Beav., 209; *Meneely v. Meneely,* 62 N. Y., 427; 20 Am. Rep., 489; *Gilman v. Hunnewell,* 122 Mass., 139; *Rogers v. Rogers,* 53 Conn., 121; 55 Am. Rep., 78. While this is the general rule, it is also true that one may so sell or part with the right to use his own name as a description or designation of a manufactured article as to deprive himself of the right to use it as such, and confer this right upon another. . . . One who has carried on a business under a trade name, and sold a

particular article in such a manner, by the use of his name as a trade-mark or a trade name, as to cause the business or the article to become known or established in favor under such name, may sell or assign such trade name or trade-mark when he sells the business or manufacture, and by such sale or assignment conclude himself from the further use of it in a similar way."

On perusal of the record, we are of opinion that a correct application of this principle is against the ruling of his Honor, as the question is now presented. It is true that the original complaint, filed by plaintiff, based on allegations designed to show a dishonest use of defendant's name, does not seem to bring defendant's conduct under condemnation of the principle first stated; but later, and by leave of the court, plaintiff filed what is termed an amended complaint, making an entire statement of his cause of action and alleging, in effect: "That defendant, at the time he began to do business in the city of Asheville, N. C., entered into an express contract with plaintiff for valuable consideration not to do a clothing business in the city of Asheville at any time under the name of 'Zagier.'

"2. That defendant wrongfully began his business in the city under the name of 'Zagier,' and that plaintiff, engaged in that business, has been thereby greatly wronged and damaged, towit, in the sum of $710,000."

(619) On authority, the amended complaint, in the form as now presented, has the effect of superseding the first (1 Enc. Pl. and Pr., p. 625), and considering plaintiff's demand in that aspect, he seems to have stated a perfect cause of action, within the meaning of the second position, above stated, and the demurrer to complaint was improperly sustained.

This will be certified, that further proceedings may be had in accordance with law.

Reversed.

*Cited: Warren v. Susman,* 168 N.C. 462 (2c); *Griggs v. Griggs,* 213 N.C. 627 (2d).

OLLIE HOYLE ET AL. v. CITY OF HICKORY.

(Filed 16 December, 1914.)

**1. Municipal Corporations — Cities and Towns — Discretionary Powers — Streets and Sidewalks—Negligent Construction—Damages—Constitutional Law—Taking of Private Property.**

A city is not liable to owners of lands abutting upon the street for any detriment to their property resulting from the grading of the street, done in the discretionary power of the city in making needed improvements, unless the damage done thereto resulted from a negligent grading of the street, or the State has given its consent by statute. The principles upon which this doctrine rests discussed by WALKER, J., and differentiated from those applying to the taking of private property for public use without just compensation.

**2. Municipal Corporations—Cities and Towns—Streets and Sidewalks—Negligence—Witness, Nonexpert—Evidence—Maps—Measure of Damages.**

Where damages are sought by the owner of lands adjoining a street of a city or town, alleged to have been caused by the negligent construction of the street by the city authorities, evidence of its negligent construction is not confined to the testimony of experts, for such construction may be shown by other witnesses in plaintiff's behalf, using photographs of the locality in explanation and illustration of the testimony, so as to give the jury a better idea as to whether or not damages had been caused, or as to their extent.

**3. Municipal Corporations—Cities and Towns — Streets and Sidewalks — Negligent Construction—Measure of Damages.**

Upon an issue as to the amount of damages sustained by the plaintiff to his lands abutting a city street, alleged to have been caused by the negligent construction of the street by the city authorities, it is competent for the plaintiff to show the cost of restoring his lot to its former condition and value, the jury to give the evidence such weight as they think proper.

APPEAL by defendant from *Webb, J.*, at February Term, 1914, of CATAWBA.

This case was before us a year ago, and was then decided in favor of the defendant to the extent of granting a new trial. The action was brought to recover damages for negligently constructing a (620) fill in front of plaintiff's home on Ninth Street in the said city, for the purpose of grading and improving that thoroughfare. The allegation is that the fill left the plaintiff's lot far below the level of the street. It was below before the street was graded, but the depth had been increased, so that the lot was greatly damaged and its value impaired by the flow of the surface water from the street, with dirt and silt. The other facts appear in the case, on former appeal, as reported

in 164 N. C., 79, where the *Chief Justice* wrote the opinion for this Court, settling about all of the legal questions involved. The case was sent back for another trial, in order that it might be determined by the verdict of the jury, upon the evidence, whether plaintiff had agreed to dispense with the erection of a retaining wall, and also because of the admission of improper evidence. It was also suggested that a separate issue be submitted as to the cutting down of the tree of which plaintiffs complained as a part of the wrong committed by defendant. Issues were submitted to the jury, and they rendered the following verdict:

1. Did defendant, in raising, grading, and permanently improving Ninth Avenue in front of the house and lot of the plaintiffs, raise, grade, and improve said street at said place in a negligent and improper manner? Answer: "Yes."

2. If so, was plaintiffs' property injured thereby? Answer: "Yes."

3. What damages are plaintiffs entitled to recover? Answer: "$478."

4. Did defendant cut down and destroy the tree in question on plaintiffs' property? Answer: "Yes."

5. If so, what damage did plaintiffs sustain by reason of such cutting of the tree? Answer: "$22.40."

Judgment was entered thereon and defendant appealed.

*W. A. Self and W. C. Feimster for plaintiffs.*

*A. A. Whitener for defendant.*

WALKER, J., after stating the case: It was decided in the former appeal that, while plaintiffs could not recover for any detriment to their property which was the result merely of the proper grading of the street, which had been done in the due exercise of the discretionary power of the city to make needed improvements, it being *damnum absque injuria,* yet they could recover for any damage done thereto which was caused by a negligent grading of the street, following the principle as adopted in numerous decisions of this Court. *Meares v. Wilmington,* 31 N. C., 73; *Salisbury v. R. R.,* 91 N. C., 490; *Wright v. Wilmington,* 92 N. C., 160; *Tate v. Greensboro,* 114 N. C., 397; *Brown v. Electric Co.,* 138 N. C., 537; *Ward v. Comrs.,* 146 N. C., 538; *Small v. Edenton, ibid.,* (621) 527; *Jones v. Henderson,* 147 N. C., 120; *Dorsey v. Henderson,* 148 N. C., 429; *Harper v. Lenoir,* 152 N. C., 723. To which may be added *Jeffress v. Greenville,* 154 N. C., 490; 4 McQuillin on Mun. Corp., p. 4220, and 2 Dillon on Mun. Corp., sec. 1040, and there is a long line of authorities which uniformly sustain the doctrine, so that it may now be considered as no longer open to question.

Where there is no negligence, no liability arises. This, we said in *Dorsey v. Henderson, supra,* has been the law since the days of *Chief Justice Kenyon* and *Justice Buller. Governor, etc., Manufacturers, v. Meredith,* 4 Durnf. and East, 794, 796; *Sutton v. Clark,* 6 Taunton, 28; *Boulton v. Crowther,* 2 Barn. and Creswell, 703. This doctrine is almost universally accepted by the State courts of this country. Cooley Const. Lim., p. 542, and notes. The same principle was also recognized in *Transportation Co. v. Chicago,* 99 U. S., 635, and *Smith v. Corp. of Washington,* 20 Howard, 135, and as understood in that Court may be thus stated: The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The State holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it did not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there be any, must be that, and that only, which the Legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of *Magna Carta,* and the restriction to be found in the Constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. But where negligence exists in doing the municipal work, the rule is otherwise, and the corporation becomes liable in damage.

The jury have found the facts against the defendant, and there is ample evidence to support the verdict. The plaintiff could show the negligence by other than expert testimony. The jury were not bound to believe, nor to adopt, the views of the experts, nor were they concluded thereby, as to whether the work had been negligently (622) done. "For any inconvenience or damage sustained by the plaintiffs' lot from placing the fill in the street opposite thereto under the advice and supervision of the civil engineer, whose plans were approved by the city authorities acting in good faith, the plaintiffs cannot recover unless the work was done negligently. It is *damnum absque injuria.*"

This was decided on the former appeal, but the question of negligence was expressly left open for the decision of the jury. It was also there said: "If there was no such agreement, the plaintiffs were entitled to have the jury consider the damage, if any, caused by defendant's negligence in not erecting a retaining wall to prevent the dirt from rolling down upon the lot of the plaintiffs." Judging from the photograph exhibited to us at the hearing, we think the jury might well have found that there had been negligence. The photograph itself was competent, as explanatory of the other testimony. *Davis v. R. R.,* 136 N. C., 116; *Pickett v. R. R.,* 153 N. C., 149. If the lot continued to be washed by the surface water, which piled the dirt up in the yard, even near unto the door of the house, it was competent to be shown by witnesses, with the aid of the picture, reproducing exactly the true situation. Cases *supra.* It might be impossible to illustrate it or to give the jury a correct idea of the damage, if any, in any other way. The evidence as to the cutting of the tree and the damage caused thereby was competent. *Brown v. Electric Co.,* 138 N. C., 537; *Foy v. Winston,* 126 N. C., 381; *Norfolk v. Philadelphia,* 16 A. and E. Anno. Cases, 430, and note. We think it was clearly competent to show the cost of restoring the lot to its former condition and value. How better could the extent of the damage be shown? The jury were not bound by the calculation or figures, but could consider them and give them such weight as they thought was proper.

There are other exceptions which are not tenable, and if there was any error in these rulings, it is not reversible, not being prejudicial. The main question was as to the negligence. There being evidence of it, the jury were the judges of the facts.

No error.

*Cited: Bennett v. R.R.,* 170 N.C. 391 (1d); *Yowmans v. Hendersonville,* 175 N.C. 578 (1c); *Marshall v. Telephone Co.,* 181 N.C. 296 (2d); *Elliott v. Power Co.,* 190 N.C. 66 (2c); *Mabe v. Winston-Salem,* 190 N.C. 489 (1c); *Honeycutt v. Brick Co.,* 196 N.C. 557 (2c); *Simpson v. Oil Co.,* 219 N.C. 600 (2c); *Broadhurst v. Blythe Bros. Co.,* 220 N.C. 472 (1c).

(623)

MRS. M. H. HARRIS v. UNITED STATES FIDELITY AND GUARANTY COMPANY AND W. C. CRAIG.

(Filed 23 December, 1914.)

**1. Principal and Surety—Contracts—Indemnity—Notice—Date of Completion—Weather Conditions.**

Where a surety bond indemnifying the owner against loss under a contract for the building of a house provides that the owner shall notify the guaranty company of the failure of the contractor to complete the house by a certain date, and that no liability shall attach to the company unless the owner shall promptly, and in any event not later than thirty days after knowledge of such default, deliver to the surety at its office in a certain city written notice thereof, and it is expressly provided in the contract, to which the bond refers, that delays caused by excessive bad weather should not be counted against the contractor, it is *Held*, that delays from the cause stated extends the time wherein the house was contracted to have been completed, and that notification under the terms of the contract given after the date named, but within the extension thereof on account of the weather conditions, is sufficient.

**2. Trials—Nonsuit—Evidence.**

Upon a motion to nonsuit, the evidence should be considered in the most favorable aspect for the plaintiff; and there being evidence in this case that the plaintiff notified the surety in a bond given to indemnify him for loss on account of a contract entered into for the construction of a house, in accordance with the terms of the bond, the motion was properly denied.

**3. Trials—Instructions—Unconflicting Evidence—Directing Verdict.**

In an action to recover from an indemnity company damages caused to the owner by a contractor's default under his contract to erect a house, the evidence being uncontradicted, it is held that the judge properly instructed the jury to find the amount of damages in plaintiff's favor.

APPEAL by defendant from *Justice, J.*, at April Term, 1914, of BUNCOMBE.

This is an action to recover damages on a bond given by the defendant, United States Fidelity and Guaranty Company, to secure the performance of a building contract made between the plaintiff and the defendant W. C. Craig.

On 22 September, 1911, defendant W. C. Craig entered into a contract with the plaintiff by which he agreed to furnish all the labor and material for the construction of a house in the city of Asheville in accordance with certain plans and specifications attached to the contract. The amount to be paid to Craig for the construction of said house was $3,600.

Article VI of said contract is as follows:

(624) ART. VI. The contractor shall complete the several portions, and the whole of the work comprehended in this agreement, by and at the time or times hereinafter stated, by 22 January, 1912, and in case of a failure to complete within the time specified, shall forfeit and pay to the owner, same to be added to the account, a rent of $10 per week for the time building remains after said date unfinished: *Provided,* that the weather will permit and that the contractor is not delayed by the owner, all time lost on account of excessively bad weather or on account of the owner's failure to complete work, her part of this contract, not to be counted against contractor."

The contract is referred to in the bond, the penalty of which is $1,800, and the following stipulation is contained therein:

"First. That no liability shall attach to the surety hereunder, unless, in the event of any default on the part of the principal in the performance of any of the terms, covenants, or conditions of the said contract, the obligee shall promptly, and in any event not later than thirty days after knowledge of such default, deliver to the surety at its office in the city of Baltimore written notice thereof, with a statement of the principal facts showing such default and the date thereof; nor unless the said obligee shall deliver written notice to the surety at its office aforesaid, and the consent of the surety thereto obtained, before making to the principal the final payment provided for under the contract herein referred to."

The house was not completed on 22 January, 1912, but evidence was offered by the plaintiff tending to prove that the completion of the building was delayed by bad weather, and that she gave notice of the default to the defendant guaranty company within thirty days after the defendant Craig abandoned the contract, but not within thirty days from 22 January, 1912.

The plaintiff completed the building, and she testified that she did so under the supervision of an architect according to the plans and specifications of the contract, and that the total cost, including $2,225 paid to Craig, was $6,500. There was other evidence to the same effect.

There was a motion to nonsuit, which was denied, and the defendant excepted.

The court charged the jury as follows: "Gentlemen of the jury, I submit two issues to you. First, 'Is the defendant C. W. Craig indebted to the plaintiff, and if so, in what amount?' There is undisputed evidence here that he is indebted to the plaintiff in a considerably larger amount than $1,800, but the plaintiff does not insist on a verdict against Craig for more than $1,800. Therefore, I say to you, if you believe all the testimony and believe the witnesses, you will answer this issue

'$1,800.' The next issue is, 'Is the United States Fidelity and Guaranty Company indebted to the plaintiff, and if so, in what (625) amount?' The court charges you that if you believe all the testimony by all the witnesses, you will answer this issue '$1,800.' They are entitled to recover the interest from 6 June, 1912, in both of these cases; so if you believe all this testimony and find the facts to be as testified to by all these witnesses, you will answer the issue 'Yes, with interest from 6 June, 1912.'"

To this charge the defendant excepted.

The jury found both issues in favor of the plaintiff and assessed her damages at $1,800, with interest on said sum from 6 June, 1912. Judgment was entered upon the verdict, and the defendant United States Fidelity and Guaranty Company appealed, and assigned the following errors:

1. For that the court erred in refusing to grant the defendant's motion for a judgment of nonsuit, as set out in the first exception.

2. For that the court erred in his intimation that he would charge the jury that if they believed the evidence they should answer the issues finding for the plaintiff in damages in the sum of $1,800, as set out in the second exception.

3. For that the court erred in charging the jury that if they believed the evidence they should answer the first issue "$1,800" and the second issue "Yes, with interest from 6 June, 1912," as set out in the third exception.

*W. R. Whitson for plaintiff.*

*Merrick & Barnard for defendant.*

ALLEN, J. The motion for judgment of nonsuit is upon the ground that the plaintiff did not notify the guaranty company of the failure of the contractor to complete the house by 22 January, 1912, within thirty days from that date, the defendant relying upon the stipulation in the bond, "that no liability shall attach to the surety hereunder unless, in the event of any default on the part of the principal in the performance of any of the terms, covenants, or conditions of the said contract, the obligee shall promptly, and in any event not later than thirty days after knowledge of such default, deliver to the surety at its office in Baltimore written notice thereof."

No issue was tendered by the defendant, presenting the defense of the failure to give notice, and as the question is raised upon a motion to nonsuit, we must consider the evidence in the most favorable aspect for the plaintiff.

The bond does not require the plaintiff to give notice to the defendant if the house is not completed by 22 January, 1912, but to give notice of *default* in the performance of the building contract, and if there (626) is evidence which, when properly applied to the terms of the contract, shows that the default occurred at a later date, the motion for judgment of nonsuit ought not to have been allowed; and in our opinion there is such evidence. In the article of the building contract, requiring the house to be completed by 22 January, 1912, it is expressly provided that if the contractor is delayed by excessively bad weather, this time is not to be counted against him, and when the article is read as a whole, the natural and reasonable construction is that the contractor agreed to complete the house under ordinary conditions by 22 January, 1912, but if he was delayed by very bad weather, he should have additional time for the performance of the contract.

This is in the agreement of the parties, which defendant company guaranteed should be performed, and it has the effect of extending the time of performance, if delays are caused by bad weather, and during this extension of time there would be no default on account of failure to complete the house, and the plaintiff offered the evidence of several witnesses tending to prove delays on account of the weather, one witness testifying that at one time no work could be done for three weeks.

The plaintiff was entitled to have this evidence considered by the jury, and, if believed, it tended to establish her contention that there was no default by reason of the failure to complete the house by 22 January, and the motion for judgment of nonsuit was, therefore, properly denied.

There is no error in the instruction given to the jury, as the uncontradicted evidence is that the plaintiff expended much more than $1,800, according to the plans and specifications of the contract, in the completion of the house.

No error.

*Cited: Horne v. R.R.,* 170 N.C. 654 (2j).

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CONTINENTAL JEWELRY COMPANY v. ROWLAND PITTMAN & BRO.

(Filed 16 September, 1914.)

**Vendor and Vendee—Goods Returned—Purchase Price.**

In an action for the purchase price of goods sold and delivered, it appeared that the purchaser returned a part of the goods as unsatisfactory, paying for the balance, and that the seller received and kept them.

*Held*, the latter cannot recover for those returned, the case being governed by *Medicine Co. v. Davenport*, 163 N. C., 294.

APPEAL by plaintiff from *Bond, J.*, at March Term, 1914, of BUNCOMBE.

*J. M. Norfleet for plaintiff.*
*No counsel for defendant.*

WALKER, J. This was an action for the recovery of $96.75, (627) the price of jewelry and showcase sold to defendant, and which he testified the sales agent agreed he might return if unsalable and unsatisfactory. Defendant alleged that the goods, except some of them of the value of $15.90, were returned to plaintiff and accepted by it. He admitted liability for $15.90. The jury, upon an issue (No. 6) being submitted to them, found that the goods had been returned and accepted by the plaintiff, and that defendant was only indebted to plaintiff in the sum of $15.90, for which amount judgment was entered for him. Plaintiff requested the court to charge that, on defendant's own evidence, it was entitled to recover the full amount, less the credits, viz., $96.75, and to direct the answer to the fifth issue accordingly. The court refused to do so, and plaintiff, having excepted, appealed from the judgment. We are of the opinion there was evidence for the jury to consider, to the effect that defendant returned the goods and that they were received and kept by the plaintiff; and the jury having found that this was so, the case is governed by *Medicine Co. v. Davenport,* 163 N. C., 294, which decides that the plaintiff cannot retain the goods and recover their price, a self-evident proposition. There was some evidence of fraud by the agent in procuring the contract, but we suppose it was not submitted to the jury under a proper issue, as the other question presented a more simple solution of the controversy.

No error.

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L. P. HORNTHAL v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 16 September, 1914.)

**1. Appeal and Error—Record—Trials — Instructions — Exceptions — Presumptions—Supreme Court—Discretionary Powers.**

When exceptions are taken to the refusal of the trial judge to give proper instructions of law upon the evidence and issues in controversy, which were duly requested, it must appear of record that these instructions were not substantially given in the charge; and when the record

does not set out the charge it will be presumed that the court correctly charged the law applicable to the case, though the Supreme Court, acting under its discretionary powers, may order the charge to be sent up when it thinks that a clear miscarriage of justice may thereby be prevented.

**2. Carriers of Goods—Live Stock—Improper Cars—Approved and General Use—Weather Conditions—Rule of Prudent Man—Negligence.**

The defendant railroad company used for the transportation of the plaintiff's horse an open slat car, the slats being 4 or 5 inches apart, and the evidence was conflicting as to whether the weather was bitter cold and penetrating, or mild and balmy. There was evidence that the shipment was delayed for several hours, and that the horse contracted pneumonia and shortly afterwards died of the disease; and also that the car was one approved and generally used for the purpose of such shipments. *Held*, the carrier is required to exercise due care, under the rule of the prudent man, according to the existing circumstances, in the selection of a proper car for the shipment, and will not be exempted from liability solely for the reason that the car was such as is generally used under ordinary conditions for such shipment, as this may not be the equivalent of the proper care required.

(628) APPEAL by defendant from *Ferguson, J.*, at June Term, 1914, of WASHINGTON.

*Ward & Grimes for plaintiff.*

*W. M. Bond, Jr., and Small, McLean, Bragaw & Rodman for defendant.*

WALKER, J. This action was brought to recover damages for the death of a horse, alleged to have been caused by the negligence of the defendant in shipping it from Norfolk, Va., to Plymouth, N. C., via Mackey's Ferry, N. C., in March, 1911. The horse was carried between those points in an open slatted car, the slats being 3 to 4 inches apart. The weather was bitter cold and the horse contracted pneumonia, on account of the exposure, soon after he was delivered to plaintiff at Plymouth, and shortly thereafter he died of the disease. The train should have arrived at Plymouth, according to its regular schedule, not later than 11 o'clock a. m. the next day, whereas it reached there at 3 o'clock p. m., being delayed about four hours, which prolonged the exposure to the cold. The horse, in order to preserve its health, should have been sent in a closed car, because of the severe weather at the time. This was the substance of plaintiff's evidence.

Defendant offered evidence tending to show that the weather was mild and the car a proper one for the shipment; that the train carrying the car left Norfolk 23 March, at 10:30 o'clock in the night, and arrived at Mackey's Ferry at 5:40 o'clock the next morning, and the ferry is 9

miles from Plymouth. It was a through train and did not stop at Plymouth, so that the car in which the horse was shipped had to be set off at the ferry until it could be taken to Plymouth. It was coupled to the train which left the ferry at 11:20 o'clock a. m. on 24 March.

Defendant requested several special instructions, which were denied. The charge is not in the record, and it does not, therefore, appear what instructions were given to the jury by the presiding judge. He may have refused the instructions, in the form requested, and yet have given them substantially in the charge, which, under the (629) circumstances, should have been sent to this Court, and is essential to a proper decision upon the merits, if we really thought that any serious principle of law is involved. If we so regarded the case, we would direct the charge, or the substance of it, to be sent up, in the exercise of our discretionary power, so that a clear miscarriage of justice might be prevented, for we cannot assume that the learned judge could have missed the law in such a plain and simple case. All presumptions are in favor of the rulings below, and the appellant must show error, if any was committed. There is no exception to the charge of the court, and we, therefore, assume that it was correct. *Carroll v. Smith,* 163 N. C., 204.

The furnishing of a car "in general and approved use," as stated in the prayer of defendant, did not fully discharge defendant from liability, as we have recently held. It is only a part of the obligation to carry safely, and the car must, moreover, be reasonably fit and suitable for the particular service, in the exercise of the degree of care which the law requires of the carrier. A car in general use may not be a proper one for the particular shipment, when the special circumstances and surroundings, condition of the weather, length of the journey, and other pertinent facts are considered. *Ainsley v. Lumber Co.,* 165 N. C., 122: *Kizer v. Scales Co.,* 162 N. C., 133. To acquit a master or carrier of liability simply because the implement or car employed was "approved and in general use" might shut out the consideration of negligence in other respects. It is his duty to use such cars or implements as are generally approved and in general use; but this is not all of it. Something more is exacted of him by the law. Whatever is done in any ordinary service must, at least, be reasonably adapted to its plain requirements, such as would appear to a man of ordinary care and prudence to be suggested by the special facts and circumstances of the particular case. He cannot easily go astray in this regard, if he follows the plain dictates of ordinary prudence, not being required to act sagaciously always, but to give that degree of attention and care to the matter which the ordinarily prudent man would give if it were an affair of his own

and his personal interests were involved. He should, in other words, do unto others as he would that they should do unto him.

But we need not rest the decision upon any particular consideration of the prayers, as we are of the opinion that the case, in its substance, presented only an issue of fact, which seems to have been correctly answered by the jury, and fairly submitted to them. The real question concerned more the condition of the weather than anything else. Was it bitter cold and penetrating, as contended by the plaintiff, or was it mild and balmy as a spring day, as asserted by defendant? This was a question of fact, and not one of law. The jury evidently found with (630) the plaintiff upon this question, and concluded, under the charge of the court as to the general rule of liability, that a prudent carrier would not have shipped a horse in such a car, under such circumstances.

There is no reversible error in the case.

No error.

*Cited: Lynch v. Veneer Co.,* 169 N.C. 172 (2c); *Dellinger v. Building Co.,* 187 N.C. 848 (2c); *Maynard v. Holder,* 219 N.C. 471 (1c); *S. v. Sullivan,* 229 N.C. 258 (1c).

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HENRY H. TURNER v. ASHEVILLE POWER AND LIGHT COMPANY.

(Filed 16 December, 1914.)

**1. Electricity—Negligence—High Degree of Care—Trials—Instructions—Ordinary Care—Appeal and Error.**

While corporations engaged in the business of furnishing electric power and light to their patrons are not regarded as insurers against injury, they owe the duty to the public and to their patrons to exercise a high skill and the most consummate diligence and foresight in the construction, maintenance, and inspection of their plants, wires, and appliances consistent with the practical operation of their business; and when in an action for damages there is evidence tending to show that the plaintiff was injured on the streets of a city by coming in contact with the defendant's live wire, heavily charged with electricity, lying down upon the sidewalk, it is reversible error for the trial judge to charge the jury, in effect, upon the issue of defendant's negligence, that the care required of the defendant in such instances was that of the ordinarily prudent man.

**2. Trials—Issues—Electric Wires—Control and Ownership.**

It being contended in this action against an electric power company that the wire with which the plaintiff came in contact, causing the injury,

was not operated by the defendant or under its control, a separate issue upon that question should be submitted to the jury.

APPEAL by plaintiff from *Cline, J.*, at August Term, 1914, of BUNCOMBE.

Civil action, tried upon these issues:

Was the plaintiff, Henry H. Turner, injured by the negligence of the defendant, as alleged in the complaint? Answer: "No."

What damage, if any, is the plaintiff entitled to recover? Answer: "Nothing."

From the judgment rendered, the plaintiff appealed.

*R. S. McCall, O. K. Bennett for plaintiff.*

*Martin, Rollins & Wright for defendant.*

BROWN, J. The evidence in this case tended to prove that the defendant maintained a line of electric wires on Atkins Street in the city of Asheville about 9 August, 1913, and that on said date, or thereabout, one of said wires had fallen to the ground by the negli- (631) gence of the defendant; that it was a live wire, heavily charged with electricity, and was lying down on the sidewalk; and that the plaintiff came in contact with the same, and sustained permanent injuries.

Upon the question as to the degree of care which the defendant owed in respect to the keeping of its wires, the judge charged the jury as follows: "The defendant ought to exercise ordinary care which an ordinarily prudent man would use in operating that substance, electricity, over the wires and at the place alleged and admitted in the pleadings."

This portion of the charge was excepted to by the plaintiff. The exception must be sustained.

We have said in many cases that while the law does not regard companies furnishing electric power and lights to its patrons as insurers against injury, yet such companies owe to the public, as well as to their patrons, the duty to protect them by exercising a high skill, the most consummate care and caution, and the utmost diligence and foresight in the construction, maintenance, and inspection of its plant, wires, and appliances, consistent with the practical operation of the business. *Turner v. Power Co.*, 154 N. C., 132.

The language used in *Haynes v. Gas Co.*, 114 N. C., 203, is the "utmost degree of care." In that case it is said, also: "The danger is great and the care and watchfulness must be commensurate with it."

It may be rather a high degree of care to place upon electric companies, but it is absolutely essential for the protection of the citizens who

use the public streets to protect them from the danger incident to such hazardous business. *Horne v. Power Co.*, 144 N. C., 375; *Harrington v. Wadesboro*, 153 N. C., 437.

It is contended that the wire from which the plaintiff received his injury was not operated by, nor under the control of, the defendant. If that is true, of course, the defendant is not liable for the injury sustained by the plaintiff. As the case is to be tried again, in order to avoid possible error, it would be well to submit a separate issue as to the control and operation of the wire, in addition to the issue of negligence.

New trial.

*Cited: Small v. Utilities Co.*, 200 N.C. 721 (1c); *Lynn v. Silk Mills*, 208 N.C. 11 (1c); *Kiser v. Power Co.*, 216 N.C. 700 (1c); *Mack v. Marshall Field & Co.*, 217 N.C. 62 (1c).

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T. M. LUTZ ET AL. v. L. W. HOYLE ET AL.

(Filed 16 December, 1914.)

1. **Trusts and Trustees—Parol Trusts—Evidence—Common Law.**

There being no statute in North Carolina to the contrary, the common-law rule prevails here, that a trust may be created by parol agreement entered into between the parties before or at the time of the transmission of the legal title to lands, and that when created it attaches to and becomes a part of the title, the difference between establishing a parol trust and that under a sufficient writing being only in the mode and degree of proof.

2. **Same—Equitable Mortgage — Equity of Redemption — Foreclosing — Power of Sale—Courts—Decree.**

Where it is established that a purchaser of lands agreed by parol at the time of the purchase that he would bid in the lands at a certain price and hold them for the benefit of the other party to the agreement, and convey to him upon a part payment of the purchase price at a specified time, and take a mortgage for the balance, etc., and subsequently refuses to carry out this agreement, in a suit to declare a parol trust upon the land it is *Held*, that the effect of the conveyance is to vest in the plaintiff an equitable estate of redemption, which cannot be foreclosed in the absence of an abandonment of the right and in the absence of a power of sale, legally ascertained, except by decree of a court of equity, the relation of the parties being that of mortgagor and mortgagee.

3. **Trusts and Trustees—Parol Trusts—Equitable Mortgage—Readiness to Pay—Equity of Redemption.**

A parol trust in plaintiff's favor engrafted upon the title to land acquired by the defendant, and the relation of mortgagor and mortgagee

(without power of sale) having been established, an answer to the issue finding that the plaintiff was not ready, able, and willing to pay the money secured, does not necessarily bar the plaintiff's right to redeem.

**4. Trusts and Trustees—Parol Trusts—Equitable Mortgage—Ready, Etc., to Pay—Issues—Verdict.**

The plaintiff having established by parol an interest in his favor in the nature of an equitable mortgage in the lands, conveyed to the defendant, it is *Held*, that an answer to an issue including the findings of facts, that the plaintiff was not and is not ready, able, and willing to comply with the terms of the agreement, does not bar the plaintiff of his equitable interest, it appearing of record that the plaintiff had offered to pay the full amount of the purchase price, with interest, etc., into court for the use of the defendant, and that actual payment was waived by him, and it is *Further held*, under the instruction of the court, in this case, that the jury must have found by their answer to this issue that the plaintiff could not have paid the money from his own earnings, which does not preclude the right of the plaintiff to have obtained the money from other sources.

**5. Trusts and Trustees—Parol Trusts—Leases—Estoppel.**

In this action to establish an equity arising "in the defendant's title to land" it is *Held*, that an issue as to whether the plaintiff was estopped by certain leases from maintaining his action for specific performance was correctly answered under the authority of *Hauser v. Morrison*, 146 N. C., 252.

APPEAL by plaintiff from *Harding, J.*, at July Term, 1914, of (633) LINCOLN.

Civil action, brought by plaintiffs to declare a parol trust, plaintiffs alleging that the defendant L. W. Hoyle took the legal title to a certain tract of land under contract to hold it in trust for the plaintiffs, and that said L. W. Hoyle, at or before the time he took the legal title, contracted to bid it in at the sale under a mortgage or deed of trust, and to convey the land in controversy to the plaintiffs at the end of three years upon their paying him the sum of $3,000 and executing to him a mortgage on said land for $3,000, and upon their paying the accrued interest on $6,000.

The jury returned the following verdict:

1. Did L. W. Hoyle agree with the plaintiffs, at or before the time of sale of the land under the mortgage referred to in the complaint, that he would bid the land in at the sale for $6,000 and hold it for their benefit, and convey it to them upon the payment of $3,000 in cash at the end of three years, and take a mortgage on the land for the balance of the $6,000, and that the defendant should pay the interest and taxes on the land? Answer: "Yes."

2. Were the plaintiffs ready, willing, and able to comply with their part of the agreement, and are they now ready, willing, and able to comply with their part of said agreement? Answer: "No."

3. Are the plaintiffs estopped by the leases referred to in the answer from maintaining this action for specific performance? Answer: "No."

Judgment was entered upon the verdict in favor of the defendant, and the plaintiffs excepted and appealed.

*L. B. Wetmore, Charles A. Jonas, and Manning & Kitchin for plaintiffs.*

*C. E. Childs and Cansler & Cansler for defendants.*

ALLEN, J. If a declaration had been incorporated in the deed executed to the defendant that he held the title to the land in trust to secure the payment of $6,000 and interest, $3,000 to be paid in three years and $3,000 thereafter, and then in trust for the plaintiffs, it could not be contended that the defendant has an absolute and indefeasible title, although the plaintiffs may not have been ready, willing, and able to pay.

Such a conveyance would have vested in the plaintiffs an equitable estate, an equity of redemption, which could not be foreclosed, in the absence of a power of sale, without the consent of the plaintiffs,
(634) legally ascertained, except by the decree of a court of equity. It would have established substantially the relation of mortgagor and mortgagee. *Freeman v. Bell,* 150 N. C., 149.

Speaking of a similar contract in *Mason v. Hearne,* 45 N. C., 90, *Pearson, J.,* says: "The agreement in writing, signed by the defendant, shows upon its face that the real intention of the parties to the transaction was to create merely a *security,* and for this purpose the legal title was conveyed to the defendant, in trust to secure the repayment of the $30, with interest, and then in trust to convey to the plaintiff. Such being the intention of the parties, *time is not of the essence of the contract* in this Court; which is the principle upon which the Court allows the equity of redemption, after the estate at law has become absolute, in all cases where the intention was to create *merely a security.*"

The same result follows if, instead of declaring the trust in the deed, it had been absolute in form, and a separate paper had been executed at the same time containing the declaration of trust, upon the familiar principle that writings executed at the same time and relating to the same subject-matter are to be construed together as one paper. *Cheek v. B. and L. Assn.,* 126 N. C., 244; *Porter v. White,* 128 N. C., 44.

If this is true of a declaration in trust contained in a deed, or in a separate writing executed at the same time, what difference does it make

in the relation of the parties if the trust is established by parol and not by some writing?

The seventh section of the English Statute of Frauds, providing that declarations of trust shall be in writing, has not been adopted in this State (*Shelton v. Shelton,* 58 N. C., 292), and in the absence of a statute the common-law rule prevails, that a trust may be created by parol agreement entered into before or at the time of the transmission of the legal title, and that when created it attaches to and becomes a part of the title.

It was held in *Sykes v. Boone,* 132 N. C., 199, that a trust declared by parol at the time the legal title passed, to the effect that the vendee should hold in trust for a third person and convey to her on receiving the purchase money paid by him, was not within the statute of frauds, and was valid and enforcible; and in *Taylor v. Wahab,* 154 N. C., 223, that it is annexed to the legal estate; and in *Avery v. Stewart,* 136 N. C., 436, the Court says: "Where one person agrees before a sale to buy the property proposed to be sold for the use and benefit of another, although the former may advance all of the purchase money, it has been held that such a transaction is equivalent to a loan of the money and a taking of the title as security for its repayment, even if there is no suppression of bidding or other equitable element; and the purchaser who has thus acquired the legal title will not be permitted to hold it and repudiate his promise."

If, therefore, no writing is required, and a trust created and (635) established by parol is valid and enforcible and is annexed to the legal title, it follows that when created and established, the same relationship exists between the parties as if established by some writing, the difference between the two being only in the mode and degree of proof.

In *Owens v. Williams,* 130 N. C., 168, which has been twice affirmed, *Furches, C. J.,* speaking for the Court, says: "As the statute of frauds does not apply to the declaration of trusts in this State, whenever the terms of the parol trust are established they have the same force and binding effect as if they had been in writing. So the facts found in the case going to establish the trust have the same binding effect upon the defendant as if they had been incorporated in the deed from Faison to the defendant. And had this been done, it seems to us there could be no ground upon which the defendant could dispute the trust."

The same equitable principle was considered in a learned opinion by *Justice Walker* in *Bateman v. Hopkins,* 157 N. C., 470, involving the rights of the parties under a contract to convey, where, after discussing the authorities, he concludes that "The general and clear result of the best considered authorities is that the vendor, especially when he has

been and is in default himself, or when he has denied or repudiated the contract, cannot insist upon the failure to tender the money or to bring it into court for the purpose of performance, but will be left to such protection as the court can afford in the decree, which will be shaped so as to carry out the purposes of the contract fairly and equitably, without any great regard for technicalities, the object being to do justice to both parties without unnecessarily sacrificing the rights of either. This is the wisest and safest doctrine."

If the premises we have laid down are correct, the conclusion follows that the finding upon the second issue does not bar the equity of the plaintiffs.

According to the finding upon the first issue, the defendant has never had any interest in the land in controversy, except to secure the payment to him of $6,000 and interest, and has never been entitled to anything except his money; and when the court requires that to be paid, he must be content.

We have thus far considered the record in the most favorable light for the defendant, and have assumed that the jury has found, in answer to the second issue, that the plaintiffs have not at any time, been ready, willing, and able to pay; but this is not a proper construction of the verdict. The second issue includes two facts: (1) Were the plaintiffs ready, willing, and able? (2) Are they now ready, willing, and able?

The jury could not answer the second question in the negative, because it is stated in the case on appeal, as an admission of the parties,
(636) that the plaintiffs offered to pay $6,000 and interest to the court for the use of defendants, and that actual payment was waived, and the answer to the first question, when read in the light of his Honor's charge, that the jury must answer the second issue "No," unless they found that the plaintiffs had $3,000 "of their own earning, raised by reason of their own industry," does not negative the ability of the plaintiffs to procure the money from some other source, as they had the right to do.

The answer to the second issue, thus interpreted in connection with the admission in the record and with the charge, means no more than that the plaintiffs have not accumulated enough money from their own earnings to pay the amount due the defendant, and does not affect their right to equitable relief.

We are, therefore, of opinion a decree ought to have been entered upon the verdict in favor of the plaintiffs.

There is no exception to the third issue, which was answered in favor of the plaintiffs; but since it was adverted to in the argument, we will

say it seems to have been answered correctly under the authority of *Hauser v. Morrison,* 146 N. C., 252.

The Superior Court will enter judgment upon the verdict in accordance with this opinion.

Reversed.

*Cited: Bank v. Scott,* 184 N.C. 315 (1c, 2c); *Perry v. Surety Co.,* 190 N.C. 291 (1c, 2c); *Hare v. Weil,* 213 N.C. 488 (1c, 2c); *Wolfe v. Land Bank,* 219 N.C. 316 (1c, 2c); *Atkinson v. Atkinson,* 225 N.C. 133, (1j, 2j); *Carlisle v. Carlisle,* 225 N.C. 465 (1c).

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J. W. INGLE, ADMINISTRATOR, v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 16 December, 1914.)

1. **Appeal and Error—Brief—Argument—Exceptions Abandoned—Rules of Court.**

Mere reference to exceptions of record made in the brief, without argument or citation of authority, is not a compliance with Rule 34, Supreme Court, which requires that authority or reason be given to support the exceptions, or they will be considered as abandoned.

2. **Trials—Instructions—Construed as Whole—Appeal and Error.**

The charge of the court in this case is construed as a whole, and being according to Laws 1913, ch. 6, sec. 1, and precedents, no error is found. *Ward v. R. R.,* 161 N. C., 180, cited and applied.

3. **Trials—Negligence—Instructions—Appeal and Error—Harmless Error.**

The plaintiff's intestate, a brakeman on defendant's train, was caught between the tank of the engine and box car and mashed to death, and it is *Held,* that the court in his general charge upon the question as to whether the intestate went between the cars without the knowledge of defendant and against its orders, etc., instructed more favorably to the defendant than it had specially requested, and no reversible error is found.

4. **Trials—Issues—Answer—Instructions — Appeal and Error — Harmless Error.**

Where in an action to recover damages for a personal injury an issue as to contributory negligence has been found in defendant's favor, the instructions of the court upon this issue become immaterial, so far as the defendant is concerned.

5. **Railroads—Employer and Employee—Contributory Negligence—Measure of Damages—Interpretation of Statutes—Federal Act.**

The verdict of the jury in this action against a railroad company to recover for the wrongful death of its employee, under the instruction of the court, awarded damages by considering the contributory negligence of

the plaintiff's intestate and diminishing the amount of recovery according to Laws 1913, ch. 6, secs. 2, 3, and 4; and it appearing that by admissions, pleadings, and the evidence that the intestate was engaged upon an intrastate train, the State statute and not the Federal statute is applicable; and it is *Further held*, that the testimony of a witness that he thought, without accurate means of knowledge, that some of the cars of the train were loaded with coal from Tennessee or Virginia, is not sufficient to constitute legal evidence of interstate commerce.

(637) APPEAL by defendants from *Cline, J.*, at August Term, 1914, of BUNCOMBE.

*Fortune & Roberts for plaintiff.*
*Martin, Rollins & Wright for defendants.*

CLARK, C. J. This is an action to recover damages for the wrongful death of the plaintiff's intestate, W. J. Ross. As stated in the defendants' brief, the deceased was a brakeman on the defendants' freight train "running from Asheville to Canton."

Exception 1 is immaterial and, besides, must be taken as abandoned under Rule 34, which provides that "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 appellants' brief refers to this exception, but gives no authority nor reason to support it.

Exceptions 2, 3, 4, 5, 6, 7, and 8 are without merit. Construing the charge fairly and as a whole, it was fair to the defendants and in accordance with our precedents. Laws 1913, ch. 6, sec. 1; *Ward v. R. R.*, 161 N. C., 180; *Mendenhall v. R. R.*, 123 N. C., 275, 278.

Exception 9. The defendants requested the court to charge the jury: "If you find that the plaintiff's intestate, W. J. Ross, voluntarily stepped in between the tank of the rear engine and the first car without the knowledge of the defendants, and was mashed and killed by the backing engine, and that the defendants did not know that the said Ross was between said cars, it would be the duty of the jury to answer the first issue 'No.'"

(638) The judge charged the jury even more strongly for the defendants than this prayer, as follows: "Now, if the young man brought about his own death without any instructions, or in the face of instructions to the contrary, given him by the conductor, then his death would have been brought about by his own negligence, and you should answer the first issue 'No.' The railroad company is not responsible for every injury done to one of its employees, but it is responsible when the injury is occasioned by negligence upon the part of some of its other

employees or by some defective machinery or by some negligence. Thus, notwithstanding that he was a brakeman there working for the railroad company, if the facts are that he brought about his own death by his own negligence in going there and in face of instructions from Mr. Holcombe not to go, or without any instructions one way or the other, if that should be the case, where it was reasonably apparent to an ordinarily prudent man, careful of his own safety, that he put himself in a position of danger, that would be his own negligence. And if it was done by his own negligence, then as to the first issue, whether it was done by the defendants, you would answer 'No.' "

Exceptions 10, 11, and 12, that the court did not instruct the jury that in any view they should find the plaintiff's intestate guilty of contributory negligence, need not be considered, for under the instructions given the jury found that the plaintiff's intestate was guilty of contributory negligence.

There was evidence that the conductor gave the back-up signal at a time and place when he could not see or know that Ross, who was known by him to be a green man, was in a place of safety. All the witnesses testified that no back-up signal was given as required by the company's Rule No. 14, and that they failed to give the engine bell signal, as prescribed in Rule 30, as a warning to the deceased that the engines were about to back up. The deceased had a right to rely upon these signals being given before the engines were moved back, and there was negligence in failing to do so. *Smith v. R. R.*, 132 N. C., 819.

The jury found the defendants guilty of negligence and that the plaintiff's intestate was guilty of contributory negligence, and under the instruction of the court diminished the damages in proportion to the negligence attributable to the deceased employee. Laws 1913, ch. 6, sec. 2. Section 3 of that act prohibits the defense of assumption of risk, and section 4 prohibits any contract or device to exempt common carriers from liability for damages incurred under said chapter.

The defendants contend, however, that the measure of damages laid down should have been that applicable under the Federal statute, and not that which is recognized under the construction of our State statute. But there is nothing in this record to indicate that this injury occurred on a train engaged in interstate commerce.

The complaint alleges that the plaintiff's intestate at the time (639) of the injury was employed on one of the defendants' freight trains "running between Asheville, N. C., and Canton, N. C." This is admitted in the answer and is also stated in defendants' brief. The evidence is that the train was doubling between Asheville and Canton that day; that this train left Asheville at 1:30 p. m. and that this injury

took place at Coburn, between Asheville and Canton. The defendants' fireman and conductor testified to the same facts.

The defendants put in the report of the conductor, showing that he was conductor of the train which "left Asheville on that day for Canton with thirteen loaded and three empties." And his evidence is that his train had reached Coburn, between those two points, at 4:30 and stopped for water when this injury occurred. The defendants also put in the certificate of the engineer to the same effect.

The sole evidence upon which the defendants now rely as evidence that this train was engaged in interstate commerce is as follows: The fireman of the defendant company testified, on cross-examination: "Some of those cars were loaded with coal, I think; the best I remember, some coal and some wood, and maybe bark; the coal came from Tennessee or Virginia, but I couldn't say, because I didn't see the bills." It will be seen from this that there is no evidence that any part of this shipment was being transported from a point outside of the State. The witness is not even certain that there was coal in any of the cars, but merely says he "thinks" so. He further states that he "cannot say" that the coal came either from Tennessee or Virginia, because he did not see the bills. Even if his surmise that there was coal in some of the cars, and his further surmise that the coal was Tennessee or Virginia coal, were correct, there is absolutely lacking any evidence that such surmised coal was en route from a point in either of those States to a point in this State. The entire evidence in this record, including the reports of the conductor and engineer, which are put in evidence by the defendants, show that this was a train running from one point in this State to another, *i. e.*, from Asheville to Canton, and that it was purely an intrastate train. It is true that the coal in the tender may have been mined in another State, and if there was any coal in the cars, that this also might have been mined in another State. It is also true that the cars themselves, and the engines, may have been built in another State, and that some of the employees may have been born in another State. But none of these things would have made this interstate traffic. The defendants had full knowledge on the subject, but they do not plead that the train was engaged in any wise in interstate commerce, nor did they put on any evidence by the conductor or engineer or by the bills of lading or otherwise to show that any articles in this train were being trans-
(640) shipped from a point outside of the State to a point inside the State. The mere surmise, on cross-examination of the fireman, that there may have been coal in some of the cars, which he did not assert as a fact, and the further surmise that some of the coal may have

been Tennessee or Virginia coal, though he states that he does not know this, is not evidence in any way of this being interstate traffic.

In *R. R. v. Seale,* 229 U. S., 156, the yard clerk was killed while proceeding through the railway yards to meet an incoming interstate freight train to take down the numbers and initials of the cars and to inspect the same. But in that case it was not controverted that it was an interstate freight train. In *R. R. v. Zachary,* 232 U. S., 248, the fireman was killed while employed in interstate commerce by the lessee interstate railroad, though the lessor railroad was intrastate. In *R. R. v. Behrens,* 233 U. S., 473, the fireman employed by an interstate railway carrier killed on a switching engine which was aiding in moving several cars loaded with intrastate freight, between two points in the same city, was held not to be employed in interstate commerce, although upon completion of the task of switching the cars the force was to take several other cars to sundry points as a step or link in both interstate and intrastate transportation.

In *R. R. v. Lindsay,* 233 U. S., 43, it was held that where there was allegation and proof that a switchman was injured in moving interstate commerce the case was governed by the Federal Employers' Liability Act, though the provisions of that act were not expressly referred to in the pleadings. These four cases are to be found in succession in 33 A. and E. Anno. Cas., 1914 C, with full citations in the notes to all the literature applicable to the point. But it is needless to say that in all the cases cited there was at least legal evidence that the person injured was engaged at the time in some way in aiding interstate commerce. There is not one in which, as in this, there was no evidence to that effect, and nothing more than a mere surmise that there was among the freight an article which the witness surmised had its origin in another State, without any indication whatever, even by surmise, that it was then in process of transportation from such other State. If there was coal on this train in a freight car, it was, according to the evidence, like the coal in the tender of the engine, shipped from Asheville, irrespective of its place of origin, for all the evidence is that this was a train running from "Asheville, N. C., to Canton, N. C." and back—this is alleged in the complaint, admitted in the answer, in proof by oral evidence on both sides, by the reports of engineer and conductor which were put in evidence by the defendants, and is so recited in the defendant's brief.

Upon the whole case we find

No error.

*Cited: Herring v. R.R.,* 168 N.C. 556 (5d); *Hanes v. Utilities Co.,* 191 N.C. 20 (5c).

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MRS. L. B. FORNEY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 9 December, 1914.)

**Common Carriers—Bills of Lading—Written Claim—Reasonable Stipulations—Damages—Penalty Statutes.**

Stipulations in the bill of lading of a common carrier that it would not be liable for loss or damage or delay in the shipment unless claim is made in writing, etc., within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed, are regarded as a reasonable protection to the carrier, and under the circumstances of this case it is *Held*, the failure of the plaintiff to comply with these stipulations as to the written claim bars his right to recover damages and the statutory penalty.

APPEAL by defendant from *Long, J.*, at March Term, 1914, of CLEVELAND.

Civil action to recover damages and penalty for the loss of a box of merchandise shipped to plaintiff on 7 October, 1911, from Hopkinsville, Ky., to Shelby, N. C.

The plaintiff recovered judgment, and the defendant appealed.

*Ryburn & Hoey for plaintiff.*

*Walter H. Neal and D. Z. Newton for defendant.*

BROWN, J. The bill of lading for the box contains this clause: "Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable."

The evidence shows that the box was addressed to Mrs. Lewis Forney, and that it arrived at defendant's station of Shelby, N. C., on 30 October, 1911. On the bill of lading the consignee's name was given as Mrs. Lewis Fooney. Notice of arrival was duly mailed, addressed to Mrs. Lewis Fooney, Shelby, N. C. The box remained in Shelby until 13 June, 1912, unclaimed, and was after that taken to Charlotte and sold in the "Old Hoss" sale.

It is in evidence upon part of the plaintiff that from 20 October, 1911, to June, 1912, she telephoned frequently to the defendant's office in Shelby, making inquiries about this box, which she stated had been shipped to her and which she was looking for. The evidence of plaintiff shows that she failed to file any claim for loss or damage with the defendant until August, 1913, when a claim in due form was filed and not paid.

We are of opinion that the stipulation in the bill of lading (642) bars a recovery. Such stipulations are regarded as a reasonable protection to the common carrier. A stipulation requiring the claim to be filed within thirty days is held to be unreasonable, but in the same case it is said: "We deem it proper to state that we are inclined to think that in analogy to the ruling as to telegraph and express companies, a stipulation requiring a demand to be made within sixty days after notice of loss or damage would be reasonable." *Mfg. Co. v. R. R., supra,* has been cited with approval in the case of *Deane v. R. R.,* 152 N. C., page 172. *Sherrill v. Tel. Co.,* 109 N. C., 527; *Lewis v. Tel. Co.,* 117 N. C., 436.

In *Cigar Co. v. Express Co.,* 120 N. C., 350, *Clark, J.,* says: "We are inclined to think, in analogy to the ruling as to telegraph companies, that a stipulation would be reasonable that the consignor or consignee should make his demand within sixty days after he has notice of his loss or damage that he intends to hold the carrier responsible for negligence or other default, so that the carrier may perpetuate the evidence of its shifting agents."

See, also, *Watch Co. v. Express Co.,* 120 N. C., 351; *Duvall v. R. R., ante,* 24; *So. Ry. Co. v. Reid,* 222 U. S., 431; *N. P. Ry. v. Washington,* 222 U. S., 370; *So. Ry. Co. v. Beam,* 222 U. S., 444.

Reversed.

*Cited: Anthony v. Express Co.,* 188 N.C. 411 (c).

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J. B. BRITTAIN v. SOUTHERN RAILWAY COMPANY.

(Filed 9 December, 1914.)

**Railroads—Negligence—Employees—Willful and Reckless Acts—Trials—Evidence—Nonsuit.**

The plaintiff, at the request of an employee of the defendant railroad company, was on the ground assisting him in lifting a 500-pound keg down from the car, while another employee in the car was helping from that place. A hoop of the keg in some way caught in the side of the car door, and owing to the efforts of the employee in the car in helping to free it, the keg came loose and fell upon the plaintiff, causing the injury complained of. The question of the defendant's negligence being eliminated, it is *Held,* that the evidence was insufficient to sustain a judgment for exemplary damages for the willful or reckless acts of the defendant's employee; and if it were otherwise, the judgment rendered could not be sustained, there being no finding that the defendant was responsible for the willful or reckless acts of its agent, if any were committed by him.

BRITTAIN *v.* R. R.

APPEAL by defendant from *Long, J.*, at June Term, 1914, of BURKE.

Action for the recovery of damages for personal injury. It appeared on the trial that the plaintiff was not in the employ of the
(643) defendant at the time of his injury, but he testified that some of the train crew in charge of a local freight train, moving east from Biltmore, had agreed that he might work his way to his home at Morganton if he would aid in loading and unloading freight while en route from Biltmore to Morganton, and that pursuant to this agreement he was helping two other hands to unload a barrel of coca-cola from the car at Old Fort when he was injured. The testimony of the plaintiff in regard to the circumstances accompanying the injury is as follows:

"I think we arrived at Old Fort about 11 o'clock. We unloaded some freight there. We unloaded a small galvanized barrel and got to this barrel of coca-cola. One of the fellows told me to unload it. He was one of the men in charge of the train. I think it was the conductor. When given that direction, I went and took hold of the barrel. The barrel was in the car and the car was about 15 feet from the platform of the depot. The fellow in the car had laid the end of the barrel hanging out over the car a little bit. The depot at Old Fort is on the right hand, going up. There was a fellow in the car of this local, and one on the ground helping to carry. The man in the car was putting the freight to the door, and the man on the ground and myself were carrying the freight to the platform. When we came to the barrel of coca-cola the man in the car told me to help carry it to the depot. He pushed it to the door. It was lying in the door. We got hold of it end up and the barrel got hung. I was on the upper side, and the other fellow was on the lower side. I was up towards Asheville, standing up close to the door. The barrel was out of the car, end foremost, and got hung, and we could not get it loose. The fellow in the car shoved it out, and it fell over on me. I had no notice about his shoving it out. He took his hand and shoved it out. The weight of the barrel was 500 pounds, I think. It fell on my right leg and crushed and broke it. When the man in the car shoved it, we two men outside was working trying to get it loose, and the man in the car just shoved it out. I did not know whether he was going to do it or not. When he shoved it, it was pretty straight in the door, and one of the hoops got hung in the edge of the door, and could not get it loose. I did not get out of the way of the barrel because I could not. It went out too quick for me, I guess."

On cross-examination: "The barrel of coca-cola came out of the car endways. It was not standing up; the end sticking out the door. Me and the fellow that was carrying it had hold of that end. We both had hold with two hands. The fellow in the car headed it up and turned it

loose. It got hung and we could not get it loose, and he shoved it out. I had not gone a step before the barrel finally came out. I could not have taken a step with the barrel, for it was in the car and hung. I think a barrel of coca-cola weighs about 500 pounds."

The jury returned the following verdict: (644)

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: "No."

2. If the plaintiff was injured by the negligence of the defendant, as alleged in the complaint, what damages, if any, is the plaintiff entitled to recover? Answer: "None."

3. Was the plaintiff injured by reason of the reckless and willful acts and conduct of defendant's brakeman, H. C. Smith, as alleged in the complaint? Answer: "Yes."

4. If the plaintiff was so injured by reason of the reckless and willful acts and conduct of defendant's brakeman, what damage, if any, is the plaintiff entitled to recover on this account? Answer: "Yes; $500."

It appearing that the plaintiff was not an employee or servant of the defendant, the court instructed the jury to answer the first and second issues in favor of the defendant.

When the plaintiff rested, and again at the close of the entire evidence, the defendant entered a motion for judgment of nonsuit, which was denied, and to these rulings the defendant excepted.

The defendant asked the court to instruct as follows:

1. "If the jury believe the evidence in this case and find the facts to be as testified to, they will answer the third issue 'No.'"

2. "There is no evidence in this case tending to show that the plaintiff was injured by reason of any willful or wanton act on the part of the defendant's brakeman, H. C. Smith, and the jury will, therefore, answer the third issue 'No.'"

3. "On the evidence in this case, the jury will answer the third issue 'No.'"

The court declined all of these requests, and the defendant excepted to this refusal.

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

*Spainhour & Mull for plaintiff.*

*S. J. Ervin for defendant.*

ALLEN, J. Negligence being eliminated by the answer to the first issue, the question raised by the motion to nonsuit and by the exceptions to the refusal to instruct the jury as requested is whether there is any

evidence to support the finding on the third issue, that the plaintiff was injured by the reckless and willful acts and conduct of defendant's brakeman.

If the brakeman shoved the barrel of coca-cola on the plaintiff willfully and recklessly and injured him, he is guilty of a violation of
(645) the criminal law, and the words used in the issue have the same import and should receive the same construction as if embodied in a criminal statute.

In *S. v. Whitener,* 93 N. C., 592, which was approved in *S. v. Morgan,* 136 N. C., 630, the Court said: "The word willful, used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether he has the right or not—in violation of law"; and recklessness is defined to be an indifference whether wrong is done or not, an indifference to the rights of others.

It is a stronger term than negligence. 7 Words and Phr., 5999. Applying these principles, we are of opinion there is no evidence of recklessness or willfulness.

According to the evidence of the plaintiff, he and another were on the ground pulling the barrel and the brakeman was in the car pushing, the barrel caught and the combined efforts of those on the ground and of the brakeman finally freed it and forced it through the door, and it struck the plaintiff in falling.

There is nothing to suggest indifference to the safety of the plaintiff or anything except a purpose to aid in the removal of the barrel, and no extraordinary or unusual means were resorted to.

As was said in *Seagroves v. Winston, ante,* 206, "Circumstances raising a possibility or conjecture, unless sustained by other evidence, should not be left to the jury as evidence of a fact which a party is required to prove."

If, however, there was evidence to support the findings of the jury, the verdict is not sufficient to sustain the judgment, as there is no issue determinative of the defendant's liability.

It is found that the brakeman of the defendant injured the plaintiff, but there is nothing to show that the defendant is responsible for his acts, and it is not every act of a brakeman which imposes liability on his employer.

The motion to nonsuit ought to have been allowed.

Reversed.

*Cited: Ballew v. R.R.,* 186 N.C. 707 (c); *West v. West,* 199 N.C. 15 (p); *S. v. Dickens,* 215 N.C. 305 (p).

(646)

ANDIE E. CLARK, BY HIS NEXT FRIEND, W. E. CLARK, v. R. H. WRIGHT AND J. E. JOHNSON.

(Filed 16 December, 1914.)

**Automobiles—Negligence—Trials—Issues—Proximate Cause—Instructions —Appeal and Error.**

In an action to recover damages for injuries alleged to have been sustained by the negligence of the defendant, while driving an automobile, in running over the plaintiff, it is error for the trial judge to instruct the jury to answer the issue as to defendant's negligence in the affirmative if the evidence satisfied them, by its greater weight, that the machine was being run in a negligent manner; for this eliminated the question of proximate cause; and when it appears that the error was not cured by construing the charge as a whole, it is reversible error.

APPEAL by defendant from *Harding, J.*, at July Term, 1914, of LINCOLN.

Civil action, tried upon these issues:

1. Was the plaintiff, Andie Clarke, injured by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

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

3. What damage, if any, is the plaintiff entitled to recover? Answer: "$2,500."

From the judgment rendered, the defendant appealed.

*L. B. Wetmore, E. R. Preston, Duckworth & Smith for plaintiff.*

*C. E. Childs, Cansler & Cansler for defendants.*

BROWN, J. This action is brought to recover damages for injuries alleged to have been sustained by the negligence of the defendants in so running their automobile as to cause the same to run over and injure the plaintiff.

His Honor charged the jury: "Now, defendant contends he has shown you that by the evidence, which he contends ought to satisfy you. The burden is not on the defendant to satisfy you of that contention by the greater weight; the burden is upon the plaintiff to satisfy you of his contentions as to the first issue by the greater weight of the evidence. If the plaintiff fails to satisfy you by the greater weight of the evidence, that is, when you have heard all the evidence and the law and circumstances, and you go to deliberate upon the testimony, the circumstances under which the injury took place, (a) if the weight of the evidence satisfies you, by its greater weight, that the defendant was driving its

machine in a negligent manner, then the issue would be answered 'Yes';
(b) but it must, by the greater weight, satisfy you of that."

(647) The defendants except to that portion of the charge embraced between the letters (a) and (b).

Negligence becomes actionable only when it results in injury and is the proximate cause thereof. The charge was, therefore, erroneous in that it entirely left out of view the question of proximity of cause, and permitted the jury to convict the defendant of negligence merely by proof of the single and sole fact that the car was being driven in a negligent manner. *Brewster v. Elizabeth City,* 137 N. C., 392; *Edwards v. R. R.,* 129 N. C., 78.

An examination of the charge as a whole fails to disclose that the error was cured.

New trial.

CLARK, C. J., dissenting: There was evidence that while the plaintiff, a boy of 9 years of age, with his little sister, was diagonally crossing Main Street in Lincolnton at a point about 50 yards east of Childs' corner, he was run over and injured by the defendant's automobile, which was being driven by a colored chauffeur at a speed of from 10 to 12 miles an hour and without giving any warning or signal of the approach of said car before running over and striking the plaintiff. The defendant offered evidence that the car was being driven carefully down the street at a speed of 6 to 8 miles per hour, with the usual signals, when the plaintiff suddenly darted out from behind a vehicle standing immediately in front of the moving car, and so close thereto as to make it impossible for the driver of the car to stop the same before striking the plaintiff, though he used the emergency brake and other appliances at his command.

If the plaintiff's evidence was taken by the jury as true, he was injured by the negligence of the defendant, as alleged in the complaint. If the defendant's testimony was taken as true, the plaintiff contributed to his own injury. There being evidence that the plaintiff [defendant] was driving at a speed exceeding 10 miles an hour, this was contrary to law, and the plaintiff, irrespective of other conduct of the defendant, was stricken by his negligence, and the court told the jury that if "the testimony satisfied them by its greater weight that the defendant was driving his machine in a negligent manner and struck the plaintiff, then the first issue would be answered 'Yes.'" This was in accordance with the long settled rulings of this Court.

If, however, the defendant's testimony was also true, that, notwithstanding his own negligence either in the speed of the car or otherwise,

the plaintiff by darting suddenly out in front of the machine was run over by the defendant's car because he was unable to stop it, then the second issue as to the contributory negligence of the plaintiff should have been answered "Yes." In the absence of contributory negligence by the plaintiff, the injury was necessarily caused by the proximate negligence of the defendant, if the jury found that the defendant was negligent, for there is no controversy that the child was run over and injured by the defendant's machine. (648)

There being no controversy as to the fact that the plaintiff was struck and injured by the car of the defendant, it was for the jury by the greater weight of the evidence to say, as the judge told them, whether at the time of the injury the defendant was guilty of negligence. If so, it was the proximate cause unless the jury should find that the plaintiff's negligence contributed to the injury. It is the second issue, and not the first, which always determines the question of proximate cause. The first issue merely finds whether the injury was caused by the defendant's agency while he was negligent. The second issue determines whether the plaintiff's own negligence contributed, and if it did not, then the plaintiff's negligence is necessarily the proximate negligence, because it was the only cause.

These have been the well settled principles governing these cases. Out of abundant caution, formerly there was a third issue often submitted in favor of the plaintiff, *i. e.*, "Notwithstanding the plaintiff's contributory negligence, could the defendant have avoided injuring the plaintiff by the exercise of proper care?" But the law applicable to the first two issues was so well understood to be as above stated that practically the third issue has been abandoned and cases of wrongful death or injury have of late years been decided on the two issues, the second issue being well understood to settle the question of proximate cause. The first issue has always determined whether the plaintiff was injured by the defendant while the latter was negligent.

The authorities to the above effect are numerous and well settled. It will be instructive, however, and of some interest to review the history of the doctrine of negligence causing injuries or death and its development which has been a contest between opposing forces.

At common law no damages could be recovered for negligence causing death. This was attempted to be cured by what is known as "Lord Campbell's Act," and subsequent acts in this country, but these acts have been variously construed in many aspects and are still the subject of legislation and judicial construction.

In 1937 the doctrine was first applied to railroads, that the master was not responsible if the injury was caused by the negligence of a fellow-

servant. This exemption of the employer in such cases was not by statute, but by judicial construction. The history of the development of that doctrine will be found in *Hobbs v. R. R.*, 107 N. C., 1.

(649) It was also held by judicial construction for a long time that negligence was a matter of law, and that the jury should find the facts under the instruction from the court as to whether they constituted negligence or not. This was corrected by adopting what is known as the "rule of the prudent man," in *Russell v. R.R.*, 118 N. C., 1098, and other cases which held the question of negligence to be a mixed question of law and fact for the jury.

In *Owens v. R. R.*, 88 N. C., 502, it was held that the burden was upon the plaintiff to show that he was not guilty of contributory negligence—that is, that he did not contribute to his own injury. This is in essence the same doctrine of "proximate negligence" that is now being advanced, that the plaintiff must show not merely negligence on the part of the defendant in committing the act which caused the injury, but, further, that the injury would not have occurred but for his own conduct. In the *Owens case, Ruffin, J.*, filed a dissenting opinion, and the Legislature passed the statute which is now Revisal, 483, to cure that decision by providing: "In all actions to recover damages by reason of negligence of the defendant, where contributory negligence is relied upon as a defense, it shall be set up in the answer and proved on the trial."

After the passage of this act there then appeared the new doctrine of the "assumption of risk," which served nearly the same purpose as the former defense of contributory negligence. Thereupon the Legislature, to cure that evil, as well as to take away the defense of "fellow-servant," passed the act of 1897, which is now Revisal, 2646. For some unknown reason this statute was placed in the *Private* Laws of 1897, ch. 56. Its constitutionality was earnestly contested, but in many decisions which will be found in Pell's Revisal, under that section, it was sustained, and it was held in cases there cited that it destroyed the defense as to railroads not only that the negligence was that of a fellow-servant, but also took away the doctrine of assumption of risk.

It was further enacted that "Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void." Notwithstanding the clear terms of the paragraph last quoted, it was attempted to deprive employees of the benefit of its provisions by establishing "Relief Departments" on some of the roads, and every employee was required to contribute to a fund, managed by the officers of the company, out of which the employees were to be paid for death and other injuries caused them by the negligence of the corporation. This was held illegal in *Barden v. R. R.*, 152 N. C., 318;

but this was afterwards questioned, until the Federal statute was enacted forbidding this device to evade the statute. This act was sustained in *Schoubert's case,* 224 U. S., 603.

It also then became not unusual to hold, in some courts more (650) than others, that notwithstanding the act required the defendant to plead and bear the burden of proving contributory negligence, that the trial judge would not permit an action for personal injuries or wrongful death to go to a jury unless in the opinion of the trial judge the evidence was sufficient to sustain a verdict. This was again in effect a reverter to the former doctrine that negligence was a matter of law for the court, and the plaintiff could not recover unless he negatived contributory negligence. It was a very clear perception of this fact that caused Congress to pass the present act, which prohibits contributory negligence to be a defense, and puts it in the power of the jury, and not of the judge, to estimate how far it shall avail, if at all, to abate the damages.

The doctrine now maintained, that "proximate cause" must be proven by the plaintiff on the first issue, is in effect a reverter to the former condition of things which these statutes and decisions were intended to change. If the plaintiff must prove, not only that he was struck and injured by the defendant's automobile while being operated negligently, but further must prove that the defendant's negligence, and not his own, was the proximate cause, then he is again called upon, as was held in *Owens v. R. R.* prior to Revisal, 483, to disprove his own negligence being the proximate cause.

This is the result which we have reached after so many statutes and so many decisions to the contrary. When the act of the defendant's chauffeur and machine injured the plaintiff, and he proved that such act was negligent, he has shown a *prima facie case,* which under the letter and spirit of Revisal, 483, entitled him to recover damages unless the defendant proved that the plaintiff's negligence contributed to the injury. If the plaintiff's own negligence is found by the jury to have contributed to the injury, then that is the proximate cause, unless there is a third issue, as formerly, whether, "notwithstanding such negligence on the part of the plaintiff, the defendant by the exercise of reasonable care could have prevented such injuries, or death." When, as in this case, the jury find that the plaintiff did not contribute to his own injury, that is necessarily a finding that the negligence of the defendant was the proximate cause, for the fact of the injury by the car is not controverted.

*Cited: Shepard v. R.R.,* 169 N.C. 240 (c); *Hinton v. R.R.,* 172 N.C. 590 (c); *Williams v. May,* 173 N.C. 79 (p); *Hardy v. Construction Co.,*

174 N.C. 323 (c); *Albritton v. Hill,* 190 N.C. 430 (c); *Lancaster v. Coach Line,* 198 N.C. 108 (c); *Winfree v. R.R.,* 199 N.C. 593 (c).

(651)

SAM A. LINKER ET ALS. v. NANCY E. LINKER ET ALS.

(Filed 16 December, 1914.)

**1. Pleadings—Allegations — Information and Belief — Denial — Issues — Deeds and Conveyances—Delivery.**

Allegations of the complaint, made upon information and belief, and denied by the answer, that a deed sought to be set aside had never in fact or in law been executed by the grantor, is sufficient to raise the issue as to whether the grantor signed and delivered the deed to the grantee.

**2. Evidence—Transactions with Deceased—Interpretation of Statutes.**

In a suit to set aside a deed made by the deceased father of a party defendant, it is incompetent for the son to testify as to the consideration of the deed or his father's intention to make it, being testimony relating to a transaction prohibited by Revisal, sec. 1631.

**3. Deeds and Conveyances—Registration—Immediate Parties—Delivery—Parol Evidence—Trials—Burden of Proof.**

It may be shown that a deed registered after the death of the grantor had never been executed or delivered, as between the immediate parties, the burden of proof being on the plaintiff.

**4. Trials—Instructions—Verbal Requests—Appeal and Error.**

The trial judge has the right to ignore a prayer for special instructions when not reduced to writing, and an exception to his doing so will not be considered on appeal.

**5. Deeds and Conveyances—Delivery—Evidence—Issues — Answers — Instructions.**

Where the issues in an action to set aside a deed, one as to its actual signing and delivery and the other as to the mental capacity of the maker, it is proper for the trial judge to instruct the jury not to consider the second issue, should they find the first one in the negative.

**6. Deeds and Conveyances—Witness to Deeds—Weight of Evidence—Wills —Witnesses of the Law.**

The testimony of a witness to a deed sought to be set aside for lack of execution and delivery has no greater weight than that of any other witness under oath. It is otherwise with witnesses to a will, who are witnesses of the law. *Cornelius v. Cornelius,* 52 N. C., 593.

APPEAL by the defendants from *Adams, J.,* at August Term, 1914, of CABARRUS.

Civil action, tried upon these issues:

1. Did Jackson Linker sign and deliver to Paul Linker the deed set out in the complaint, dated 25 September, 1912? Answer: "No."

2. If so, did said Jackson Linker have sufficient mental capacity to understand what property he was disposing of, the person to whom he was selling it, and the purpose for which he was disposing of said property?

From the judgment rendered, the defendant appealed. (652)

*W. G. Means and L. T. Hartsell for plaintiffs.*

*H. S. Williams and L. Lee Crowell for defendants.*

BROWN, J. This action is brought to set aside a deed made by Jackson Linker and wife on 25 September, 1912, to Paul Linker, conveying a certain tract of land therein described for the recited consideration of $400: First, upon the ground that the said deed, although duly registered on 11 October, 1912, after the death of Jackson Linker, had in fact never been executed and delivered; second, upon the further ground that at the time of the alleged execution of the said deed the said Jackson Linker did not have sufficient mental capacity to execute the said deed. There was a further allegation of fraud and undue influence upon the part of Paul Linker, which his Honor held was not supported by any evidence, and which it is not necessary for us, therefore, to consider.

The defendants except to the submission of the first issue, upon the ground that no such issue was raised by the pleadings. We see no ground upon which to base such contention. In the complaint the plaintiffs allege, after reiterating the facts set forth in paragraphs 1 and 2 of their first cause of action, that the said alleged deed was never in fact or law executed by the said Jackson Linker.

It is true, this allegation is made upon information and belief. An allegation made upon information and belief raises an issue, when denied by the answer (as this is), as readily as when made upon the pleader's own knowledge. So we find the question of the execution and delivery of the deed directly raised by the allegation of the complaint and the specific denial in the answer. Of course, his Honor, therefore, very properly submitted the first issue.

The defendants except because the court excluded the testimony of Paul Linker as to a conversation between him and his father, Jackson Linker, as to the consideration of the deed and Jackson Linker's intention to make it. This is a transaction between Paul Linker and the deceased, Jackson Linker, which the former was incompetent to testify to, under section 1631 of the Revisal. *Bunn v. Todd.* 107 N. C., 266; *Smith v. Moore,* 142 N. C., 277; *Bonner v. Stotesbury,* 139 N. C., 6.

Upon examination of the charge of the court, we find that his Honor confined the consideration of the jury upon the first issue to the actual delivery of the deed, and put the burden of proof upon the plaintiffs to show that the deed had not been in fact executed and delivered. The deed was registered after the death of the grantor, and while registration is *prima facie* evidence of delivery, it is not conclusive evidence as between the parties, and it was open to the plaintiff to attack the
(653) execution and delivery of the deed and to show that the deed had never been delivered. The defendants requested the court to charge the jury that in any view of the evidence, if they believed it to be true, they should answer the first issue "Yes." This prayer was not in writing, and the court had the right to ignore it. Upon the evidence, however, we do not think the instruction could properly have been given, and his Honor rightly submitted the question to the determination of the jury. His Honor correctly instructed the jury that if they found that the deed was not delivered, to answer the first issue "No," and that then they need not answer the second issue at all. We find the charge to be a very clear and correct application of the law to the facts in evidence, so much so that it was hardly possible for the jury to misunderstand any portion of it.

It is not necessary that we should consider the correctness of his Honor's charge upon the question of mental capacity, as the jury did not reach the consideration of that issue. Nevertheless, we do not hesitate to say that it was a very clear and correct exposition of the law.

The only other assignment of error necessary to be considered is the prayer for instruction, "that the deed under consideration, having been put in evidence showing that it is witnessed by R. L. Hartsell, J. P., that the law gives peculiar importance to his evidence."

We think that his Honor very properly refused to give such an instruction. The prayer was evidently based upon a well-known rule of law applicable to issues of *devisavit vel non*. The witnesses to a will are the witnesses of the law, and to their testimony the law gives peculiar importance, because they are witnesses of the law and not witnesses of either party. *Cornelius v. Cornelius*, 52 N. C., 593.

But this rule has no application to the witness to a deed. The law does not prescribe that a deed shall have a witness. It may be proven by the acknowledgment of the grantor, and, therefore, no more importance is attached to the testimony of the witness of a deed, when put upon the witness stand to testify concerning it, than is attached to any other witness under oath.

Upon a review of the entire record, we find

No error.

*Cited: Reece v. Woods,* 180 N.C. 633 (3c); *Faircloth v. Johnson,* 189 N.C. 432 (3p); *Burton v. Peace,* 206 N.C. 101 (3c); *Barbee v. Comrs. of Wake,* 210 N.C. 720 (1c); *Johnson v. Johnson,* 229 N.C. 546 (3p); *Cannon v. Blair,* 229 N.C. 611 (3p).

(654)

MRS. JOSEPHINE I. LUMMUS v. FIREMEN'S FUND INSURANCE COMPANY.

(Filed 9 December, 1914.)

**1. Insurance—Automobiles—Stipulations—Material Inducements—Consideration.**

Stipulations contained in a policy of insurance on automobiles, relating to matters which influence the insurer in accepting the risk and fixing the rate of premium, are held to be material, and will avoid liability thereunder when disregarded by the insured, without the necessity for the insurer to show that their infraction contributed to the loss.

**2. Same—Change of Location.**

Stipulations of a policy of insurance on an automobile in consideration of a reduced rate of premium, requiring that the machine shall be kept at the private stables or garage of the insured on his certain premises, with certain privileges respecting its location while en route or being cleaned and repaired, are held to be material and valid, and a recovery on the policy will be denied under the circumstances of this case, where a change of the location had been made permanent without the knowledge of the insured, and the automobile had been destroyed by the burning of a machine shop where it had been left by the owner.

APPEAL by plaintiff from *Adams, J.,* at March Term, 1914, of MECKLENBURG.

Civil action. From the judgment rendered, plaintiff appealed.

*Maxwell & Keerans, J. W. Hutchison for plaintiff.*

*Smith, Hammond & Smith, Osborne, Cocke & Robinson for defendant.*

BROWN, J. This is an action to recover on a policy of insurance issued by the defendant upon an automobile. The defendant pleads, first, that the action was not brought within one year; second, that there was a breach of the private garage warranty; and, third, that proof of loss was not filed within sixty days. It is only necessary that we should consider the second defense.

The policy contains this provision:

"*Private Garage Warranty.*—In consideration of the reduced rate at which this policy is written, it is understood that the property insured hereunder shall at all times be kept or stored in the private garage or private stable, situate in rear of residence, No. 1412 Third Avenue, Columbus, Ga. Privilege, however, to operate car and to house in any other building or buildings for a period of not exceeding fifteen days at any one location at any one time, providing the car is en route, visiting, or being cleaned or repaired."

It appears from the statement of facts that after the said policy of insurance was issued and delivered, and without the knowledge or consent of the defendant, the plaintiff, during the month of June,
(655) 1911, removed said automobile from the private garage or private stable in the rear of residence No. 1412 Third Avenue, Columbus, Ga., to Charlotte, N. C., where it remained for a period of five or six months until it was placed in the machine shop of the Gibbs Machinery Company in Columbia, S. C., as hereinafter mentioned.

That said automobile, while in Charlotte, N. C., for the period above mentioned, was not en route from Columbus, Ga., nor was it visiting, nor being cleaned or repaired, but, on the contrary, its removal from the location aforesaid in Columbus, Ga., was permanent.

That on .... December, 1911, the plaintiff placed said automobile in the machine shop of the Gibbs Machinery Company of Columbia, S. C., to be painted and repaired.

That the said automobile remained in the said machine shop of the Gibbs Machinery Company at Columbia, S. C., until 10 January, 1912, when it was destroyed by fire which originated in said machine shop.

The contention of the defendant is that the policy became forfeited because of this breach of the private garage warranty. The plaintiff contends that the breach of warranty was immaterial, because it in no way contributed to the loss, citing Revisal, sec. 4808. This position is untenable. In construing that section, this Court has held that in application for a policy of insurance every fact stated will be deemed material which would materially influence the judgment of an insurance company either in accepting the risk or in fixing the rate of premium. *Bryant v. Ins. Co.*, 147 N. C., 181.

It is further held in the same case that it is not necessary, in order to defeat a recovery upon such policy of insurance, that a material misrepresentation by the applicant must be shown to have contributed in some way to the loss for which indemnity is claimed. See, also, *Fishblate v. Fidelity Co.*, 140 N. C., 589.

Nothing is better settled than that the location of the property insured is essentially material in contracts of insurance and enters largely into the consideration of the company in fixing the rate of premium. The

clause of the policy in this case, containing this warranty, expressly declares that a reduced rate of premium is granted because of the insertion of this provision in the contract. The contention of the plaintiff that the policy could remain dormant for six months and then be revived suddenly because the property was burned up in a repair shop is utterly untenable.

When the owner took the automobile away from the garage in Columbus it was not for a temporary purpose. There was a removal of the property permanently to another State, which, under the provisions of the policy which we have cited, rendered the contract of insurance void.

The judgment of the Superior Court is

Affirmed.

*Cited: Ins. Co. v. Woolen Mills,* 172 N.C. 539 (1c); *Williams v. Ins. Co.,* 184 N.C. 269 (1c); *Person v. Tyson,* 215 N.C. 129 (1c).

(656)

EVA MUNDAY v. TOWN OF NEWTON, G. A. WARLICK ET ALS.

(Filed 9 December, 1914.)

**Municipalities—Cities and Towns—Shade Trees—Streets and Sidewalks—Interpretation of Statutes—Discretionary Powers—Courts.**

The board of commissioners of a town or city are charged with the duty, among others, of keeping its streets, which includes its sidewalks, in proper repair (Revisal, sec. 2930), and in the exercise of this authority, unless done negligently or maliciously, the municipality is not responsible in damages to its citizen, owning property abutting upon the street, for cutting down shade trees on the sidewalk in front of his property; nor is this principle affected by the facts in this case, that the street was wider in front of the plaintiff's property than elsewhere, it appearing that the plaintiff had dedicated a strip of land to the public use as a sidewalk, the trees in question being over the outer edge of the sidewalk next to the street.

APPEAL by defendants from *Long, J.,* at July Term, 1914, of CATAWBA.

*Self & Bagby and R. R. Moose for plaintiff.*

*W. B. Gaither, A. A. Whitener, and Walter C. Feimster for defendants.*

CLARK, C. J. The plaintiff seeks to recover damages alleged to have been suffered by reason of cutting down certain shade trees on the sidewalk in the town of Newton in front of the plaintiff's property.

The town of Newton was making improvements on its streets, the work being done under the supervision of the authorities of the town. The plaintiff has also made the mayor of the town, the members of the board of aldermen, and the township road commissioners defendants, officially and individually.

The town of Newton in improving College Street found it necessary, in the opinion of its authorities, to remove certain shade trees which stood in the street or sidewalk in front of plaintiff's property. This was a matter within the discretionary power of the board of aldermen, and unless done negligently or maliciously or wantonly—and of this there was no evidence—the plaintiff is not entitled to recover. It appears from the evidence that the cutting of the trees was done in good faith and with a view to the public improvement. If there was a mistake in judgment on the part of the town authorities, it cannot be corrected either by the Superior Court or by this Court.

This matter was fully discussed and determined in *Brodnax v. Groom,* 64 N. C., 244, where *Pearson, C. J.,* says: "This Court is not capable of controlling the exercise of power on the part of the General Assembly, or of the county authorities, and it cannot assume to do so without putting itself in antagonism as well to the General Assembly as to
(657) the county authorities and *erecting a despotism of five men,* which is opposed to the fundamental principles of our Government and the usages of all times past. For the exercise of powers conferred by the Constitution the people must rely upon the honesty of the members of the General Assembly and of the persons elected to fill places of trust in the several counties. This Court has no power and is not capable, if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the Government or upon the county authorities."

*Brodnax v. Groom, supra,* has been time and again cited with approval by this Court. See Anno. Ed.

Revisal, 2930, provides: "The board of commissioners of a town or city shall provide for keeping in proper repair the streets (which of course includes the sidewalks) and bridges in the town in the manner and to the extent they may deem best," etc. This power, when exercised in good faith, is not reviewable by the Court. *Small v. Edenton,* 146 N. C., 529, citing *Barnes v. District of Columbia,* 91 U. S., 540; *Cooley* Const. Lim. (6 Ed.), 255.

The charter of Newton (Private Laws 1907, ch. 34, sec. 62) provides: "The board of aldermen shall have the power to lay out, change, and open new streets and sidewalks, to widen, change in any way or extend those already open; to grade, macadamize, pave, concrete, cement, or in

any other way improve the streets and sidewalks of the town, as they may deem best for the public good; to acquire, lay out, establish, and, with the mayor, regulate and control parks, squares, or other public grounds, within or without the town limits, for the use of the town; to protect and regulate the planting of trees on the streets, sidewalks, public parks and squares of the town, and to top and train the same, to remove any trees or parts of trees or roots interfering with improvements from time to time," etc. The board of aldermen of Newton, therefore, not only have the power under the general law to improve the streets and sidewalks of the town, but they have the special power conferred upon them (which is embraced in the general power, anyway) to remove any trees or parts thereof as they may deem proper for the improvement of the streets or sidewalks of the town.

This power was conferred by the Legislature, and the courts cannot interfere with it except in cases of fraud or of oppression on the part of the authorities, of which there is no evidence in this case. This has been so well settled that it is sufficient to cite a few of the cases. *Tate v. Greensboro,* 114 N. C., 392; *Dorsey v. Henderson,* 148 N. C., 423; *Rosenthal v. Goldsboro,* 149 N. C., 128; *Moore v. Power Co.,* 163 N. C., 302; *Jeffress v. Greenville,* 154 N. C., 490; *Newton v. School Committee,* 158 N. C., 188; *Hoyle v. Hickory,* 164 N. C., 79.

In *Jeffress v. Greenville, supra,* the facts were almost identical (658) with these. There it was sought to enjoin the town authorities from cutting down a row of shade trees, standing on the outer edge of the sidewalk in front of plaintiff's residence in Greenville, for the purpose of widening the street. The point is there fully discussed by *Mr. Justice Walker* and in the most conclusive manner.

In *Newton v. School Committee, supra, Mr. Justice Hoke* says: "In numerous and repeated decisions the principle has been announced and sustained that the courts may not interfere with discretionary powers conferred on these local administrative boards for the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion."

The facts here are even stronger than in *Jeffress v. Greenville, supra,* for there the trees were cut down in order to widen the street. Here the plaintiff is contending that the street is wider in front of her property than at another point on said street, and that if the street in front of her house was narrowed to the same extent these trees would not be in the street. But it appears that the street in front of her property was thus widened some thirty-five or forty years ago. The property has thus been dedicated to the public. The trees are in the street, over the outer edge of the sidewalk next to the street, and the town authorities, in the exer-

cise of the discretion conferred on them both by the general statute and specially by the charter of the town, were within the exercise of their discretion in what they did.

Upon the evidence the motion for nonsuit ought to have been directed.

Reversed.

*Cited: Milling Co. v. Highway Com.*, 190 N.C. 699 (c).

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O. P. WHITAKER v. CLINGMAN GARREN.

(Filed 16 December, 1914.)

**1. Processioning Lands—Issues—Title—Estoppel—Judgment.**

While prior to the act of 1903, now Revisal, 717, title to lands were not affected by proceedings to procession lands, now the dividing line may be established without putting the title in issue, or the parties may also join issue upon the title; and where the first course is pursued a judgment in the proceeding is an estoppel as to where the line is located, and in the second event the case is transferred to the Superior Court in term upon issues joined as to the title, and a judgment of the court therein estops the parties both as to the title and the location of the line.

**2. Same—Controverted Matters—Evidence—Interpretation of Statutes.**

As to whether the party in an action involving title to lands is estopped by a judgment formerly rendered in processioning proceedings to determine the true dividing line between himself and another, parol evidence is admissible to show whether or not the title as well as the boundary of the land was properly embraced in and determined by the judgment in former proceedings, or whether the issue as to the true location of the line was raised and determined by merely showing occupancy of the parties without involving the issue as to title, Revisal, sec. 326; and in this case it is held for error under the defendant's exceptions that the trial judge withdrew from the consideration of the jury the processioning proceedings, which had been introduced, and instructed them not to consider them in any view, it therein appearing that the parties were claiming under mesne conveyances under separate grants from the State, and that the court "settled and adjudged the true line between the said grants, and between the parties, in accordance with the defendant's contention."

HOKE, J., dissenting.

APPEAL by defendant from *Cline, J.*, at May Term, 1914, of HENDERSON.

This is an action to recover land, and for damages for cutting and removing timber from the disputed part thereof.

The plaintiff claims the land in dispute as part of a tract of land granted from the State to Alf. Williams, 17 December, 1862, and conveyed by Alf. Williams to W. R. Williams, with covenants of seizure and full warranty, 31 May, 1870, and by Johnson Ashworth, administrator of W. R. Williams, to John W. Whitaker, 2 January, 1883, and conveyed by Sallie Whitaker *et al.*, representatives of John W. Whitaker, to O. P. Whitaker, 24 June, 1905.

There was a controversy as to the location of the Williams grant.

It was admitted by the plaintiff that the J. E. Lyda grant covers the land in controversy.

The defendant claims the land in dispute as a part of a tract of land granted from the State to J. E. Lyda, 1 December, 1871, and conveyed by J. E. Lyda to J. L. Whitaker, 24 January, 1884, and conveyed by J. L. Whitaker and wife, N. A. Whitaker, to J. C. Garren and wife, Mary Garren, which wife, Mary Garren, is still living.

In the year 1906 the plaintiff O. P. Whitaker brought a special proceeding before the clerk of the Superior Court of Henderson County, against the defendant Clingman Garren herein, to have the lines between the above mentioned grants, and between the plaintiff O. P. Whitaker and the defendant Clingman Garren, run and established as provided by law in such proceedings; and at the same time his sister, Martha Rhodes, now Martha Laughter, brought a similar proceeding against the same defendant, Clingman Garren, for the same purpose; and said matters coming on to be heard, were consolidated and heard by the clerk, together, in which proceeding the clerk settled and adjudged the true line between the said grants, and between the parties thereto, according to the contention of and in favor of the defendant herein, and (660) to be those lines shown on the map used in this case, towit: Those lines from the C O, third corner of the Lyda grant, to the B O marked "A W," the fourth corner of said Lyda grant, and from said B O to a locust, the fifth corner of said Lyda grant. And upon the hearing of this cause the aforesaid sister of O. P. Whitaker, Martha Laughter, having also brought a suit against the defendant herein, Clingman Garren, for the same purpose as the suit of the said O. P. Whitaker, both of said causes were tried together.

The processioning proceeding was introduced in evidence, but his Honor afterwards withdrew it from the jury and instructed them they must not be influenced by it in any way, and defendant excepted.

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

*Smith & Shipman for plaintiffs.*

*McD. Ray and O. V. F. Blythe for defendant.*

ALLEN, J. Prior to 1903 it was generally held that proceedings under the processioning act of 1893 did not affect the title.

The Court said in *Williams v. Hughes,* 124 N. C., 3: "We do not think it was intended to try title to land under this statute, but to procession, locate, and establish the lines between adjacent landowners." In *Wilson v. Alleghany Co.,* 124 N. C., 7, the proceeding "settles no rights or titles to property, but only locates the dividing lines between the parties." In *Vandyke v. Farris,* 126 N. C., 746, it "does not prohibit either party from asserting his rights as to the title to the same land," and in *Midgett v. Midgett,* 129 N. C., 21, "it settles nothing as to title."

In 1903 an act was passed by the General Assembly (Rev., 717) providing that: "In special proceedings which have been or may hereafter be begun it shall be competent for any defendant or other party thereto to plead any equitable or other defense, or ask any equitable or other relief in the pleadings which it would be competent to ask in a civil action; and when such pleas are filed the clerk shall transfer the cause to the civil-issue docket for trial during term upon all issues raised by the pleadings. It shall be competent for the trial judge to allow amendments to the pleadings and interpleas in behalf of any person claiming an interest in the property, with a view to substantial justice between the parties."

Since the enactment of this statute the parties may under the processioning act establish the dividing line without putting the title in issue, or they may join issue also upon the title.

(661) If the first course is adopted the judgment is an estoppel as to where the line is located, but not as to title, and under the second the issues raised are transferred to the Superior Court in term and the judgment estops as to title and as to the location of the line. *Parker v. Taylor,* 133 N. C., 105; *Davis v. Wall,* 142 N. C., 452; *Woody v. Fountain,* 143 N. C., 70; *Green v. Williams,* 144 N. C., 63; *Brown v. Hutchison,* 155 N. C., 206.

The Court said in the *Parker case:* "This present action is for trespass in cutting timber beyond a dividing line which had thus been determined in a special proceeding formerly had between the plaintiff herein (defendant in that proceeding) and the parties under whom the defendants claim (plaintiffs in such former proceeding), and the defendants plead said judgment as an estoppel. The record of the former proceeding and judgment therein was pleaded and shown in evidence, and the plaintiff admitted that according to the line as located by said judgment the *locus in quo* was on the defendants' side thereof. His Honor thereupon intimated an opinion that the plaintiff could not recover, in deference to which he took a nonsuit and appealed.

"There was no error. The line was located by a judgment to which the plaintiff and those under whom these defendants claim were parties. The plaintiff, who was defendant in the former action, did not therein raise any issue as to title and have it tried, as he might have done, and the adjudication as to this being the true boundary is *res judicata.* The judgment of the clerk 'determining the location' of the line is authorized by the statute, and is conclusive of that fact upon parties and privies to said action." And in the *Davis case:* "It is true that a processioning proceeding is for a settlement of a boundary line, title not being involved; but if the defendant therein denies the title of the plaintiff, as well as the location of the boundary line, upon the issue of title thus raised the case would have been transferred to the Superior Court at term for trial, and tried as if the action had been originally brought in that court, just as when an issue of title is raised in proceedings of partition. *Smith v. Johnson,* 137 N. C., 43; *Stanaland v. Rabon,* 140 N. C., 202. Not having raised such issue, the defendant is estopped by the judgment in that action from denying the boundary thus determined to be the true line, and from now asserting title to any land beyond it. *Parker v. Taylor,* 133 N. C., 105."

The real difficulty is in determining the effect and extent of the estoppel when title is not in issue, and this arises because occupation of land is sufficient evidence of ownership for the purposes of the statute (Revisal, sec. 326), and the difficulty must be solved by resort to the principles governing estoppels by judgment.

In *Coltrane v. Laughlin,* 157 N.C. 287, the Court said: "It is (662) well recognized here and elsewhere that when a court having jurisdiction of the cause and the parties renders judgment therein, it estops the parties and their privies as to all issuable matter contained in the pleadings, and though not issuable in the technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined on the hearing. *Gillam v. Edmonson,* 154 N. C., 127; *Tyler v. Capehart,* 125 N. C., 64; *Tuttle v. Harrell,* 85 N. C., 456; *Fayerweather v. Ritch,* 195 U. S., 277; *Aurora City v. West,* 75 U. S., 82, 103; *Chamberlain v. Gaillard,* 26 Ala., 504; 23 Cyc., pp. 1502-4-6. 'A judgment is decisive of the points raised by the pleadings, or which might be properly predicated upon them; but does not embrace any matters which might have been brought into the litigation, or causes of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings.' "

Under the old rules of the common law the matters investigated and determined could only be ascertained by an inspection of the record;

but now parol evidence is admissible for that purpose. *Yates v. Yates,* 81 N. C., 397; *Person v. Roberts,* 159 N. C., 173; *Clothing Co. v. Hay,* 163 N. C., 499.

If, therefore, the judgment estops as to the matters put in issue and litigated and determined (and the statute would be useless if this effect cannot be given to it), and if these matters may be shown by parol, it follows that the extent of the estoppel depends on what is tried.

If the parties to the proceeding are mere occupants, the adjudication as to the dividing line does not affect the title, and only determines the right to possession on either side of the line; but if they are adjoining owners, and the location of the deeds and grants under which they claim is put in issue and determined, they cannot afterwards litigate this location and contend that the lines of their deeds and grants are *at some other place* than the one settled by the proceeding.

In neither case is the title adjudicated, although in many instances the location of the deeds and grants may have an important bearing as evidence on the trial of an issue of title.

This construction gives some vitality to the statute, and is fraught with no dangers, as the parties can always put the title in issue; and whether this is done or not, either party may appeal to the Superior Court in term, and have a hearing before a jury *de novo.*

If these principles are applied, it follows that his Honor was in error when he withdrew from the jury the processioning proceeding and instructed them they must not be influenced by anything that was done in that proceeding, as it appears from the case on appeal that the
(663) plaintiffs claim under the Williams grant, and the defendants under the Lyda grant; that one of the facts in controversy in this action is the location of the Williams grant, and that in the processioning proceeding the court "settled and adjudged the true line between the said grants, and between the parties thereto, according to the contention of and in favor of the defendant."

A new trial is ordered.

New trial.

HOKE, J., dissenting: The primary purpose of proceedings of this character is to ascertain and establish an uncertain or disputed line between adjoining proprietors. In several well considered decisions of the Court it has been held that the parties may, by their pleadings, raise the issue as to title, and, when this is done, the statute directs that the cause be transferred to the Superior Court in term, and becomes, in effect, a civil action to try title to land.

Unless this issue is made and the cause transferred, the proceedings remain as they were instituted, before the clerk; and he has no juris-

diction to settle questions of title. He can only ascertain and define the disputed or doubtful line, and if, in the course of proceedings, it appears that the parties, under the guise of a proceeding to settle boundary, are in fact endeavoring, wittingly or unwittingly, to determine title, the clerk should dismiss the case; or if he does not, and proceeds to determine a dividing line, which in effect settles the title, his decision is of none effect, and the litigants may, in a proper action, have the true title declared and, as an incident thereto, settle and determine the true boundary. This is what our decisions mean when they hold, as they have in many cases, "That title to land cannot be tried under the processioning act"; and further: "That processioning proceedings had between parties and the judgment of the clerk therein are no bar to an action of ejectment, subsequently instituted to determine the title between the same parties." *Midgett v. Midgett,* 129 N. C., 21; *Vandyke v. Farris,* 126 N. C., 744.

It is true, as stated in the opinion, that "where the purpose of the proceeding is to settle a question of boundary, the judgment of the clerk should work an estoppel as to *where* the dividing line between two tracts is"; but when, from a perusal of the pleadings and the facts in evidence, it clearly appears that the issue presented is not one of establishing a divisional line, but is in fact and in truth an issue of title, the jurisdiction of the clerk is at an end, and his judgment should not be allowed the effect of an estoppel; and so it is here. This plaintiff, in a former suit, mistaking his remedy, applied to the clerk to settle the boundary line between him and defendant. There was no issue of title raised by the pleadings. The cause was not transferred, (664) and the clerk proceeded to hear evidence and decide the issue, establishing the line as claimed by defendant. An examination of the former suit and the facts in evidence will show that establishment of the divisional line was not the matter in dispute at all, save as an incident of the graver question of title.

Plaintiff claimed under a grant to Alfred Williams, 12 December, 1862; defendant, under a grant to J. F. Lyda, in 1871; and the location of the Lyda grant, as claimed by defendant, will cover not less than two-thirds of the Williams grant, located as claimed by plaintiff. And the clerk, to my mind, being entirely without jurisdiction, has proceeded to settle this issue.

True, he calls it a judgment settling a disputed line; but it was not the case of a dividing line at all, but a question of lappage, affecting the title to two-thirds of the plaintiff's property.

The question of estoppel by judgment and the decisions thereon, so clearly stated in the opinion of the Court, are only applicable when the

court rendering the judgment had jurisdiction of the cause and the parties.

In this case the clerk was without jurisdiction to adjudicate or determine the question at issue, and, in my opinion, and under the numerous decisions on the subject, the court below was right in ignoring the action of the clerk and in trying the cause *de novo*.

*Cited: Crossey v. Markham,* 171 N.C. 44, 45 (2c); *Maultsby v. Braddy,* 171 N.C. 301 (1c); *Hilliard v. Abernethy,* 171 N.C. 645 (1c); *Parker v. Parker,* 176 N.C. 201 (1c); *Exum v. Chase,* 180 N.C. 96 (1c); *Nash v. Shute,* 182 N.C. 531 (1d); *Freeman v. Ramsey,* 189 N.C. 798 (1p); *Hardison v. Everett,* 192 N.C. 374 (1p); *Moore v. Edwards,* 192 N.C. 449 (1p); *Crump v. Love,* 193 N.C. 466 (2c); *Savage v. McGlawhorn,* 199 N.C. 429 (2c); *Bruton v. Light Co.,* 217 N.C. 8 (2d); *Abernethy v. Amburst,* 217 N.C. 374 (2d).

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ADA S. HORTON ET AL. v. JOHN S. JONES ET AL.

(Filed 16 December, 1914.)

**1. Partition—Title.**

It is held, under the evidence in this action, involving the disputed title to lands, that the plaintiff's contentions that the land was allotted to the one under whom he claims in proceedings for partition in 1835 were clearly and properly submitted to the jury upon a proper issue.

**2. Limitations of Actions—Adverse Possession—Color—Trials—Questions for Jury.**

Evidence of adverse possession to ripen title to lands under color is sufficient to be submitted to the jury which tends to prove actual possession for the statutory period by one claiming the title in his own right, and that he has made such use of the land as its condition rendered capable of, with acts of ownership so repeated as to show they were committed in his character as owner, in opposition to the right or claim of any other person, and not as an occasional trespasser; and the charge of the court under the evidence of this case is not objectionable on the ground that the evidence of plaintiff's adverse possession was insufficient to authorize it.

**3. Judicial Sale—Commissioner's Deed—Judgments—Estoppel.**

A deed made by a commissioner appointed in proceedings to sell lands of a decedent to pay his debts can only convey so much of the lands as are embraced in the description set out in the petition, and authorized by the order of sale, and being inoperative as to other lands therein attempted to be conveyed, a decree of confirmation of the report of sale made in general terms, so far as the lands sold are described, referring

to the petition and decree of sale, cannot operate as an estoppel by judgment so as to bar the claim of the heirs at law to the lands not authorized, but included in the commissioner's deed, though they were parties to the proceedings to sell the lands.

**4. Same—Trials—Evidence—Questions for Jury.**

In this action, involving title to lands, the plaintiff's claim by adverse possession under color is made to depend upon whether the lands were included in an exception of lands in a junior grant from those granted in a senior grant, and by way of estoppel the defendant sets up that in 1855 these lands were sold as being contained in the junior grant under an order of a court of equity to pay the debts of the original owner, and that those under whom the plaintiff claims were parties to these proceedings as his heirs at law. The petition for sale describes the land in accordance with the description contained in the junior grant, the order of sale conformed therewith, but the deed of the commissioner to sell nevertheless included the *locus in quo*. The decree of sale generally referred to the description in the junior grant and the order of sale confirming it, and it is held that it is for the jury to determine whether the *locus in quo* was embraced in the lands covered by the exception in the junior grant, the deed of the commissioner being invalid to pass title to more lands than those described in the petition and order of sale, and the decree therefor and to that extent being inoperative to estop the plaintiff.

**5. Excessive Judgments—Lands in Controversy—Pleadings—Appeal and Error.**

The lands in this controversy admittedly being those embraced within certain boundaries as shown on a map thereof, and the judgment of the court having included more lands than described in the pleadings, and which were not in controversy, the judgment is accordingly modified and costs of appeal taxed equally upon the appellant and appellee.

APPEAL by defendants from *Long, J.*, at May Term, 1914, of (665) CALDWELL.

Civil action to try title to land, tried upon these issues:

1. Are the plaintiffs the owners of the land described on the map and indicated by the figures 1, 2, 3, and 4, as alleged in the complaint? Answer: "Yes."

2. Are the plaintiffs estopped from maintaining this action against the defendants? Answer: "No."

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

From the judgment rendered, the defendants appealed.

*Squires & Whisnant, S. J. Erwin, W. C. Newland for plaintiffs.* (666)
*Edmund Jones for defendants.*

BROWN, J. The *locus in quo* is represented on the official map attached to the judgment by the figures 1, 2, 3, 4, and was originally owned by William Dula, under whom all parties claim. There does not seem to be any real dispute as to the location of the land in controversy nor of the lands described in the plaintiffs' as well as the defendants' deeds. The real matters in issue appear to be as to whether the plaintiffs have shown evidence of title of the *locus in quo,* and if so, are they estopped to assert such title?

1. The plaintiffs undertake to show title under a partition proceeding had in 1835 among the heirs of William Dula. The plaintiffs are the descendants of Sarah Dula (William Dula's daughter) and her husband, David E. Horton. The defendants are the descendants of Nancy Dula (sister of said Sarah Horton) and of her husband, Catlett Jones.

This land was granted to William Dula by Grant No. 3200, dated 22 December, 1819, and lies on north side of the Yadkin River. All this land was divided in 1835, and the evidence tends to prove that to Sarah Horton was allotted a part of the land which includes the land in controversy. This contention was clearly and correctly submitted to the jury under the first issue along with the other claim of title by the plaintiffs.

2. David E. Horton and wife, Sarah, conveyed certain lands by deed of 12 October, 1866, to James T. Horton, under whom the plaintiffs claim. This deed, it is contended, includes the land in dispute. The plaintiffs claim under this as color of title, and offer evidence of possession necessary to mature title under it.

His Honor charged: "If the jury find from the evidence that the plaintiffs and those under whom they claim entered into possession of the lands described in the deed from David E. Horton and wife, Sarah Horton, to James T. Horton, deed dated 12 October, 1866, and they further find that said deed includes within its lines and boundaries the lands in controversy, designated on the map between the figures 1, 2, 3, and 4, and that the said James T. Horton erected a still-house on said premises about the year 1870 or 1871, and planted a turnip patch, and that he maintained said still-house on said premises and used the same for a period of over seven years, claiming said land adversely; and if you find they have the sole and exclusive possession of said land in controversy, then the court instructs you that such possession so taken and held by the said James T. Horton would give him, and the plaintiffs herein claiming under him, a good title to all the land in controversy; and in this case it would be your duty to answer the first issue 'Yes.'"

It is contended that the charge is not warranted by the evi-
(667) dence. We think there is ample evidence to sustain the claim of adverse possession, or at least to warrant the jury in finding it.

Such evidence is sufficient to carry the case to the jury, when it tends to prove actual possession for the statutory period by one claiming the title in his own right, and that he had made such use of the land as it was capable of in its present condition, with acts of ownership so repeated as to show they were committed in his character as owner, in opposition to the right or claim of any other person and not merely as an occasional trespasser. *Locklear v. Savage,* 159 N. C., 236, and cases cited.

It is claimed that the plaintiffs are estopped to assert their title. This contention was submitted to the jury under the second issue.

On 9 December, 1835, a grant was issued to William Dula, No. 3789, which covers a strip of land about 75 poles by 75 of the northwest corner of Grant No. 3200, thus lapping over on that senior grant. Grant No. 3789 contains these words, "including 100 acres previously granted, which is excepted in this grant."

In 1855 the heirs at law of William Dula filed a petition in the court of equity of Wilkes County for the sale of the lands of William Dula therein described to pay debts. The 400-acre tract is described therein, but the description contains these words, viz.: "including 100 acres previously granted, which is excepted in this grant, as will appear by Grant to William Dula, No. 3798, dated 9 September, 1835, excepting also 75 poles west and 75 poles south on account of lappage on said William Dula's 100-acre tract on the head of the big branch, adjoining William B. Dula, Catlett Jones, and others."

It is contended by the plaintiffs that this exception embraces the land now in controversy. A decree of sale was entered. The clerk and master, James Calloway, was appointed commissioner to sell. The sale was duly made to C. P. Jones, under whom the defendants claim, sale confirmed and deed made to him.

It is admitted this deed covers the land in controversy. The notice of sale, the report of the sale by the clerk and master, and the decree of confirmation are in general terms so far as the lands sold are described, and all refer to the petition and decree of sale.

It is contended by the defendants that because of the presence of the ancestors of the plaintiffs in this equity proceeding, and because of the confirmation of the report of the commissioner and proceedings had in such cause, that the deed of the clerk and master conveys to them title to so much of the lands embraced within the Grant No. 3200 as are likewise embraced in the deed of the clerk and master to C. P. Jones.

The plaintiffs, on the other hand, contend that notwithstanding their presence in the suit, and while admitting that they are bound by the decrees that were rendered in such proceeding, that still C. P. Jones and the defendants claiming under him have acquired (668)

no rights as against them, for the reason that the lands which are now the subject of controversy, and which are the only lands in controversy, were excepted, as they contend, out of the petition, and that as to them the court of equity of Wilkes County acquired no jurisdiction.

It being admitted that the commissioner's deed to Jones covers the land in controversy, the court, under the evidence in the case, very properly and clearly submitted the question to the jury as to whether the land in dispute was embraced within the exception, and thereby excepted from the petition, saying: "While the language of this exception in the petition is subject to doubt as to what is meant, as to whether it excepts the land referred to from the grant and from the petition, it is, nevertheless, left open to inquiry by the jury as to where the lands referred to in this description, "75 poles west and 75 poles south," and so on, is situated. It is also left open for the jury to inquire as to whether the lands referred to in this language are the identical lands now in suit.

Taking it to be established by the verdict that the land in controversy is excepted from the petition, we think the commissioner's deed, in so far as it undertook to convey land not embraced within the proceedings and decree of sale and confirmation, is void, in that the deed exceeds the power conferred on the commissioner.

Among cases of judicial sales that are void, Judge Freeman instances those "where the property was not described in the pleadings upon which the judgment or order was based." Void Judicial Sales, page 19, par. 4 A. Again: "A license to sell, granted without any petition therefor, is void." Par. 11, page 53. Again, at page 58: "The property sold must be described in the petition. No jurisdiction is obtained over that which is not described." To same effect is *Verry v. McClellan,* 6 Gray (Mass.), 535; *Colligan v. Cooney,* 107 Tenn., 214; *Wakefield v. Camel,* 37 Am. Dec., 60; *Falls v. Wright,* 55 Ark., 562; Black on Judgments, sec. 242 *et seq.*

It is contended that the judgment of *Judge Long* in this case includes possibly lands of the defendant not included in the action or described in the pleadings, and not in controversy. This exception is sustained.

The land in controversy in the action, as admitted by both parties, and as charged by the court, was the square embraced in the lines and corners as indicated by the figures 1, 2, 3, 4, as shown on the map.

The judgment will be modified accordingly so as to embrace no other. Let the cost of the Supreme Court be equally divided between the plaintiffs and the defendants.

Modified and affirmed.

*Cited: Alexander v. Cedar Works,* 177 N.C. 146 (2c); *Trust Co. v. Refining Co.,* 208 N.C. 504 (3p).

(669)

M. D. DUNLAP v. RALEIGH, CHARLOTTE AND SOUTHERN RAILROAD COMPANY.

(Filed 9 December, 1914.)

1. **Independent Contractor—Dangerous Character of Work—Negligence of Contractor—Contributory Negligence.**

A railroad company which in the construction of its roadbed makes a cut 30 feet deep across the main street of a town cannot escape liability for an injury to a pedestrian who has fallen into the cut, while passing along the street a dark, drizzly night, caused by the negligence of its contractor in not properly safeguarding a temporary narrow footbridge across it, with rails or guards or providing lights to give warning of the danger, on the ground that the work was being done by an independent contractor, for work of this character is necessarily and inherently dangerous; and it is further held that the case was properly submitted to the jury upon the issues of negligence and contributory negligence. *Watson v. R. R.*, 164 N. C., 176, and that line of cases, cited and applied.

2. **Independent Contractor — Supervision of Work — Negligence of Contractor.**

A railroad company may not successfully defend an action to recover for an injury received by the plaintiff proximately caused by its negligence in falling into a deep cut across the main street of a town where the plaintiff was walking, on the ground that the work was being done by an independent contractor, when it appears that the work was being done under the direction of the railroad company.

APPEAL by defendants from *Adams, J.*, at July Term, 1914, of RANDOLPH.

*Hammer & Kelly for plaintiff.*

*Jerome & Price, J. T. Brittain, J. A. Spence, W. B. Rodman, and Tillett & Guthrie for defendants.*

CLARK, C. J. This action is for the recovery of damages for personal injuries sustained by plaintiff falling into a railroad cut 30 feet deep across Main Street in the town of Mount Gilead. The only point presented is the refusal of the motion for nonsuit.

There was no evidence offered for the defendants. The evidence for the plaintiff was that he was a stranger in the town; that he was ignorant of the cut across the street, which was 30 feet deep and ran completely across Main Street; that there were no lights or any kind of signals to warn travelers nor any railing to prevent passers-by from falling into the cut; that it was a very dark, drizzly night; that a small footbridge had been swung across the cut by defendants for the use of pedestrians, but that this bridge on the side where the plaintiff fell in

was 5 or 6 feet out of line with the sidewalk, so that any one keeping on the sidewalk would inevitably walk into the cut, just as the (670) plaintiff did; that the cut was on the right of way of defendant railroad; that it had been excavated by the other defendants, Kenefick, Hoffman & Co.; that plaintiff while walking on said sidewalk, under these circumstances, stepped off into said cut, falling 30 feet on a pile of stone, thereby breaking his jaws, fracturing his nose and skull, and totally incapacitating him for work, and that his mind has been seriously impaired as a result of his injuries.

The evidence was that the cut was on the right of way of the defendant company and that the other defendants did the excavating and bridge work under contract with the railroad company. Defendants set up the defense of independent contractors in their answers, but there was no evidence to support the plea. This work was done by contract, but under the direction of the railroad company. Besides, the defense of an independent contractor is not available where the thing contracted to be done is "necessarily attended with danger or will probably become a nuisance." *Watson v. R. R.*, 164 N. C., 176; *Denny v. Burlington*, 155 N. C., 33; *Thomas v. Lumber Co.*, 153 N. C., 351; *Davis v. Summerfield*, 133 N. C., 325.

Digging the railroad cut across the street in question was "necessarily attended with danger, however skillfully and carefully performed." *Carrick v. Power Co.*, 157 N. C., 378; *Bailey v. Winston, ib.*, 252. In the first of these two cases the plaintiff was injured by stepping into a hole 2 feet square and 4 or 5 feet deep. In *Bailey's case* the ditch was 2 feet wide and 9 feet deep. Here the railroad cut was 30 feet deep, across the main street of a town of 1,000 inhabitants, and was left unguarded and unlighted for several weeks. The railroad company could not delegate the duty of properly safeguarding this street to the contractors so as to absolve itself from liability. Kenefick, Hoffman & Co. are liable because they created the nuisance which caused the injury to the plaintiff. There had been a fence, but this had been removed by J. E. Andrews, who testified that he was working for McCabe & Steen, who were building a bridge across the chasm.

The jury found that the plaintiff was injured by the negligence of the railroad company, and also of Kenefick, Hoffman & Co., as alleged in the complaint, and that the plaintiff did not contribute by his own negligence to his injuries.

There was evidence to justify the submission of the case to the jury on these issues, and we find

No error.

*Cited: Strickland v. Lumber Co.,* 171 N.C. 756 (1c); *Simmons v. Lumber Co.,* 174 N.C. 227 (2c); *Williams v. Lumber Co.,* 176 N.C. 181 (1c); *Evans v. Rockingham Homes,* 220 N.C. 263 (1j).

(671)

JESSE EDWARDS v. INTERSTATE CHEMICAL COMPANY.

(Filed 9 December, 1914.)

**Negligence—Personal Injury—Warning of Danger—Proximate Cause.**

While engaged with other employees in the defendant's chemical plant in cutting a channel through phosphate in a bin, and sloping its sides, the usual method for removing the phosphate, the plaintiff received the injury complained of by a piece of phosphate falling upon him, with evidence on defendant's part that the plaintiff was warned of the danger by its foreman in time to have avoided the injury had he obeyed. *Held,* error for the trial judge to instruct the jury upon the theory of plaintiff's want of the exercise of ordinary care being the proximate cause of the injury, for the plaintiff cannot recover if his failure to obey the warning was the proximate cause, and the defendant's special prayer for instruction to this effect was erroneously refused.

APPEAL by defendant from *Adams, J.,* at June Term, 1914, of MECKLENBURG.

Civil action, tried upon issues of negligence, contributory negligence, assumption of risk, and damage. The jury found for the plaintiff upon each issue. From the judgment rendered, the defendant appealed.

*Duckworth & Smith and E. R. Preston for plaintiff.*

*J. M. Robinson and Osborne, Cocke & Robinson for defendant.*

BROWN, J. The evidence tends to prove that the plaintiff was working for the defendant in its phosphate bin, a large room containing phosphate.

On Friday evening the plaintiff and his fellow-workers began removing phosphate in the bin, the first work being to cut a channel through and slope back the sides. On Friday evening they cut the channel and sloped back the east side, that is, set it back like a railroad cut. On Saturday morning the plaintiff was sloping back the west side, when he was injured by a lump of phosphate falling upon him.

The defendant requested this instruction: "If you find from the evidence that immediately before the plaintiff's injury Jim Murdock was standing within a few feet of plaintiff; that Murdock then and there

warned the plaintiff that the phosphate was about to fall, and told him to leave his rake behind and get out of the way of said phosphate; that if the plaintiff had heeded said warning he would have had time to escape the danger; and if you should further find that the plaintiff failed to heed the warning thus given him, if it was so given, and that such failure on his part was the proximate cause of the injury, it will then be your duty to answer the second issue 'Yes.' "

His Honor refused to give this charge, and changed it as follows:

"Upon the second alleged cause of contributory negligence the
(672) court charges that if you find that Murdock, who, it is contended by the defendant, was standing near the place at the time of the alleged injury, warned the plaintiff that the phosphate was about to fall, and called to him to get out of the way, and then by the exercise of ordinary care the plaintiff could have gotten out of the bin in time to prevent the injury, and that the plaintiff failed to exercise such care, and that his failure to exercise such care was the proximate cause of his injury, you will answer the second issue 'Yes.' "

It is admitted that Jim Murdock was the foreman, and, therefore, it was the plaintiff's duty to obey his instructions. There is unequivocal evidence upon the part of the defendant that Murdock was with the plaintiff and saw that the large lump of phosphate had been loosened and was about to fall. Murdock ordered and warned plaintiff to come out, saying that the "stuff is coming." This warning and order was repeated. There is evidence that the phosphate always gives two or three minutes warning before it falls, and that the plaintiff could have escaped injury had he obeyed Murdock's order instantly.

His Honor erred in the change made in the instruction. Defendant was entitled to the prayer as requested. The element of ordinary care and diligence does not enter into it. It was the plaintiff's duty to obey the order and to heed the warning at once. *Whitson v. Wrenn,* 134 N. C., 86.

By introducing the element of ordinary care and prudence, the court deprived the defendant of the benefit of the facts testified to by Murdock. *Hinson v. Tel. Co.,* 132 N. C., 460.

New trial.

J. A. PIERCE v. HENRY ELLER ET AL.

(Filed 16 December, 1914.)

**1. Judgments—Motions to Set Aside—Excusable Neglect—Reversing Previous Order—Judgment—Estoppel.**

Where an order refusing to set aside a judgment for excusable neglect, etc., on motion made within twelve months (Revisal, sec. 513), has without objection been set aside by the same judge, at the next succeeding term of court, the original motion is left pending and the movant is not estopped by the former judgment denying his motion.

**2. Judgments—Motions to Set Aside—Excusable Neglect—Facts Found—Legal Inference—Appeal and Error.**

The findings of fact by the trial judge upon which he bases his decision on motion to set aside a judgment for excusable neglect are conclusive of the facts found, but not as to matters of law or legal inference arising therefrom.

**3. Same—Old Age—Pleadings—Lands—Bond for Possession—Default.**

It is required of a party litigant that he shall give his case such attention as a man of ordinary prudence gives to his important business, and that he must not sleep on his rights. Hence, setting aside by the trial judge of a judgment obtained against a party on the ground that he was old and feeble will be reversed on appeal, when it appears from the facts found that the judgment in question was one by default in an action against him to recover lands in his possession, and the action had been pending several years without answer filed or bond given to retain possession; that there was no finding that the party was not of sound mind and nothing appearing to show why these necessary steps had not been taken.

APPEAL by plaintiff from *Webb, J.*, at January Term, 1914, of (673) WILKES.

This is a motion to set aside a judgment rendered at August Term, 1912, of Wilkes Superior Court, heard before *Webb, J.*, at January Term, 1914, of said Superior Court.

The action is to recover land and damages for trespass thereon.

The summons was issued on 4 June, 1907, and served on 6 June, 1907. The complaint was filed and the case continued from term to term until January Term, 1912, when the plaintiff obtained leave to file a complaint in place of the one theretofore filed, which had been misplaced, and the defendant was allowed thirty days to file answer. The complaint was filed 28 February, 1912. The case was on the calendar for the August Term, 1912, and, no answer being filed, the judgment appearing in the record was signed and the cause continued for inquiry as to damages. On 10 January, 1913, the defendants filed an affidavit, and served notice on the plaintiff, to set aside the judgment rendered at August Term, 1912, which motion was heard by Judge Cline at August

Term, 1913, of Wilkes Superior Court, upon affidavits filed pro and con, when Judge Cline refused to set aside said judgment, and taxed the defendants with the cost of the motion, and directed that the case be continued for trial upon the question of damages for the removal of the timber.

To this refusal to set aside said judgment the defendants did not except or appeal.

At October Term, 1913, the case was on the trial calendar as to damages, but the defendants were not ready, and a contention arose between the attorneys as to the exact location of the 8 acres of land referred to in the judgment of August term, when Judge Cline set aside his order of the former term.

At January Term, 1914, the case was again on the calendar for trial as to damages, and upon the call of the case the defendants renewed their motion to set aside the former judgment, when Judge Webb
(674) heard the affidavits, upon the same state of facts as passed upon by Judge Cline, and rendered the judgment setting aside the judgment of August Term, 1912, and the plaintiff appealed.

His Honor, Judge Webb, found the following facts bearing on excusable neglect:

"The court further finds it a fact that at the time the summons was issued in this cause against the defendants by the plaintiff, and at the time the judgment by default was taken in this cause by the plaintiff against the defendants, the defendants were very old people, they being approximately 76 years of age. The court finds that they were at the time of taking said judgment very feeble, and the said Henry Eller, being hard of hearing and very forgetful, owing to his old age and feeble health, was not able to carry current events in his mind but a very short time.

"The court further finds it a fact that neither of them have any recollection that a summons was served on them in the above entitled action, but it is not denied that it was so served. Said action was commenced on 4 June, 1907, and the summons served, as the return shows, on 6 June, 1907; that at the time of the service of said summons Henry Eller was sick and remained sick for some time, but nothing was ever said to him about the suit, so far as he remembers, until the judgment was rendered, or rather some time after the judgment was rendered, which was at August Term, 1912, of this court; that he, being old and feeble, had entirely lost sight of the suit, and does not now remember any circumstance about it, not even the service of the summons upon him; that the record shows that the complaint was filed and lost, or misplaced, and

plaintiff obtained leave to file another complaint, which has been done, as the records show, on 28 February, 1912.

"The court further finds it a fact that the defendant claims that his title deed covers the land, or a part of it, in dispute, and that he had a *bona fide* claim and title to all the land in controversy, or at least part of the same.

"The court finds it a further fact that after Judge Cline made his last order therein that the records of the court do not show that any request was made to continue said motion thereafter, but the same came on for hearing before the undersigned upon motion of the defendants at said January Term, 1914.

"The court further finds it a fact that the defendants did not know of the institution of said suit against them by the plaintiff, and did not know that any judgment was taken against them in the cause by default until some time thereafter; or, at least, if they had such knowledge, by reason of their infirmities and old age and sickness, they had forgotten it."

The motion was allowed, and the plaintiff appealed. (675)

*W. W. Barber for plaintiff.*

*Finley & Hendren for defendants.*

ALLEN, J. The order of Judge Cline, made at August Term, 1913, refusing to set aside the judgment, is not an estoppel upon the defendants, because at the succeeding September term the same judge set aside the order of the August term without objection by either party, and when this was done it left pending the motion of the defendants to set aside the judgment upon the ground of excusable neglect, and this was made within twelve months, as required by the statute, Revisal, sec. 513.

This leaves for consideration the order of Judge Webb, and while his findings of fact are conclusive upon us, his determination of the legal question, that there is excusable neglect, is reviewable on appeal. *Stockton v. Mining Co.,* 144 N. C., 596.

It has been held repeatedly by this Court that persons of sound mind who are served with process must be active and diligent, and that if they fail to give litigation the attention which a man of ordinary prudence usually gives to his important business, they can have no relief under the statute. *Sluder v. Rollins,* 76 N. C., 271; *Roberts v. Allman,* 106 N. C., 394; *School v. Pierce,* 163 N. C., 427.

In the first of these cases the Court says: "The least that can be expected of a person having a suit in court is that he shall give it that amount of attention which a man of ordinary prudence usually gives to

his important business," and this was quoted in the second case. And in the last case: "The law does not allow a party to sleep on his rights. He must keep awake and be alert, exercising the care and watchfulness of an ordinarily prudent man in protecting his rights and saving his interests. We have held that the standard of care by which he must be judged is that which a man ordinarily prudent bestows upon his important business. *Roberts v. Alman,* 106 N. C., 391."

Applying these principles, we are of opinion there is no excusable neglect.

The defendants are old and feeble, it is true, but there is no finding that they are not of sound mind, and they are defending this motion without the intervention of a guardian.

The action is to recover land and damages for trespass on land, and although there is no denial that the summons was regularly served, they have taken no steps for five years to prepare a defense.

It was their duty to file a bond, and they had no right to answer and defend until they had done so or had shown their inability to give bond. *Vick v. Baker,* 122 N. C., 99; *Norton v. McLaurin,* 125 N. C., 189.

(676) It does not appear that they employed counsel, that they made any effort to file a bond, that they made application for time to answer, that they ever made any inquiry as to the course of the litigation, and the only excuse for their neglect is that they were so inattentive they forgot the suit.

If under these circumstances a judgment can be set aside, no one will be secure in his rights, if the judgment is against one old and feeble.

Reversed.

*Cited: Hyatt v. Clark,* 169 N.C. 179 (2c); *Jernigan v. Jernigan,* 179 N.C. 240 (3c); *Gaster v. Thomas,* 188 N.C. 350 (3c); *Johnson v. Sidbury,* 225 N.C. 210 (3c); *Whitaker v. Raines,* 226 N.C. 528 (3c).

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E. A. GLAZENER ET AL. v. GLOUCESTER LUMBER COMPANY.

(Filed 9 December, 1914.)

**1. Liens for Labor—Interpretation of Statutes.**

The lien on personal property given by Revisal, 2017, applies when possession is retained by the mechanic, etc., of the property upon which he claims his lien; and for a lien upon buildings, etc., to obtain under Revisal, sec. 2016, it is necessary for the work, etc., of the one claiming it to have been a betterment to the property.

**2. Same—Sawing Lumber.**

One claiming a lien for "doing the work of cutting or sawing logs into lumber" under sec. 6, ch. 150, Laws 1913, can only obtain it upon the lumber which his services have helped to convert from the logs; and it is held that the provisions of this section apply when the lienor worked in a band sawmill of a lumber plant, received the plank as it fell from the saw and placed it upon a mechanical devise used in its further manipulation.

**3. Liens for Labor—Buildings—Betterments—Interpretation of Statutes.**

Under contract, one of the defendants agreed to operate a large lumber plant, including a railroad equipment for handling the logs, owned by the other defendant, and assumed the payment of all employees, several of whom filed liens against logs and lumber sawed, in a justice's court, for the nonpayment of wages. *Held*, work done in repairing the track, equipment, etc., was not in contemplation of chapter 150, Laws 1913 (amending Revisal, secs. 2021 and 2033a), so as to give those performing these services a lien on the logs and lumber used or manufactured by the plant; nor could a lien upon the plant hold, for the material had not been used in its construction as betterments.

**4. Liens for Labor—Sawing Lumber—Priorities—Interpretation of Statutes.**

The lien given to the person "doing the work of cutting or sawing logs into lumber," etc., by chapter 150, Laws 1913, is superior to the lien given to the contractor therefor, or any other person.

HOKE, J., dissenting in part; WALKER, J., concurring in dissent.

APPEAL by plaintiffs Glazener and Fisher in No. 525, and by Lumber Company *et als.* in No. 526, at April Term, 1914, of TRANSYLVANIA, from *Cline, J.*

*O. W. Clayton and N. Y. Gulley for plaintiffs.* (677)
*Galloway & Allison and Merrick & Barnard for defendants.*

CLARK, C. J. This was an action brought by E. A. Glazener, Jack Fisher, and C. P. Hogsed, separately, to enforce a laborer's lien, and tried together by consent. Judgment below was entered against Glazener and Fisher, from which they appealed, and in favor of C. P. Hogsed, from which the defendants appealed.

By consent, the court found the facts, which are as follows: The defendant lumber company entered into a contract with Donald Campbell under which he took over the band sawmill and all attachments, the railroad for hauling out logs, and entire rolling stock and certain sections of the timber boundary which the defendant lumber company had been operating, and became responsible for the upkeep of the entire property, and employed and became responsible for the wages of the

laborers, among whom are the three plaintiffs. They represent distinct classes of employees, and about one hundred other actions brought by the other employees to enforce laborers' lien for their wages abide the result of the appeal by these three plaintiffs.

It is admitted that the lumber company had no control over the employees of Campbell, and did not assume any obligation to pay them after they entered Campbell's employment, and the court found that the debts due the plaintiffs were the sole obligation of Campbell, except in so far as they might, as a matter of law, have the lien which they claim.

The court also found that the plaintiff E. A. Glazener was an employee of the defendant lumber company prior to 15 July, 1913, and after the property was turned over to said Campbell he was employed by him. He was an employee in the blacksmith's shop which was a part of the plant, and worked therein, "making small repairs from time to time on the cars which were used in hauling out the logs from the woods," and he also made necessary repairs, in the way of blacksmithing, to the sawmill machinery. He was paid by Campbell for the months of August and September, but there was a balance due him for October and November of $86.13 for labor and services rendered in the respect above mentioned, for which he began his action before a justice of the peace and filed his lien against two engines, two logging cars, and certain logs and lumber.

The court finds the facts as to the claim of Jack Fisher to be the same as in the case of Glazener, except that Fisher was a section hand and worked upon the railroad, repairing its tracks, its trestles and bridges from day to day, as he was directed to do by the section foreman, and that there is due him the sum of $11.07 for work and labor done, for which he began his action before a justice and filed his notice of lien upon the same property as Glazener, above set out.

(678) As to the claim of C. P. Hogsed, the court finds the same facts as above, with these exceptions: The said Hogsed worked in the band sawmill, receiving the plank as it fell from the saw and placing it upon a mechanical device, and there is due him for said service and labor a balance of $12.30 for work and labor done in November, 1913, for which he brought action and filed the lien on the same property as Fisher and Glazener.

The court was not asked to find, and did not find, whether the lumber company was indebted to Campbell upon the contract, as there is an action pending between them to settle their differences.

The court adjudged that the claim of Glazener, who was an employee in the blacksmith shop making repairs on the cars, and of Fisher, who was a railroad hand working on the track and repairing bridges, were not liens upon the lumber of other property named above in the lien

filed, but that the claim of Hogsed, who aided in cutting the lumber by taking the boards from the saw as cut and placing them on a truck, was such lien, provided, of course, that there was an indebtedness found to be due from the lumber company to Campbell at the time the notice of the lien was given.

We think his Honor's decision was well considered and correct as to all three parties. The lien claimed by Glazener and Fisher could have no validity unless it comes under the provisions of Revisal, 2017 or 2016. Revisal, 2017, provides:

*"Personal Property Repaired.*—Any mechanic or artisan who shall make, alter, or repair any article of personal property at the request of the owner or legal possessor of such property shall have a lien on such property so made, altered, or repaired, for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges shall be paid"; with a further provision that if not paid within the time specified, such mechanic or artisan may proceed to sell the property so altered or repaired at public auction, upon giving the notice required. This act does not apply, because it is held that under this statute, if the mechanic or artisan surrenders possession of the property, he loses his lien. *Tedder v. R. R.,* 124 N. C., 344; *Block v. Dowd,* 120 N. C., 402; *McDougall v. Crapon,* 95 N. C., 292.

The other section is as follows (Revisal, 2016):

*"On Buildings or Other Property.*—Every building built, rebuilt, repaired, or improved, together with the necessary lots on which such buildings may be situated, and every lot, farm, or vessel, or any kind of property not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same or material furnished."

This section is also construed in *Tedder v. R. R.,* 124 N. C., (679) 342, as meaning that the "Legislature has provided a lien only when the service or labor is for the betterment of property on which it is bestowed, leaving the laborer in all other cases to secure himself as at common law"—*i. e.,* by retaining in his possession any property on which he makes repairs until paid for the same.

It would seem clear, therefore, that Glazener has no lien on the "two engines, two logging cars, and the logs and lumber." It does not appear that he made any repairs or did any work on any of this particular property, and certainly not on the logs and lumber, which is the material point. If he made any repairs on these cars, it does not appear, and he certainly did not retain his lien by keeping possession, as was necessary to a common-law lien.

The same is true as to Fisher, who repaired the tracks, trestle, and bridges, against which he has filed no lien, even if he was entitled to do so under Revisal, 2016. As already stated as to Glazener, Fisher could have no lien on "personal property repaired" under Revisal, 2017, because he surrendered possession of the same. *Block v. Dowd,* 120 N. C., 402, and other cases above cited. Revisal, 2018, applies only to laborers "constructing railroads."

As to the claim of Hogsed, that stands upon an entirely different footing. Laws 1913, ch. 150, sec. 6, provides: "Every person doing the work of cutting or sawing logs into lumber, getting out wood pulp, acid wood, or tan-bark, shall have a lien upon said lumber for the amount of wages due them, and the said lien shall have priority over all other claims or liens upon said lumber, except as against a purchaser for full value and without notice thereof." Hogsed may properly be said to have shared in "the work of cutting or sawing logs into lumber," but has a lien against lumber only.

Laws 1913, ch. 50, sec. 4, applies only where the contractor's business is to build, alter, or repair any building, vessel, or railroad, which was not the case here. Here there was a great plant in which there was some incidental repairing done on the railroad and cars, but that was not the contract within the purview of sec. 4, ch. 150, Laws 1913. The laborer thus repairing the cars could have a lien only upon the identical cars repaired, which is not shown to be the case here, and then only if he had kept such personal property in his possession. There was no building or railroad being "constructed" upon which the lien could have been filed, nor in fact was any attempted to be filed thereon.

His Honor properly found that neither Glazener nor Fisher was entitled to any lien upon the property described in their notice and claim of lien. He also adjudged that the lien of Hogsed was valid, was
(680) properly filed, and notice was given as required by law, and that there was due him $12.30 for work done in receiving the plank as it fell from the saw and placing it upon the truck that carried it away.

The contract between the lumber company and Campbell was that he was to take the plant into sole control, employ his own laborers, be responsible for the upkeep of all equipment and for the pay of all employees, and was to receive $10 per thousand feet for all lumber which he sawed and stacked in the defendant's (lumber company) yard. The court refused to find whether there was anything due Donald Campbell from the lumber company, as there is a suit between them to settle that matter, and also refused to decide whether the lumber company is indebted to the plaintiff as an original obligor or only by virtue of the notice and lien given under chapter 150, Laws 1913. Such a judgment is similar to a

judgment *quando* against an executor or administrator under the former system of procedure, whereby the amount and validity of a claim against an estate was determined, but no execution could issue until assets applicable to such indebtedness came into the hands of the personal representative.

The claim of Hogsed, under the statute, is a preferred lien upon the lumber in the sawing of which he participated and upon which he filed his lien, in preference to Campbell or any one else.

As to all the parties appealing, the judgment is

Affirmed.

HOKE, J., dissenting as to claims of E. A. Glazener and Jack Fisher: It is not contended in this case that the two employees, E. A. Glazener and Jack Fisher, are entitled to a common-law lien on this lumber nor to a lien under the sections of the Revisal of 1905 and the decisions construing the same. It was for this very reason and because an ordinary laborer, working as an employee in these large lumber enterprises, frequently was unable to find his paymaster and lost the fruits of his labor altogether, that the Legislature of 1913 enacted the statute which now controls the matter. Laws 1913, ch. 150, sec. 6, and appearing in Gregory's supplement, sec. 2023a. In the section referred to it is provided: "That every person doing the work of cutting and sawing logs into lumber, getting out wood pulp, acid wood, or tan-bark, shall have a lien upon the lumber for the amount of wages due them, and such liens shall have priority over all other claims or liens upon said lumber except as against a purchaser for full value and without notice thereof," etc. After making provision for the method of making said lien efficient, in ordinary instances, and which has been pursued in these claims, the section provides further, that "If the owner of the lumber cannot be located, the notice may be given by attaching the same to the pile of lum- (681) ber, wood, etc., and any one buying the lumber after that shall be affected with notice of the claim."

On the facts in evidence, which are very fairly set forth in the opinion of the Court, it appears that the lumber company, owning large timber interests, a tramroad, cars, sawmill, shops, etc., engaged in getting out lumber, turned the plant and all the rolling stock, machinery, implements, etc., over to one Donald Campbell, who was to take charge of and operate the same, place the lumber on the yard, and be paid for it by the thousand feet after it was piled, etc. The company and Campbell have fallen out and are in litigation as to some differences between them, and while this suit is being investigated, these laborers, who have done the work, are kept out of their pay and, if this decision stands, are likely to lose it altogether.

To my mind, it is not the correct nor permissible construction of this statute to restrict its operation to laborers who worked at or with the saws. These men were all engaged in one common enterprise of "cutting and sawing logs into lumber or getting out wood pulp, or acid wood," etc., these terms having reference to and including everything done by them as common employees and contributing to the result. Fisher, who helped keep the tramroad in order, by which the logs were conveyed to the mill, and Glazener, who kept the rolling stock in repair and sharpened the tools, are just as much engaged in cutting and sawing logs into lumber or getting out wood pulp, etc., as the men who handle an axe or feed the machinery in the mill.

There is no finding in the record that the company is "a purchaser for value and without notice," the only exception made by the law, and this being true, these men are within the mischief and, by correct interpretation, within the meaning of the statute, and, in my opinion, their claims should also be allowed.

WALKER, J., concurs in this dissent.

*Cited: Thomas v. Merrill,* 169 N.C. 627 (2c, 3d); *Hogsed v. Lumber Co.,* 170 N.C. 529, 530 S.c.; *Bryson v. Lumber Co.,* 171 N.C. 702 (1); *Motor Co. v. Motor Co.,* 197 N.C. 375 (1c); *Reich v. Triplett,* 199 N.C. 681 (1c); *Graves v. Dockery,* 200 N.C. 318, 319 (3c).

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H. F. ADICKES v. PAUL CHATHAM.

(Filed 16 December, 1914.)

**1. Contracts, Written—Breach — Damages — Later Contract — Collateral Parol Agreement — Pleadings — Court's Discretion — Amendments — Issues.**

In an action to recover damages for a breach of a written contract for the sale of shares of the capital stock in a certain corporation, the defendant contended that this contract was superseded by a later one which the plaintiff admitted executing, but attempted to show by his evidence a separate agreement by parol that he could hold the defendant under the terms of the first contract if the defendant did not "treat him right" under the later one. This phase of the matter not having been alleged, the plaintiff asked leave of the trial court to amend the complaint, which was refused. *Held,* the matter of amending pleadings lies within the discretion of the trial judge, and is not reviewable on appeal. *Semble,* the alleged contemporary parol agreement was too uncertain to be made available, and it is *Further held,* the amendment, had it been allowed, would have neces-

sitated trying the case on the later contract, introducing new issues of which the defendant had no notice.

**2. Contracts—Breach—Damages—Second Contract—Amendments—Courts—Discretion—Nonsuit.**

Where upon a trial for damages for a breach of a written contract it is admitted that the contract sued on had been superseded by another and different one, requiring answers to issues not raised by the pleadings, and a requested amendment to the complaint has been refused by the trial judge, a judgment of nonsuit is properly allowed.

**3. Contracts—Breach—Damages—Second Contract—Nonsuit.**

The plaintiff sued for damages on breach of contract for the sale of certificates of capital stock in a corporation held by D., by the terms of which the plaintiff and defendant would have practically been created partners in equal interest with D., who was not a party to the contract. D. refused to perform the contract and failed to furnish the stock. The plaintiff afterwards acquired the stock and entered into a new contract with the defendant. This action is upon the first contract, and it is held that it would not lie, for the later contract necessarily superseded and put an end to it.

APPEAL by plaintiff from *Cline, J.*, at August Term, 1914, of (682) BUNCOMBE.

Civil action. From a judgment of nonsuit the plaintiff appeals.

*Bourne, Parker & Morrison, R. B. Longham for plaintiff.*
*Cameron Morrison, J. H. McLain for defendant.*

BROWN, J. This action is brought to recover damages of defendant for breach of a written contract, entered into between the plaintiff and the defendant, dated 1 April, 1907, for the purpose of selling shares of the capital stock of the L. D. Johns Company, a corporation chartered in New Jersey.

The defendant answered, denying many allegations of the complaint, and further alleged that on 2 February, 1911, the plaintiff and defendant entered into a new contract in writing, attached to the answer as Exhibit B, which superseded the first contract, and was in complete adjustment of all differences between the parties.

On the trial the plaintiff, upon examination, admitted the execution of the second contract, and sought to show by his own evidence that at the time of its execution there was a separate parol agreement (683) that plaintiff took the new contract only upon condition, to quote from plaintiff, "that he (the defendant) would carry it out satisfactorily, and if he would treat me right, then I would not claim my rights under the old one; but if he did not treat me right, I would hold him under the old contract."

The defendant objected to this evidence upon the ground that such contemporaneous parol agreement is not set up in the pleadings, and no such issue raised. To meet this objection, the plaintiff moved to amend the complaint so as to set up the alleged separate parol agreement, viz.: "That if the defendant treated him right and performed his part of the contract, then the plaintiff was not to press his claims under the old contract." His Honor, in his discretion, declined to allow the amendment. The plaintiff excepted.

The value of the amendment, had it been allowed, is very doubtful, as the alleged contemporary parol agreement is too indefinite and uncertain; but, in any event, the amendment would have necessitated trying the case under the second contract of 2 February, 1911, to ascertain if the defendant "had treated the plaintiff right" under that contract. This would have introduced during the trial new issues not raised by the pleadings and of which the defendant had no notice. *Carpenter v. Huffstetler,* 87 N. C., 273; *Grant v. Burgwyn,* 88 N. C., 95.

The allowance of the amendment was in the sound discretion of the judge below, and his action in refusing it is not reviewable. *Knott v. Taylor,* 96 N. C., 553.

The plaintiff might have pleaded this new matter, as to the contemporaneous agreement, by replication, but did not do so, and the refusal of the judge to allow the amendment to the complaint leaves no such issue raised by the pleadings. It being then admitted that the new contract superseded the old one sued on, the plaintiff was properly nonsuited.

There is another reason why the plaintiff cannot recover on the contract of 1907. Section 7 thereof conveys and assigns to the plaintiff one-half of all of the defendant's interest in a contract with John L. Dodge, which made a part of the contract sued on. That section practically created the plaintiff and defendant copartners in equal interest in the contract with Dodge. It appears that Dodge owned the 48,525 shares of the stock of the Johns Company, the sale of which was the subject-matter of the contract of 1907 between the plaintiff and the defendant. Dodge refused to perform his contract and failed to furnish the stock. That put an end to the selling agency created by the agreement between the plaintiff and the defendant.

(684) Afterwards plaintiff became the owner of that stock in the Johns Company, and, as such owner, entered into the contract with the defendant of 2 February, 1911, which necessarily superseded the contract sued on.

The judgment of nonsuit is

Affirmed.

*Cited: Sanford v. Junior Order,* 176 N.C. 448 (1c).

ALBERT C. CORPENING v. W. H. WESTALL ET AL.

(Filed 16 December, 1914.)

**1. Deeds and Conveyances—Lines and Boundaries—General Reputation—Remoteness—Evidence—Corroboration.**

Common reputation is competent evidence on questions of location of a given line or boundary of lands when it is of comparatively remote origin, existed before the controversy arose, and is supported by evidence of occupation and acquiescence tending to give the land some fixed and definote location; and when general reputation of this character is introduced upon the trial, evidence of the reputation existent at a subsequent period may be received by way of corroboration.

**2. Same—Sufficiently Remote.**

Where damages for wrongfully cutting timber on lands is made largely to depend upon the establishment of the true dividing line between adjoining owners, general reputation of an old marked line, claimed by one of the parties to be the true one, existing before the controversy arose, is competent which tends to show that this line existed as far back as the Civil War, and before; was then pointed out by old persons, now dead, as such; and thereupon it is further competent for a witness at the trial to testify that he had known this line as far back as 1800 as the line contended for, and that at that time the same general reputation was prevalent; and it is *Further held*, that the rejection of the evidence in such cases, being on the principal question presented and determinative of the issue, constitutes reversible error.

APPEAL by defendant from *Webb, J.*, at September Term, 1913, of BURKE.

Civil action to recover damages for wrongfully cutting timber on land claimed by plaintiff.

Verdict and judgment for plaintiff, and defendant excepted and appealed.

*J. T. Perkins for plaintiff.*

*Avery & Ervin and S. J. Ervin for defendant.*

HOKE, J. Plaintiff claimed the land in controversy under a deed from E. J. Ervin, clerk and master, to father of plaintiff, dated 17 January, 1848, and in which the northern line of plaintiff's (685) tract is described as follows: "Thence north 172 poles with Moore's line to a black oak on John Wakefield's line; thence east 72 poles with Wakefield's line to a Spanish oak; thence same course 56 poles to a chestnut on Joseph McGimsey's line," the northern line, shown on map, as claimed by plaintiff, being from a black-oak stump east to 9,

and offered evidence to show continuous occupation under said deed, but south of the *locus in quo*.

Defendant, owning land to north of plaintiff's tract, claimed under a grant of State to Robert and William Tate, dated 30 May, 1795, and mesne conveyances passing such title to defendant, one of the mesne owners being John Wakefield, who had executed one of the deeds in the line of defendant's title; said grant being represented on the map by the letters A, B, C, D; C, D being the south line of defendant's tract as claimed by him, and 50 poles south of plaintiff's northern line as contended for by him.

The land in controversy, therefore, from which defendant had cut the timber was between these two lines: black-oak stump to 9, to which plaintiff claimed, and the line C, D, parallel thereto and 50 poles further south, to which defendant claimed.

In order to show that the line C, D was the correct line, defendant offered evidence tending to show "that the line C, D was a marked line and had been pointed out by parties, now dead, both prior to and shortly after the Civil War, as the line of the Robert and William Tate grant, and also as the John Wakefield line, said John Wakefield being one of the immediate grantors under whom defendant claimed." And, in order to further strengthen the position that the John Wakefield line, called for in the plaintiff's deed, was the marked line C, D, defendant offered a witness, Joe Tate McGimsey, who testified that he had known the line C, D as a marked line since 1879.

Defendant then proposed to ask this witness if, prior to the institution of the suit and as far back as 1880, the line C, D was, by general reputation in the community, known and called by any certain name; and again, "By what name was the line on the map designated as the line C, D generally known and called?" Counsel stating that he proposed to show by this witness that, as far back as 1880, the line C, D was generally known and reputed to be the John Wakefield line. An objection by plaintiff was sustained, the evidence excluded, and exception duly noted. It is the well recognized principle in this State that evidence of common reputation will be received on questions of private boundary, the limitation being, "That such reputation had its origin comparatively remote; that it existed before the controversy, and that it attached itself (686) to some monument of boundary or natural object or is supported by evidence of occupation and acquiescence tending to give the land some fixed and definite location." *Sullivan v. Blount,* 165 N. C., pp. 7-11. And, on this subject, it has been further held, "That when there has been evidence offered of general reputation, sufficiently remote, as to the location of a given line or corner, evidence of the reputation

existent at a subsequent period and otherwise permissible may be received in evidence by way of corroboration." *Ricks v. Woodard,* 159 N. C., 647.

A correct application of the principles as stated and sustained in these opinions are, in our opinion, against the ruling of his Honor on the question presented. There were facts in evidence tending to show that the line C, D was a marked line as far back as the late Civil War, and before that, and was pointed out then by old persons, now dead, as the line of the William and Robert Tate grant and as the John Wakefield line; and, when it was proposed to show by the witness McGimsey that this same line was known by him to be a marked line as far back as 1880, and that the general reputation then prevailing was that it was the John Wakefield line, the evidence should have been received. On the facts presented, it was competent, as being sufficiently remote within the meaning of the decisions, and was clearly so as corroborative of evidence tending to show a much earlier origin of this general reputation. The evidence, therefore, was competent and, being on the principal question presented and determinative of the issue, we must hold that its rejection constitutes reversible error, entitling defendant to a new trial. It is so ordered.

New trial.

*Cited: McKay v. Bullard,* 219 N.C. 593 (p).

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BLUE RIDGE LAND COMPANY v. WILLIAM FLOYD.

(Filed 9 December, 1914.)

**1. Deeds and Conveyances—True Title—Color of Title—Possession—Presumptions—Interpretation of Statutes—Limitations of Actions.**

The occupation of lands is presumed in law to be under and in subordination to the true title until the contrary is made to appear (Revisal, sec. 386); and where the plaintiff, in an action to recover lands, has shown his title by proper grant from the State and mesne conveyances to himself, the presumption is, unless it is made to appear to the contrary, that the occupation thereof by others is under his title. Hence, when the defendant relies on a deed made to his ancestor as color, and adverse possession of others thereunder to ripen his title, it is necessary to show that their occupancy was under or connected with the deed under which he claims, or the presumption will obtain that they were under the true title shown by the plaintiff.

**2. Same—Tenants—Trials—Evidence—Questions for Jury.**

The plaintiff having shown a sufficient and connected title to the land in controversy in himself, it is necessary for the defendant, claiming by adverse possession under a deed to his ancestor, as color, to show a continuity of such possession for seven years; and it is held in this case that the possession by a tenant of his ancestor for one year, under his deed, and the occasional entry upon the land by his heirs at law after his death, for the purpose of cutting a few logs, is insufficient evidence of adverse possession in character and continuity to be submitted to the jury.

(687) APPEAL by plaintiff from *Cline, J.*, at May Term, 1914, of HENDERSON.

Civil action to recover land. On the issue as to title there was verdict for defendant. Judgment, and plaintiff excepted and appealed.

*Smith & Shipman and McNinch & Justice for plaintiff.*
*Staton & Rector and O. V. F. Blythe for defendant.*

HOKE, J. On the trial plaintiff introduced a grant from John D. Corn, dated 28 September, 1856, covering the land in controversy, and mesne conveyances passing this title to plaintiff.

Defendant introduced a deed from Solomon Jones to George Thomas, dated 11 January, 1872, also covering the said land; proved that his wife was a granddaughter of said George Thomas, and contended that he had matured title under said deed by adverse occupation for the time required for that purpose.

It is said in some of our decisions that the possession of land is presumed to be adverse; but that is only true when nothing else is shown but the mere fact of possession, as when it is sought to show title out of the State, a case presented in *Bryan v. Spivey,* 109 N. C., 57, and in which it was held: "That every possession of land is presumed to be in possessor's own title until the contrary is shown," a principle approved in the subsequent case of *Alexander v. Gibbon,* 118 N. C., 796, and in which it is stated in this way: "The law presumes possession unexplained to be adverse possession."

Where, however, it is shown that the title, having been granted by the State, is vested in a claimant by proper mesne conveyances, then, under our statute, Revisal, sec. 386, and several decisions rendered since its enactment, as in *Bland v. Beasley,* 145 N. C., 168; *Monk v. Wilmington,* 137 N. C., 322, the law will presume the occupation of land to be "under and in subordination to the true title until the contrary is made to appear." It may not be necessary to establish this in any definite or precise way, as by giving formal notice of the hostile nature of the occupation. This could, doubtless, be inferred from facts showing that the

occupant was in under a deed or was openly exercising over it in some way the rights of ownership, but there must be some facts (688) in evidence from which the inference can be reasonably made that the possession of land is hostile to and not in subordination to the true title. And our decisions further recognize that in order to establish a title by actual occupation under color, the possession or occupation must be under or in some way connected with the color or title claimed. Revisal, 2382; *Barrett v. Brewer,* 143 N. C., 88.

There is much evidence offered in this case tending to show that, since the execution of the deed from Solomon Jones to George Thomas, being the deed under which the defendants assert their claim, this land has been occupied by Abe Shipman and others; but, on careful perusal of the record, we do not find any testimony tending to show that such occupation was under or in any way connected with this Thomas claim except that of one Cook, who was shown to have rented the land from George Thomas in '81 or '82 or '83, and to have held it as such tenant for one year.

The later possession by the Thomas heirs themselves, being only an occasional entry for the purpose of cutting a few logs, was not of a character to establish title by adverse possession. *McLean v. Smith,* 106 N. C., 172; *Gudger v. Hensley,* 82 N. C., 482. And on the facts as they are now presented, in order to defeat the title vested in plaintiff company under its grant and written deeds, it was necessary for defendants to show seven years continuous possession in the assertion of ownership under the Thomas claim. The evidence, as stated, not showing or tending to show that the occupation of the third persons, other than Cook, was in any way connected with this claim, the presumption is that they held under the true title, and we are of opinion that plaintiff was entitled to the instruction prayed for by him: "That there was no evidence that Abe Shipman or any other occupant of the Payne House, except Cook, was in possession of the land in controversy at any time, claiming the same under George Thomas."

For the error indicated, plaintiff is entitled to a new trial of the cause, and it is so ordered.

New trial.

*Cited: Land Co. v. Floyd,* 171 N.C. 544, 545 S.c.; *Vanderbilt v. Chapman,* 175 N.C. 14 (1c); *Moore v. Miller,* 179 N.C. 398 (1d); *Land Co. v. Potter,* 189 N.C. 62 (1c).

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4. *Deeds and Conveyances—Timber Deeds—Adverse Possession—Admitted Into Possession—Possessory Action.*—*Semble*, the possession of land by the owner is not regarded as adverse to the claim of a vendee of the timber growing thereon, under a separate deed, or to a purchaser of his title to the timber at an execution sale thereof, nothing else appearing; and under the circumstances of this case, it appearing that the purchaser at the execution sale was admitted into the possession by the owner of the lands, and thereafter was prevented by the owner of the lands from exercising his rights under his timber deed, it is held

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that the position is not available to the owner of the lands that his possession put the purchaser to his action therefor. *Williams v. Parsons*, 529.

5. *Pleadings—Interpretation—Cause of Action.*—Under our Code system of pleading, actions should be tried upon their merits, construing every intendment in favor of the pleader; and a complaint may not be overthrown by demurrer if in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, however inartificially it may have been drawn, or uncertain, defective, or redundant may be its statements. *Hoke v. Green*, 594.

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APPEAL AND ERROR.

1. *Slander — Libel—Qualified Privilege—Malice—Publication—Appeal and Error.*—In this action of slander it is held that defendant's answer to a letter written by the plaintiff's attorney or agent, denying a claim made for shortage in weights of a shipment of hay, etc., is one of qualified privilege, requiring proof of defendant's malice to sustain the action, and the evidence showing that the defendant believed the truth of his statement complained of, the action cannot be maintained. This result will not be disturbed on appeal because of the fact that the trial judge, erroneously holding that the letter to the attorney was not a publication, dismissed the action upon a wrong ground. *Brown v. Lumber Co.*, 9.

2. *Reference—Report—Omission of Findings—Approval of Trial Judge—Conclusions of Law—Appeal and Error.*—Where the report of a referee fails to find a material fact necessary to the determination of the controversy, and his report has been approved by the court without further finding, and the judgment appealed from, the affirmation of the report by the lower court will have no conclusive effect, and this Court will remand the case, to the end that the necessary fact be found; and while the conclusions of law found by the referee in this case seem to regard the fact as found, the Court will not supply the omission or pass upon the matter. *French v. Richardson*, 41.

3. *Limitations of Actions — Reference—Debtor and Creditor—Application of Payment—Intent—Trials—Evidence.*—In an action by the mortgagor against the mortgagee for an account, etc., it appeared that the parties had various and sundry dealings, the defendant mortgagee keeping the accounts, and there was evidence tending to show that certain credits were made by him on the mortgage note in time to prevent the running of the statute of limitation in plaintiff's favor, with conflicting evidence as to whether the plaintiff had authorized these credits to be made upon the note, some of it tending to show that the plaintiff had contended that the credits should be in a larger

APPEAL AND ERROR—*Continued.*

amount. *Held*, the direction of the creditor as to the application of his payment may be express or deduced from circumstances tending to show his intention; and in this case the question was one of fact as to the authority of the defendant creditor to enter the credit upon the note, which should have been passed upon and determined by the referee. *Ibid.*

4. *Estate for Life—Reinvestment—Findings of Fact—Appeal and Error.*—In this case the plaintiff contended that she took a fee-simple estate under the construction of a will devising lands to her, and requested that should she be held to take a life estate, the lands be sold and reinvested for her. The lower court correctly holding, upon the evidence, that the plaintiff took only a life estate, found as facts that her present income was sufficient for her support in her condition of life, that her income would be increased by the sale, etc., but that she would be the only one materially benefited, and refused to order the lands sold; and on appeal it is held that the Supreme Court is bound by these findings, and no error is found. *Miller v. Harding*, 53.

5. *Appeal and Error—Assignments of Error—Requisites.*—Assignments of error must point out concisely the substance of the rulings on the trial excepted to, or they will be disregarded on appeal. *Haddock v. Stocks*, 70.

6. *Courts—Arguments of Counsel — Per Curiam Opinions — Statement of Fact—Jury—Appeal and Error.*—It is not objectionable for counsel in arguing propositions of law to the court, in the presence of the jury, to cite a *per curiam* opinion by the Supreme Court, and state the facts in that case, in his endeavor to show the similarity between them and the case at bar, and to contend, for that reason, that the *per curiam* opinion is authority for his position. *Betts v. Telegraph Co.*, 75.

7. *Appeal and Error—Premature Appeals—Fragmentary Appeals—Objections and Exceptions—Practice.*—An appeal will not lie from the refusal of the trial court to dismiss an action, the same being premature; nor by one of several defendants, for then the appeal will be fragmentary. The practice is for the movant to enter an exception which will preserve his position in the event of an adverse judgment in the lower court. *Griffin v. Cupp*, 96.

8. *Appeal and Error—Brief—Exceptions Abandoned—Rule of Court.*—The brief of appellant must sufficiently state the assignments of error relied upon and give some reason or argument in support of them, or the assignments are deemed to have been abandoned, under Rule 34. *Lynch v. Mfg. Co.*, 98.

9. *Measure of Damages—Wrongful Death—Net Value of Life—Children—Trials—Evidence.*—In an action to recover damages for a wrongful death the present net value of the life wrongfully taken determines the measure of damages recoverable, and evidence tending to show the number and ages of the children of the deceased is incompetent; and where the judge in his charge has correctly stated in general terms that the jury should award a fair and just compensation for the pecuniary injury, and then specifically instruct them to find from the evidence what the earnings of the deceased would have been during the balance of his life, the instruction is held for reversible error. *Ibid.*

10. *Appeal and Error—Assignments of Error—Rules of Court.*—Where error is assigned on appeal as to admissibility of evidence, referring to the

APPEAL AND ERROR—*Continued.*

page of record, or to the charge of the court, referring only to appellant's certain numbered exception, it does not come within the requirements of the rule of the Supreme Court, and will not be considered. The evidence excepted to should be set out in the assignment of error, as also the paragraph of the charge which is relied upon for error. *Carter v. Reeves*, 131.

11. *Appeal and Error—Assignments of Error—Trials—Instructions—Special Requests.*—Error assigned for a failure of the court to instruct the jury upon certain presumptions of law arising from the evidence on a matter at issue will not be considered, for if fuller instructions are desired they should be set out in a prayer for special instruction. *Ibid.*

12. *Appeal and Error—Abstract Questions—Agreements.*—In this case the purchaser at a judicial sale of lands having paid the purchase price subsequently to the rendition of an order requiring it, and from which this appeal is taken, and it further appearing from the record that this was done to abide the disposition of the appeal, and if in favor of the appellant, the purchaser, the money is to be refunded, it is held that the appeal does not present an abstract proposition which this Court will not pass upon. *Davis v. Pierce*, 136.

13. *Appeal and Error—Improper Remarks of Court—Objections and Exceptions—Presence of Jury.*—The appellant may not urge for error on appeal improper remarks of the trial judge without duly noting an exception which appears of record; and certainly when it appears, as in this case, the remarks were not made in the hearing of the jury, or where the appellant is the plaintiff, and has not shown he has a cause of action. *Yellowday v. Perkinson*, 144.

14. *Appeal and Error—Briefs—Assignments of Error Abandoned—Rules of Court.*—Assignments of error not mentioned and discussed in the brief of appellant are taken as abandoned on appeal, under Rule 34, and it is pointed out by the Court that upon mature consideration of counsel in making their briefs it is well for them not to set out useless assignments, so that the attention of the Court may be given to the material propositions of law presented in the appeal. *Tilghman v. R. R.*, 163.

15. *Appeal and Error—Evidence—Questions—Objections and Exceptions.*—Where questions are ruled out as evidence, it must be made to appear of record what the expected answers will be, so that the Court may see their materiality and relevancy, or exceptions taken thereto will not be considered. *Ibid.*

16. *Appeal and Error—Trials—Evidence—Facts Admitted.*—The exclusion of evidence relating to facts admitted at the trial is not erroneous. *Dunnevant v. R. R.*, 232.

17. *Trials—Verdicts—Motion to Set Aside—Courts—Discretion—Appeal and Error.*—Motions to set aside a verdict on the ground that it is against the weight of the evidence should be addressed to the conscience and sound discretion of the trial judge, and will not be considered on appeal, in the absence of the abuse of this discretionary power. *Pruitt v. R. R.*, 246.

18. *Reference — Evidence — Approval of Trial Judge—Appeal and Error.*—Exceptions to a report of a referee, supported by competent evidence and approved by the trial judge, are not reviewable on appeal. *Montcastle v. Wheeler*, 258.

APPEAL AND ERROR—*Continued.*

19. *Bills and Notes — Holder — Due Course—Presumptions—Trials—Erroneous Instructions—Appeal and Error.*—The possession of a negotiable instrument by the indorsee, or by a transferee where indorsement is not necessary, imports *prima facie* that he is the lawful owner of the paper, and that he acquired it before maturity, for value, in the usual course of business, without notice of any circumstance impeaching its validity; and where fraud is not alleged or suggested, it is error for the trial judge to instruct the jury that such holder is *prima facie* one in due course, and then add, "that is, if he takes it in good faith, for value, without notice of infirmity, and is the owner thereof and entitled to sue thereon." *Trust Co. v. Bank*, 260.

20. *Justice of the Peace — Judgment Against One Defendant — Appeal — Parties—Appeal and Error.*—Where in an action cognizable in the court of a justice of the peace two insurance companies are sued for the payment of a matured policy, alleging joint responsibility thereon, and judgment is rendered against both of them, with appeal to the Superior Court by only one, it is error for the trial judge, on motion of the plaintiff, to order that the other defendant be made a party in the court, as its presence is unnecessary. *Morgan v. Benefit Society*, 263.

21. *Reference — Findings of Fact — Evidence—Confirmation of Court—Appeal and Error.*—The findings of fact by the referee made upon adequate and responsive evidence, and concurred in by the trial judge, are not open to review on appeal. *Simmons v. Groom*, 271.

22. *Contracts — Interpretation — Timber Deeds—Ultimate Payment—Time for Cutting — Reasonable Time — Appeal and Error — Premature Appeal.*—Where a written contract for the sale of standing timber definitely provides for the payment of a stated sum as a balance due thereon, with further provision that the purchaser may pay for the timber by removing it from the lands at a certain rate per thousand, rendering a monthly account at certain times, and that he shall "cut the timber as a whole within the time mentioned in the timber deeds (purchased by him), and as much sooner as he reasonably can, by correct interpretation the method of payment by cutting and removing the timber was given for the benefit of the purchaser, requiring that he be reasonably diligent in order to avail himself thereof; and where he has been neglectful of his opportunity by failing for long periods of time to cut and remove the timber, permitting, in some instances, the time to expire within which his vendor was given to cut in his timber deeds; and the ultimate obligation of the purchaser to pay the balance of the purchase price being absolute, it is not open to him, in the vendor's action to recover the balance of the purchase price, to successfully maintain the position that the contract permitted him the full time specified in the timber deeds in which to cut the timber and make the required payment, and that the action, having been brought within that time, was premature and should be dismissed. *Hardison v. Lumber Co.*, 136 N. C., 173, cited and distinguished. *Ibid.*

23. *Appeal and Error — Unanswered Questions—Prejudicial Evidence — Harmless Error.*—Where the plaintiff sues to recover of the defendant his commissions of a certain per cent on the sales of goods he has made for defendant under contract, an immaterial answer to a question as to his commissions on a larger amount of sales than he

APPEAL AND ERROR—*Continued.*

claims cannot be prejudicial to the defendant or held as error on appeal. *Peyton v. Shoe Co.*, 280.

24. *Appeal and Error—Fragmentary Appeal.*—An appeal from the construction of a deed to standing timber, reserving the question of alleged trespass by reason of wrongful cutting of timber below the sizes specified and conveyed, is fragmentary and will be dismissed. *Gilbert v. Shingle Co.*, 286.

25. *Evidence — Irrelevant Matter — Appeal and Error.*—The admission of irrelevant evidence, not prejudicial to the appellant, will not be held for error. *Ferebee v. R. R.*, 290.

26. *Appeal and Error—Error as to One Issue—Trial—Damages—Evidence.* Where on appeal of an action to recover damages for a personal injury no error is found as to the issues of negligence and contributory negligence, and the case is sent back for trial solely on the issue of damages, instructions bearing upon the first two issues, as, in this case, the conduct of the plaintiff on the witness stand, are properly refused. *Ibid.*

27. *Liens—Contracts—Material Men—Trials—Amount Due—Instructions—Appeal and Error—Harmless Error.*—In an action by the material man against the owner of a dwelling to recover the amount due him by the contractor for materials furnished and used in the construction of the building under Revisal, sec. 2020, and there is conflicting evidence as to the amount due by the owner to the contractor on his contract at the time of receiving the statutory notice, it is erroneous for the trial judge to charge the jury upon the question of plaintiff's recovery, without laying down any rule for ascertaining the amount due on the contract, or furnishing a guide for them in reaching their conclusion upon the alternative propositions contained in the instruction; but when taking the charge as a whole, it may be seen that instructions on this point were correctly given, and the jury understood them, an incorrect instruction appearing in a part of the charge will not be held for reversible error. *Bain v. Lamb*, 304.

28. *Appeal and Error — Objections and Exceptions — Effect of Evidence — Record—Instruction.*—Exceptions made upon the trial to the effect of evidence and not to its competency will not be favorably considered on appeal, when the charge is not excepted to or set out in the record, the presumption being in favor of the correctness of the charge of the court as to the effect of the evidence admitted. *Miller v. Williams*, 315.

29. *Appeal and Error—Divorce—Improvident Appeal.*—Upon appeals by the wife and children in separate actions, the appeal of the children will be considered as improvidently taken if the relief sought is identical with that afforded under the judgment obtained in the action of the mother. *Ibid.*

30. *Divorce a Mensa — Husband's Misconduct — Provocation — Statutes — Trials — Questions for Jury — Former Appeal — Appeal and Error — Weight of Evidence—Courts.*—In this action for divorce *a mensa et thoro*, brought by the wife, it is *Held*, that the separate issues as to the husband's conduct and the wife's provocation are sufficiently raised by the pleadings, Revisal, sec. 1562 (4), and the verdict of the jury thereon in the plaintiff's favor, rendered upon competent evidence and correct rulings of law, will not be disturbed; the question of the suffi-

APPEAL AND ERROR—*Continued.*

ciency of the evidence to sustain the verdict is one that should have been addressed to the discretion of the trial judge; and it is *Further held*, that the former appeal in this case, deciding that the wife was not entitled to alimony *pendente lite*, did not affect the right of the plaintiff to introduce further evidence in her favor upon the issues raised. *Page v. Page*, 346.

31. *Appeal and Error—Objections and Exceptions—Courts—Statements—Arguments—Briefs.*—A statement made by the judge upon the trial, excepted to but not argued, is deemed to have been abandoned. *Ibid.*

32. *Divorce a Mensa—Custody of Child—Former Decision—Appeal and Error—Improvident Appeal.*—In this suit for divorce *a mensa* it was directed on a former appeal (166 N. C., 90) that the lower court retain jurisdiction of a minor child of the marriage until the hearing, etc., and to refrain from changing the custody of the child or permitting it to be carried out of the State, and the judgment of the lower court having already been sustained as in accordance with the former appeal, this appeal becomes irrelevant and improvident. *Page v. Page*, 350.

33. *Pleadings — Deeds and Conveyances — Insufficient Description—Appeal and Error.*—In an action upon a note given for the purchase price of lands and to foreclose a mortgage given thereon to secure it, the position is not open to the defendant that the description in the mortgage was insufficient, when it is not denied in the answer that the mortgage covered the *locus in quo*. *Crowell v. Jones*, 386.

34. *Trials — Verdict, Directing — Nominal Damages — Costs — Appeal and Error—Harmless Error.*—The failure of the jury to regard the instruction of the trial judge for them to allow nominal damages upon the issue of the defendant's counterclaim, which only had significance upon the question of costs, is held immaterial, the plaintiff being entitled to recover costs by reason of the verdict of the jury in his favor on the other issues involved in the action. *Ibid.*

35. *Deeds and Conveyances—Covenants of Seizin—Indefeasible Fee—Breach—Measure of Damages—Verdicts.*—A covenant of seizin is ordinarily one for an indefeasible title, and being *in præsenti*, a right of action accrues to the covenantee for its breach at the time he receives his conveyance; and unless he has bought the paramount title for a less amount, the rule of damages is the amount of the purchase price, where there has been an entire failure of title, and a proportionate diminution when the failure goes only to a part of the property, the purchase price being the basis of estimate, and the proportion being that of value and not of quantity; and the trial court having correctly charged this principle with relation to defendant's counterclaim, in plaintiff's action to foreclose a mortgage given for the purchase price, it is held that a verdict in plaintiff's favor upon the issue will not be disturbed. *Crowell v. Jones*, 386.

36. *Trials — Verdict, Directing — Nominal Damages — Costs — Appeal and Error—Harmless Error.*—The failure of the jury to regard the instruction of the trial judge for them to allow nominal damages upon the issue of the defendant's counterclaim, which only had significance upon the question of costs, is held immaterial, the plaintiff being entitled to recover costs by reason of the verdict of the jury in his favor on the other issues involved in the action. *Ibid.*

APPEAL AND ERROR—*Continued.*

37. *Superior Courts—Verdicts Taken by Clerks of Court—Agreement of Counsel—Notification to Counsel—Judgments Signed Out of Term—Appeal and Error.*—By agreement of counsel, the clerk of the Superior Court can represent the judge in taking the verdict of the jury; and when so done, and counsel representing one of the parties are not present, owing to the failure of the deputy clerk to notify them as he had promised to do, the validity of the verdict is not thereby affected, especially when no prejudice to the complaining party has been shown. Agreements of counsel that the clerk should take the verdict of the jury and judgment be mailed to the judge to be signed as out of term is discussed and disapproved, though not held for error. *Barger v. Allen*, 362.

38. *Actions at Law — Titles — Equity — Interpretation of Statutes—Appeal and Error—Cause Remanded—Costs.*—Though this action is denominated a suit to remove a cloud upon plaintiff's title to land, it appears that the cloud complained of was put thereon by the plaintiff itself, and the case on appeal is therefore treated by the Court as a proceeding, under Revisal, sec. 1589, to determine the title to the property; and it appearing that the court below erroneously granted defendant's motion to nonsuit, where, under the facts shown, a decree in defendant's favor should have been entered, the case is remanded to set aside the nonsuit, and the court below is directed to enter the decree in accordance with the opinion and to tax plaintiff with costs of both courts. *Guilford v. Porter*, 366.

39. *Appeal and Error—Answers to Issues—Immaterial Exceptions.*—It becomes unnecessary on plaintiff's appeal to consider his exception to the refusal of the trial court to submit an issue upon the last clear chance, in a personal injury case against a railroad company, where the jury have answered the issue as to defendant's negligence in its favor upon the evidence and under correct instructions as to the law. *McNeill v. R. R.*, 390.

40. *Pleadings — Trials — Instructions—Appeal and Error.*—In an action to recover damages of a railroad company for the negligent killing of plaintiff's intestate by its train, a requested instruction as to the defendant's duty to keep a lookout was properly refused, there being no allegation in the complaint to that effect. *Ibid.*

41. *Pleadings—Variance—Appeal and Error—Objections and Exceptions—Trials—Instructions.*—The objection by the defendant that there has been a variance between the allegations of the complaint and the proof of the plaintiff, in his action, and that recovery has been permitted him upon evidence of an entirely distinct and independent theory than that alleged, must be taken to the evidence when it is offered, and when no objection is then made, an exception to the charge of the trial judge because he stated that phase of the plaintiff's contention is untenable on appeal. *Green v. Biggs*, 417.

42. *Pleadings — Variance — Evidence—Impeachment—Appeal and Error.*—Where the defendant has not excepted to plaintiff's evidence claimed to be at variance with the allegations of the complaint upon the measure of damages, but has introduced the paragraph of the complaint relating thereto as substantive evidence for the purposes of impeachment, he will not be permitted on appeal to rely upon the variance between the allegation and proof for the purposes of obtaining another trial. *Ibid.*

APPEAL AND ERROR—*Continued.*

43. *Railroads — Federal Employers' Liability Act — Master and Servant — Negligence — Common Law—Last Clear Chance—Trials—Instructions —Appeal and Error.*—The Federal Employers' Liability act was passed for the benefit of railroad employees, to afford them a recovery of damages when under the common law their contributory negligence would have totally deprived them of the right; and where there is evidence that an employee of the defendant has placed himself in a position of danger on the track in front of an approaching train, but that the injury complained of would not have been sustained had the employees on defendant's train kept a proper lookout ahead and had performed the duties required of them under the circumstances in stopping the train, the common-law doctrine of the last clear chance is applicable; and a requested instruction to the effect that the defendant would not be liable if it did all it reasonably could to stop the train in time, after seeing the intestate's danger, is properly refused. *Gray v. R. R.*, 433.

44. *Courts — Findings of Fact — Consent — Evidence—Appeal and Error.*— Findings of fact by a court, under an agreement of the parties, supported by competent evidence, or evidence to the admission of which no objection has been duly made, are conclusive on appeal. *Gilmore v. Smathers*, 440.

45. *Limitation of Actions—Adverse Possession—Color of Title—Instructions —Charge, How Construed — Appeal and Error — Harmless Error.*— Where adverse possession under color of title is relied upon by a defendant in an action to recover lands, a charge of the trial judge upon relevant evidence will not be held as reversible error because he did not, in exact terms, instruct the jury that "possession is making the use of the land to which it is best suited," when it appears that he immediately after the charge given on this phase and in the same connection explained the meaning of that expression to the jury, so that they could not have misunderstood him, and the entire charge upon the question was a correct application of the law to the evidence. The principles of law applicable to the question of adverse possession defined by WALKER, J. *Reynolds v. Palmer*, 454.

46. *Appeal and Error—Evidence—Objections and Exceptions.*—An objection to an answer of a witness to a question, which is made in general terms, will not be sustained on appeal when it appears that parts of the answer were competent as evidence. *Smathers v. Hotel Co.*, 469.

47. *Trials—Evidence—Intervenors—Appeal and Error—Objections and Exceptions.*—Where there are two intervenors, each claiming to be a holder in due course of separate notes secured by a deed of trust fraudulent as to creditors of the maker, who are the plaintiffs in the action, exceptions by the plaintiffs, referring solely to matters relating to one of the intervenor's, cannot be considered on the appeal as to the other. *Ibid.*

48. *Appeal and Error—Lost Notes—Trials—Argument of Counsel.*—Objections to counsel referring on the trial to certain notes, introduced on a former trial and since lost by the clerk of the court, are held to be without merit. *Ibid.*

49. *Justice's Courts—Appeal—Recordari—Laches — Findings of Fact—Appeal and Error—Court's Discretion.*—Where, upon application to the Superior Court for a writ of *recordari* to issue to a court of a justice

APPEAL AND ERROR—*Continued.*

of the peace to bring up an appeal, the judge finds as facts, upon evidence, that the appellant has been guilty of laches in not giving the legal notice of appeal (Revisal, secs. 1491, 1492) and otherwise neglectful in failing to look after his appeal, and refuses to grant the writ, his judgment will not be disturbed in the Supreme Court; and it is *Held*, that praying for the appeal and the payment of the fees in the justice's court by the appellant are not, in themselves, sufficient to entitle him to the order, as a matter of right, or to take the matter out of the discretion of the trial judge. *Tedder v. Deaton*, 479.

50. *Judgments — Default and Inquiry — Breach of Contracts — Lumber — Measure of Damages—Speculative Profits—Appeal and Error.*—A judgment by default and inquiry for the failure to file answer in an action to recover damages for the breach of a contract in the failure of the defendant to deliver lumber sold, the cause of action is established by the judgment, leaving only the inquiry as to damages to be determined; and where the judge has correctly instructed the jury that the rule for the admeasurement of damages was the difference between the contract price and the market price at the place and time appointed by the contract for the delivery, the question is not presented, on the defendant's appeal, as to whether the plaintiff should be permitted to recover speculative profits, and no error is found. *Lumber Co. v. Furniture Co.*, 565.

51. *Court's Discretion—Verdicts—Motions—Weight of Evidence.*—A motion to set aside a verdict of the jury as being against the weight of the evidence is addressed to the sound discretion of the trial judge, and in the absence of evidence of its abuse is not reviewable on appeal. *Howell v. Solomon*, 588.

52. *Appeal and Error—Removal of Causes—Federal Courts—Order—Refusing Removal.*—An appeal presently lies from an order denying an application, upon proper petition and bond, to remove a cause to the Federal court for diversity of citizenship under the Federal removal act. *Pruett v. Power Co.*, 598.

53. *Same — Trial Courts — New Trial—Interpretation of Statutes.*—Where the defendant has filed a sufficient petition and bond for the removal of a cause from the State to the Federal court on the ground of diversity of citizenship, and appeals from an order of the trial court refusing to remove the cause, the appeal involves the right of the State court to try the action, including in its scope all the issues presented in the record; and pending the appeal it is error for the trial court to proceed with the trial and determine these issues, over the objection of the defendant; and when this is done, and the appeal has regularly been prosecuted in accordance with the rules of law and practice regulating appeals, a new trial will be ordered, though the Supreme Court may have affirmed the order of the trial court, appealed from, retaining the cause. Revisal, sec. 602. *Ibid.*

54. *Appeal and Error—Trial Courts—Proceedings Stayed—Interpretation of Statutes.*—An appeal duly taken and regularly prosecuted operates as a stay of all proceedings in the trial court, relating to the issues included therein, until the matters are determined in the Supreme Court. Revisal, sec. 602. *Ibid.*

55. *Appeal and Error—Objections and Exceptions—Parol Evidence—Written Contracts.*—The rule that parol evidence is inadmissible to vary

APPEAL AND ERROR—*Continued.*

or contradict a written instrument, etc., must be invoked in some proper way; and it is not available to the party relying thereon when he is not the appellant in the action. *Sykes v. Everett*, 600.

56. *Railroads — Excessive Speed—Public Crossings—Negligence—Automobiles—Guests—Last Clear Chance—Trials—Issues—Complex Instructions—Appeal and Error.*—In an action to recover damages of a railway company caused by its train in running upon an automobile in which the plaintiff was riding as a guest, at a public crossing, where the driver of the machine was attempting to cross at the time, there was evidence submitted to the jury upon the question of whether the defendant's train was being run at an unlawful speed, but the case was tried upon the theory, (1) that the defendant had failed to give notice of its approach, and (2) that the engineer thereon, by the exercise of proper care, could have stopped the train in time to have avoided the injury after he had seen or should have seen the plaintiff's danger. The evidence as to the excessive speed of the defendant's train was not relied on as a distinct ground of action, but in support of the other issues; and construing the charge as a whole it is *Held*, in this case, that the principles of law were correctly charged by the court as applicable to the evidence in their relation to the issues of negligence and last clear chance, and not objectionable as making the plaintiff responsible for any negligent act of the driver of the car; and it is *Further held*, that a new trial will not be awarded on a theory that a charge was more complex than necessary and that the jury did not understand it. *Bagwell v. R. R.*, 611.

57. *Appeal and Error — Record — Trials — Instructions—Exceptions—Presumptions—Supreme Court—Discretionary Powers.*—When exceptions are taken to the refusal of the trial judge to give proper instructions of law upon the evidence and issues in controversy, which were duly requested, it must appear of record that these instructions were not substantially given in the charge; and when the record does not set out the charge it will be presumed that the court correctly charged the law applicable to the case, though the Supreme Court, acting under its discretionary powers, may order the charge to be sent up when it thinks that a clear miscarriage of justice may thereby be prevented. *Hornthal v. R. R.*, 627.

58. *Appeal and Error — Brief—Argument—Exceptions Abandoned—Rules of Court.*—Mere reference to exceptions of record made in the brief, without argument or citation of authority, is not a compliance with Rule 34, Supreme Court, which requires that authority or reason be given to support the exceptions, or they will be considered as abandoned. *Ingle v. R. R.*, 636.

59. *Trials—Negligence—Instructions—Appeal and Error—Harmless Error.* The plaintiff's intestate, a brakeman on defendant's train, was caught between the tank of the engine and box car and mashed to death, and it is *Held*, that the court in his general charge upon the question as to whether the intestate went between the cars without the knowledge of defendant and against its orders, etc., instructed more favorably to the defendant than it had specially requested, and no reversible error is found. *Ibid.*

60. *Trials—Issues—Answer—Instructions—Appeal and Error — Harmless Error.*—Where in an action to recover damages for a personal injury

APPEAL AND ERROR—*Continued.*

an issue as to contributory negligence has been found in defendant's favor, the instructions of the court upon this issue become immaterial, so far as the defendant is concerned. *Ibid.*

61. *Automobiles — Negligence—Trials—Issues—Proximate Cause—Instructions—Appeal and Error.*—In an action to recover damages for injuries alleged to have been sustained by the negligence of the defendant, while driving an automobile, in running over the plaintiff, it is error for the trial judge to instruct the jury to answer the issue as to defendant's negligence in the affirmative, if the evidence satisfied them, by its greater weight, that the machine was being run in a negligent manner; for this eliminated the question of proximate cause; and when it appears that the error was not cured by construing the charge as a whole, it is reversible error. *Clark v. Wright*, 646.

62. *Trials—Instructions—Verbal Requests—Appeal and Error.*—The trial judge has the right to ignore a prayer for special instructions when not reduced to writing, and an exception to his doing so will not be considered on appeal. *Linker v. Linker*, 651.

63. *Excessive Judgments—Lands in Controversy—Pleadings—Appeal and Error.*—The lands in this controversy admittedly being those embraced within certain boundaries as shown on a map thereof, and the judgment of the court having included more lands than described in the pleadings, and which were not in controversy, the judgment is accordingly modified and costs of appeal taxed equally upon the appellant and appellee. *Hall v. Jones*, 664.

64. *Judgments—Motions to Set Aside—Excusable Neglect—Facts Found—Legal Inference—Appeal and Error.*—The findings of fact by the trial judge upon which he bases his decision on motion to set aside a judgment for excusable neglect are conclusive of the facts found, but not as to matters of law or legal inference arising therefrom. *Pierce v. Eller*, 672.

65. *Same — Old Age—Pleadings—Lands—Bond for Possession—Default.*—It is required of a party litigant that he shall give his case such attention as a man of ordinary prudence gives to his important business, and that he must not sleep on his rights. Hence, setting aside by the trial judge of a judgment obtained against a party on the ground that he was old and feeble will be reversed on appeal, when it appears from the facts found that the judgment in question was one by default in an action against him to recover lands in his possession, and the action had been pending several years without answer filed or bond given to retain possession; that there was no finding that the party was not of sound mind and nothing appearing to show why these necessary steps had not been taken. *Ibid.*

APPOINTMENTS. See Officers.

ARBITRATION.

*Corporations—Distribution of Assets—Act of Treasurer—Award and Satisfaction—Estoppel—Credits.*—In an action by a corporation and some of its stockholders for dissolution, and against its treasurer for an accounting and distribution of its assets among the stockholders, it is held that the treasurer cannot successfully plead accord and satisfaction by showing that he, of his own authority, had sent statements and checks to the stockholders for their distributive shares in the

ARBITRATION—*Continued.*

assets, which had been cashed by them, for the treasurer's accounting should have been made to the corporation, which cannot be estopped by his action; when the corporation is not indebted, and not otherwise, he is entitled to a credit in the settlement for the sum he has thus distributed. *Montcastle v. Wheeler*, 258.

ARGUMENT OF COUNSEL. See Trials, 88.

ATTORNEY. See Libel and Slander.

AUTOMOBILES. See Negligence, 12; Insurance, 12.

AWARD. See Arbitration.

BANKRUPTCY.

1. *Contracts — Debtor and Creditor — Bankruptcy — Promise—Consideration.*—A promise to pay a debt barred by bankruptcy of the debtor is upon a sufficient consideration. *Cauley v. Dunn*, 32.
2. *Corporations — Unpaid Subscriptions — Trustee in Bankruptcy — Right of Action.*—A trustee in bankruptcy of a corporation may, since the amendment to the bankruptcy act of 1910, maintain an action against the shareholders of the corporation to compel payment of their unpaid subscriptions to its stock to the extent necessary to protect its unpaid creditors; and he is not bound by any illegal acts of the corporation with respect to the issuance of the shares. *Bernard v. Carr*, 481.
3. *Same — Bankrupt Courts—Orders—State Courts—Collateral Attack.*—Where upon petition filed by the trustee of a bankrupt corporation in proceedings in the Federal court, a citation is issued to a stockholder to show why an assessment should not be made against him to collect the unpaid amount of his subscription, and the trustee is authorized to bring his action in the State court for the purpose of enforcing payment, and these proceedings appear to be regular in all respects, the validity thereof cannot be questioned in the State courts. *Ibid.*

BANKS AND BANKING. See Bills and Notes, 2, 3.

BETTERMENTS. See Statutes, 42; Mechanics' Liens, 7.

BILLS AND NOTES.

1. *Contracts—Bills and Notes—Parol Evidence—Contradiction.*—Under the doctrine that the terms of a written contract may not be varied by parol, it is incompetent to show by parol, in the absence of fraud and mutual mistake, that at the time of making a note, payable at a certain time, it was agreed between the parties that the maker should pay it in small amounts or after he should have recovered from bankruptcy. *Cauley v. Dunn*, 32.
2. *Bills and Notes—Negotiable Instruments—Banks and Banking—Holders in Due Course—Custom—Evidence.*—Where the evidence tends to show that a foreign bank is a holder of a draft in due course and has sent it through its correspondent banks for collection, a custom of charging back unpaid drafts by the forwarding bank to its customers may not be shown by one draft which had been charged back, which was in no wise connected with the transaction involved in the suit; nor can the custom of the collecting bank in this respect be received

as evidence of the custom of the forwarding bank. *Lumber Co. v. Childerhose*, 34.

3. *Bills and Notes—Negotiable Instruments—Banks and Banking—Holders in Due Course — Discount — For Collection — Bills of Lading Attached—Trials—Instructions.*—In this case there was evidence that a foreign bank discounted a draft, bill of lading attached, placed the money to the credit of the drawer, who checked it out, and then sent the draft to a Philadelphia bank for collection, from whence it reached the local bank of the drawee and was paid; but before remittance made the funds were attached by the drawee. The foreign bank interpleaded and the plaintiff maintained that from the amount the interpleader received on the draft and from its custom to charge it was evidently a charge made for collection and not a discount of the paper. *Held*, the instruction of the court defining a holder in due course is correct (Revisal, 2201); and the rights of a purchaser of a draft with bill of lading attached defined in the instructions are within the principles of *Mason v. Cotton Mills*, 148 N. C., 498; and the charge is further approved upon the question of whether or not the interpleader was a holder in due course, or the transfer was made for collection or a transfer in order to secure the bank for money advanced. *Ibid.*

4. *Bills and Notes—Holder—Due Course—Presumptions—Trials—Erroneous Instructions—Appeal and Error.*—The possession of a negotiable instrument by the indorsee, or by a transferee where indorsement is not necessary, imports *prima facie* that he is the lawful owner of the paper, and that he acquired it before maturity, for value, in the usual course of business, without notice of any circumstance impeaching its validity; and where fraud is not alleged or suggested, it is error for the trial judge to instruct the jury that such holder is *prima facie* one in due course, and then add, "that is, if he takes it in good faith, for value, without notice of infirmity, and is the owner thereof and entitled to sue thereon." *Trust Co. v. Bank*, 260.

5. *Bills and Notes—Interest in Advance—Short Periods—Usury.*—Interest on a note may be taken in advance for short periods by way of discount, and a note which provides for the payment of 6 per cent interest per annum, payable monthly, does not appear to be usurious upon its face. *Crowell v. Jones*, 386.

6. *Bills and Notes—Indorsements—Evidence.*—An indorsement on a note which is not admitted does not prove itself, but requires some outside or extraneous evidence to show the handwriting of the alleged indorser, or that it was in fact indorsed, which is sufficiently shown in this case by testimony of witnesses and other circumstances surrounding the transaction. *Smathers v. Hotel Co.*, 469.

7. *Bills and Notes—Fraud—Intervenor—Due Course—Burden of Proof.*—In this action the trial judge correctly charged the jury that the burden of proof was upon the intervenor claiming to be a holder in due course without notice, etc., of a note, secured by a deed in trust, made in fraud of creditors of the maker. Revisal, sec. 2208. *Ibid.*

8. *Bills and Notes—Defects—Notice—Bad Faith—Interpretation of Statutes.*—To invalidate a negotiable instrument for a defect or infirmity therein in the hands of a transferee thereof, it is required that he should have had actual knowledge of the infirmity or defect or knowl-

BILLS AND NOTES—*Continued.*

edge of such facts or circumstances as amounted to bad faith in his acquiring the paper; and the charge in this case being sufficiently definite upon this phase of the case, no reversible error is found. Revisal, sec. 2205; *s. c.*, 162 N. C., 346. *Semble*, the evidence in this case was insufficient as a matter of law. *Ibid.*

9. *Bills and Notes—Deeds in Trust—Fraud—Due Course—Creditors' Bill —Subrogation.*—Where the creditors of the maker of a deed in trust securing several notes have succeeded in setting the notes and deeds aside for fraud, as between them and their debtor, and in the same suit two holders of these notes have interpleaded, claiming as purchasers in due course of separate notes secured by the deed of trust equally upon all the property conveyed, and the jury have found in favor of one of the interpleaders only, the plaintiffs are not entitled to be subrogated to the share of the fund, claimed by the unsuccessful intervenor, in the distribution of the fund, or to prorate with the successful one, for the latter is entitled under the terms of the mortgage, valid as to him, to have his note first paid out of the proceeds of the sale of the property. *Ibid.*

10. *Bills and Notes—Indorsement in Blank—Parol Agreements—Statute of Frauds—Evidence—Holders in Due Course.*—A parol agreement made between an indorser of a negotiable instrument in blank and his transferee may be shown between the immediate parties to the transaction by parol evidence, and is not objectionable as a contradiction of the liability of an indorser implied by law, except as to subsequent holders in due course without notice. *Sykes v. Everett*, 600.

11. *Same — Notice — Assignment for Creditors — Trusts and Trustees.*—A trustee in a general assignment for the benefit of the trustor's creditors acquires a negotiable instrument, belonging to his trustor, indorsed to him in blank and upon which the indorser is liable under certain conditions resting in parol, with notice of the qualifications under which the indorser has signed; certainly when he acquired them, as such trustee, after maturity. *Ibid.*

12. *Same—Guarantors of Collection—Liability.*—The defendant, the holder of certain notes secured by the assignment of the interest of the maker in an unsettled estate, assigned them in blank for a valuable consideration to the plaintiffs upon the parol agreement that if the maker did not pay them and the money was not realized on the assignment of his interest in the estate, the defendant would be ultimately responsible for their payment, and that the defendant would not be called on to make payment until the estate had been exhausted, promising to employ attorneys, etc., in certain events, which he fully performed. Thereafter the plaintiffs acquired the notes from the defendant's transferee in a general assignment for the benefit of the latter's creditors. *Held*, (1) the trustees under the deed of assignment took subject to the defendant's rights under the agreement with their trustor; (2) the defendant's rights being analogous to a guarantor of collection, it was necessary for the plaintiffs to show that the security given for the notes sued on was worthless, or had been first exhausted, in order to bind the defendant to their payment under the terms of the agreement; and failing in this, the action will be dismissed. *Ibid.*

13. *Bills and Notes—Indorsement in Blank—Parol Agreements—Consideration — Time of Payment — Expression of Opinion — Fraud.*—Where a

BILLS AND NOTES—*Continued.*

parol agreement between the indorser and indorsee of a negotiable instrument in blank is that the indorsee shall first exhaust certain securities given with the note before the indorser shall become liable thereon, the securities consisting in the interest of the maker of the note in certain unsettled estates, the agreement is founded upon a sufficient consideration, the time within which the indorser's liability should attach being as definite as it could have been made; and the representations made by the indorser in this case, when the agreement was made, as to the time wherein the estate would be settled, was merely an expression of his opinion or expectation, and is held to raise no suspicion of fraud and to be immaterial. *Ibid.*

BILLS OF LADING. See Carriers of Goods; Bills and Notes, 3.

BOUNDARIES. See *Trials*, 15.

BRIEF. See Appeal and Error, 8, 58.

BROKER. See Contracts.

BURDEN OF PROOF. See Trials, 3, 8, 12, 15, 82, 83; Evidence, 31.

CARRIERS OF GOODS.

1. *Carriers of Goods—Bills of Lading—Stipulations—Live Stock—Written Notice—Waiver—Evidence.*—A stipulation in a bill of lading given by a common carrier for a shipment of live stock, requiring that written notice of claim for damages be given the delivering carrier before the live stock is removed or intermingled with other live stock, is a reasonable one to afford the carrier an opportunity of such examination as will enable it to protect itself from false or unjust claims, and will be upheld as a condition precedent to the right of recovery. And the mere fact that the claimant verbally notified some one employed by the carrier as a laborer, in the absence of the agent, of an injury to one of a car-load of mules, which had been transported by the carrier, before accepting and taking the mule away and intermingling it with other live stock, is neither a compliance with the terms of the stipulation by the claimant nor a waiver thereof on the part of the carrier. *Jones' case*, 148 N. C., 580, and *Southerland's case*, 158 N. C., 327, cited and distinguished. *Duvall v. R. R.*, 24.

2. *Carriers of Goods—Live Stock—Improper Cars—Approved and General Use — Weather Conditions — Rule of Prudent Man—Negligence.*—The defendant railroad company used for the transportation of the plaintiff's horse an open slat car, the slats being 4 or 5 inches apart, and the evidence was conflicting as to whether the weather was bitter cold and penetrating, or mild and balmy. There was evidence that the shipment was delayed for several hours, and that the horse contracted pneumonia and shortly afterwards died of the disease; and also that the car was one approved and generally used for the purpose of such shipments. *Held*, the carrier is required to exercise due care, under the rule of the prudent man, according to the existing circumstances, in the selection of a proper car for the shipment, and will not be exempted from liability solely for the reason that the car was such as is generally used under ordinary conditions for such shipment, as this may not be the equivalent of the proper care required. *Hornthal v. R. R.*, 627.

CARRIERS OF GOODS—*Continued.*

3. *Common Carriers—Bills of Lading—Written Claim—Reasonable Stipulations — Damages — Penalty Statutes.*—Stipulations in the bill of lading of a common carrier that it would not be liable for loss or damage or delay in the shipment unless claim is made in writing, etc., within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed, are regarded as a reasonable protection to the carrier, and under the circumstances of this case it is *Held*, the failure of the plaintiff to comply with these stipulations as to the written claim bars his right to recover damages and the statutory penalty. *Forney v. R. R.*, 641.

CARRIERS OF PASSENGERS.

*Carriers of Passengers—Stations—Safe Egress—Contributory Negligence—Trials—Questions for Court.*—Where a person *sui juris* is lawfully on the platform of a railroad company, at night, with a lighted lantern near him, which he had used in going there, and knew the existing conditions, that the platform was elevated some distance from the ground and was without guard or railing at a certain place used for the handling of freight, which was a dark and dangerous place at the time; and the light from his lantern was shining upon some steps near him from the platform to the ground, a shorter distance, where the railroad had provided a railing or guard, his attempting to leave the platform, without his lantern, by the dangerous way, instead of by the safe way opened to him, is such contributory negligence, as a matter of law, as will bar his recovery in his action for damages against the railroad company for its alleged negligence in failing to provide a safe place for the use of its passengers. *Dunnevant v. R. R.*, 232.

CAUSAL CONNECTION. See Negligence, 16.

CERTIORARI. See Courts, 5.

CHARITY. See Hospitals.

CHILDREN. See Negligence; Divorce.

CITIES AND TOWNS. See Street Railways.

1. *Cities and Towns — Ordinances—Railroads—Rights of Way—Streets—Obstructions—Equity—Injunction.*—The enforcement of an ordinance making it unlawful and a misdemeanor to maintain any telegraph line at any point upon any of its streets more than 24 inches beyond or outside of the curb line separating the sidewalk from the driveway of the street, providing that the same may be removed under the direction and control of the mayor at the cost of the corporation, etc., maintaining them, and also providing a fine of $50 for a conviction of violating the ordinance, will not be enjoined at the suit of a railroad company upon whose right of way the town has grown up since its acquisition, it appearing that the right of way has since become a part of a principal street of the town, and the telegraph poles thereon are within the driveway of the street; that the placing as required by the ordinance can be made at a comparatively small expense, and the business of the company will not be seriously interfered with by making the change. *R. R. v. Goldsboro*, 155 N. C., 356, and that line of cases, cited and applied; *Muse v. R. R.*, 149 N. C., 443, cited and distinguished. *R. R. v. Morehead City*, 118.

CITIES AND TOWNS—*Continued.*

2. *Criminal Law—Injunction—Cities and Towns—Railroads.*—The courts will not interfere by injunction with the enforcement of the criminal laws of the State, except in very restricted instances, and such relief is not available where a municipality, in the reasonable exercise of power conferred upon it for the public good, has enacted a valid ordinance relating to the placing of poles upon its streets, which does not unduly interfere with the plaintiff's rights or obstruct it in the performance of its duties as a *quasi*-public corporation. *Ibid.*

3. *Cities and Towns — Streets and Sidewalks — Negligence — Trials—Evidence—Nonsuit.*—In an action against a city for damages alleged to have been negligently inflicted on the plaintiff by reason of the defendant allowing a ditch or excavation to remain unlighted and unguarded on its street, at night, it was shown that the city issued a permit to plumbers to make sewer connections there, which were completed and the ditch properly filled and the bricks of the sidewalk replaced nine days before the occurrence; that less than an hour before the plaintiff's injury a sunken place, alleged to be the cause thereof, came into the sidewalk, where the street was well lighted, evidently resulting from a cave-in from an excavation in a private lot: *Held*, this evidence was insufficient, unsupported by other evidence, to be submitted to the jury on the question of defendant's actionable negligence. *Seagroves v. Winston*, 206.

4. *Municipal Corporations — Cities and Towns — Discretionary Powers — Streets and Sidewalks—Negligent Construction—Damages—Constitutional Law—Taking of Private Property.*—A city is not liable to owners of lands abutting upon the street for any detriment to their property resulting from the grading of the street, done in the discretionary power of the city in making needed improvements, unless the damage done thereto resulted from a negligent grading of the street, or the State has given its consent by statute. The principles upon which this doctrine rests discussed by WALKER, J., and differentiated from those applying to the taking of private property for public use without just compensation. *Hoyle v. Hickory*, 619.

5. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Negligence—Witness, Nonexpert—Evidence—Maps—Measure of Damages.*—Where damages are sought by the owner of lands adjoining a street of a city or town, alleged to have been caused by the negligent construction of the street by the city authorities, evidence of its negligent construction is not confined to the testimony of experts, for such construction may be shown by other witnesses in plaintiff's behalf, using photographs of the locality in explanation and illustration of the testimony, so as to give the jury a better idea as to whether or not damages had been caused, or as to their extent. *Ibid.*

6. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Negligent Construction—Measure of Damages.*—Upon an issue as to the amount of damages sustained by the plaintiff to his lands abutting a city street, alleged to have been caused by the negligent construction of the street by the city authorities, it is competent for the plaintiff to show the cost of restoring his lot to its former condition and value, the jury to give the evidence such weight as they think proper. *Ibid.*

7. *Municipalities—Cities and Towns—Shade Trees—Streets and Sidewalks —Interpretation of Statutes — Discretionary Powers — Courts.*—The

CITIES AND TOWNS—*Continued.*

board of commissioners of a town or city are charged with the duty, among others, of keeping its streets, which includes its sidewalks, in proper repair (Revisal, sec. 2930), and in the exercise of this authority, unless done negligently or maliciously, the municipality is not responsible in damages to its citizen, owning property abutting upon the street, for cutting down shade trees on the sidewalk in front of his property; nor is this principle affected by the facts in this case, that the street was wider in front of the plaintiff's property than elsewhere, it appearing that the plaintiff had dedicated a strip of land to the public use as a sidewalk, the trees in question being over the outer edge of the sidewalk next to the street. *Munday v. Newton*, 656.

CLERKS OF COURT. See Courts, 5, 26.

CLOUD ON TITLE. See Equity, 1.

COLOR OF TITLE. See Limitation of Actions.

COMMERCE.

1. *Intoxicating Liquors — Carrying Into Prohibited Territory — Personal Use — Interstate Commerce — Webb-Kenyon Act — Interpretation of Statutes.*—Chapter 1014, Public Laws 1907, relating to the city of High Point and providing that it shall be unlawful for any person, etc., to sell or dispose of for gain, or keep for sale, within the township, any spirituous wines, intoxicating liquors, etc., and that any person, corporation, etc., bringing within these limits any liquors, the sale of which is prohibited by the act, shall be guilty of a misdemeanor and fined or imprisoned, etc., is a valid exercise of legislative power, extending its prohibition to the purposes of sale and not to its receipt or transportation and delivery for personal use; and the importation of such liquor for personal use being lawful under the statute, the Webb-Kenyon law has no application, where interstate shipments are involved. *Express Co. v. High Point*, 103.

2. *Interstate Commerce — State Statutes—Penalties—Federal Statutes—Carmack Amendment—Federal Control.*—The validity of our statutes imposing a penalty upon a carrier for its failure to pay claims for damages under the conditions therein imposed (Revisal, sec. 2634, amended by chapter 139, Laws 1911) is made dependent, as applied to interstate shipments, upon whether Congress, or the Interstate Commerce Commission acting upon its authority, has assumed control thereof; and our statutes upon this subject having been superseded by Classification No. 22, Rule 9, prescribed by the Interstate Commerce Commission under authority conferred by the act of Congress, known as the Carmack Amendment, an express company cannot now be held liable for the penalty under our statute for failure to pay a claim in the time therein prescribed for interstate shipments. *Morphis v. Express Co.*, 139.

3. *Same—Interstate Commerce Commission—Prospective Orders—Date of Promulgation — Statutes.*—Where authority has been conferred by Congress upon the Interstate Commerce Commission to assume control of matters relating to interstate commerce, and in pursuance thereof the Commission promulgates an order relative to such commerce, such order supersedes any State statute on the subject, from the time it was promulgated; and when the cause of action subse-

COMMERCE—*Continued.*

quently arises under the State penalty statutes, but before the time is made operative, the State statute is ineffectual, and the penalty allowed by it cannot be recovered. *Ibid.*

4. *Master and Servant — Federal Employers' Liability Act — Interstate Commerce.*—An employee of a railroad doing an interstate business upon its line of railway extending beyond the borders of the State, and engaged, with a gang of hands, in putting in a new block system along the line of the railway, is engaged in interstate commerce, within the meaning of the Federal Employers' Liability act, and action to recover damages for his negligent injury or wrongful death while thus employed comes within its provisions; and the Federal act is held to apply to the circumstances of this case, where such employee, while being transported from one location to another, in the course of the work, had left the defendant's car, provided for the accommodation of the work gang, for a necessary purpose, and was injured by another of defendant's trains, moving upon a different track, which had failed in its duty to give the required signals or warnings of its approach. *Saunders v. R. R.*, 375.

COMMISSION. See Vendors and Purchaser, 3, 4; Principal and Agent.

COMMON CARRIERS. See Carriers of Goods.

COMPENSATION. See Corporations, 17.

COMPROMISE. See Courts, 3.

COMPROMISE AND SETTLEMENT.

*Contracts — Goods Sold on Commission — Compromise—Consideration.*— The plaintiff was salesman for the defendant, and was to receive a commission of a certain per cent upon the sales made by him, and also upon goods shipped by the defendant into his territory during the time of his employment, which was terminated, before its expiration, with the defendant's consent; and a difference of opinion arising as to the amount due him as commissions earned under the contract, it was agreed by them that the defendant should pay the agreed commission on all sales of goods then to be shipped, when the goods were shipped. This action was brought by the plaintiff to recover the amount alleged to be due him under this arrangement; and it is held that the compromise agreement as to the terms of settlement was supported by a sufficient consideration. *Peyton v. Shoe Co.*, 280.

CONFLICT OF LAWS. See Courts, 35; Gaming.

CONSIDERATION. See Deeds and Conveyances, 6, 7, 8; Contracts, 10; Compromise and Settlement; Insurance; Corporations, 14.

CONSPIRACY. See Libel and Slander.

CONSTITUTION OF NORTH CAROLINA.

ART.

III, sec. 10. By the amendment of the Constitution of 1875, the Governor appoints statutory officers to fill unexpired terms only with consent of Senate, when the act so provides. *Salisbury v. Croom*, 223.

CONSTITUTIONAL LAW.

1. *Public Officers—Appointment—Constitutional Law—Legislative Powers Hospitals for the Insane—Directors.*—By amendment to Article III, sec. 10, of our Constitution by the Convention of 1875, the express inhibition of the General Assembly to appoint officers to offices created by statute was taken away, and the inherent right of the Governor to appoint is now restricted to constitutional offices and where the Constitution itself so provides; and all offices created by statute, including directorates in State institutions—in this case, the State Hospital at Raleigh—the power of appointment, either original or to fill vacancies, is subject to legislative provision as expressed in a valid enactment. *Salisbury v. Croom*, 223.

2. *Municipal Corporations — Cities and Towns—Discretionary Powers—Streets and Sidewalks—Negligent Construction—Damages—Constitutional Law—Taking of Private Property.*—A city is not liable to owners of lands abutting upon the street for any detriment to their property resulting from the grading of the street, done in the discretionary power of the city in making needed improvements, unless the damage done thereto resulted from a negligent grading of the street, or the State has given its consent by statute. The principles upon which this doctrine rests discussed by WALKER, J., and differentiated from those applying to the taking of private property for public use without just compensation. *Hoyle v. Hickory*, 619.

CONSTRUCTION. See Libel and Slander.

CONTRACTS. See Insurance, 3; Schools, 5; Mechanics' Liens; Married Women; Principal and Surety.

1. *Contracts — Debtor and Creditor — Bankruptcy — Promise—Consideration.*—A promise to pay a debt barred by bankruptcy of the debtor is upon a sufficient consideration. *Cauley v. Dunn*, 32.

2. *Contracts—Bills and Notes—Parol Evidence—Contradiction.*—Under the doctrine that the terms of a written contract may not be varied by parol, it is incompetent to show by parol, in the absence of fraud and mutual mistake, that at the time of making a note, payable at a certain time, it was agreed between the parties that the maker should pay it in small amounts or after he should have recovered from bankruptcy. *Ibid.*

4. *Railroads — Principal and Agent — Contracts — Special Authority — Trials—Evidence—Questions for Jury.*—Upon the question whether a railroad company through its proper officers authorized its local agent to make a contract for furnishing the plaintiff a baggage car at certain other of its stations at stated times, or ratified the act of the agent in making such contract, evidence is held sufficient which tends to show the plaintiff requested the car from the local agent, who asked time before replying, and subsequently entered into the contract, and the car was thereafter furnished at two of the stations. The charge of the court is approved in this case. *Newberry v. R. R.*, 50.

5. *Contracts—Covenants—Parties—Misjoinder—Torts—Election—Separate Actions.*—While a plaintiff, who has brought his action against two defendants, alleging as to one a breach of an implied covenant of quiet enjoyment of leased premises in respect to sewer connections, and as to the other, a tort in wrongfully stopping up the sewers, running underground across his adjoining lands, must elect as to which

CONTRACTS—*Continued.*

cause of action he will prosecute, he may nevertheless take a nonsuit in that action and bring separate actions at the same time against each of the defendants for the same damages: against one for the breach of the implied covenant and against the other for the tort; but a recovery in one of these actions will preclude a recovery in the other. *Huggins v. Waters*, 197.

6. *Contracts, Written — Interpretation — Admeasurements by Engineer— Prima Facie Correct—Fraud or Mistake.*—Written contract should be construed so as to effectuate the intent of the parties as embodied in the entire instrument, giving effect to each and every part when it can be done by fair and reasonable intendment. Hence, in construing the contract sued on in this case, that the plaintiffs were to cut and remove all timber from the defendant's 100-foot right of way, between certain stations, for a certain price per acre, etc., according to admeasurement made by the defendant's engineer in charge, it is *Held*, that the plaintiffs are not entitled to receive the price per acre inclusive of spaces upon the right of way already open and clear of trees, etc., for such is not only a reasonable interpretation of the language employed bearing directly upon the question, but any other interpretation would ignore entirely the stipulation that the work was to be paid for according to the admeasurements of the defendant's engineer; and while the engineer's estimates are not made conclusive under the terms of the contract, his determination of the question should be taken as *prima facie* correct and controlling unless impeached for fraud or mistake. *Lefler v. Lane*, 267.

7. *Contracts, Written—Interpretation—Intent.*—The intent of the parties to a written contract, as gathered from the wording of the entire instrument, should govern in its interpretation, giving to the words employed their ordinary meaning except where the context or admissible evidence shows that another meaning was intended; and in proper instances resort may be had to the subject-matter when the ordinary meaning of the written words would lead to an absurd result, and also to the condition of the parties to the contract, so that the courts may avail themselves of the same light in its construction as the parties were in when they made it. *Simmons v. Groom*, 271.

8. *Same—Timber Deeds—Ultimate Payment—Time for Cutting—Reasonable Time—Appeal and Error—Premature Appeal.*—Where a written contract for the sale of standing timber definitely provides for the payment of a stated sum as a balance due thereon, with further provision that the purchaser may pay for the timber by removing it from the lands at a certain rate per thousand, rendering a monthly account at certain times, and that he shall "cut the timber as a whole within the time mentioned in the timber deeds (purchased by him), and as much sooner as he reasonably can, by correct interpretation the method of payment by cutting and removing the timber was given for the benefit of the purchaser, requiring that he be reasonably diligent in order to avail himself thereof; and where he has been neglectful of his opportunity by failing for long periods of time to cut and remove the timber, permitting, in some instances, the time to expire within which his vendor was given to cut in his timber deeds; and the ultimate obligations of the purchaser to pay the balance of the purchase price being absolute, it is not open to him, in the vendor's action to recover the balance of the purchase price, to successfully maintain the position

CONTRACTS—*Continued.*

that the contract permitted him the full time specified in the timber deeds in which to cut the timber and make the required payment, and that the action, having been brought within that time, was premature and should be dismissed. *Hardison v. Lumber Co.*, 136 N. C., 173, cited and distinguished. *Ibid.*

9. *Same—Liens—Counterclaim.*—The defendant in this action to recover against him a balance due on the purchase price of timber growing on the plaintiff's lands, having failed to make payment thereon, or to avail himself of a provision of payment allowed to him whereby he was permitted to remove the timber and make partial payments thereon from time to time, etc., is permitted to recover, as a counterclaim, certain sums of money he has paid to judgment creditors of the plaintiff, which constituted an encumbrance on the timber rights conveyed to him. *Ibid.*

10. *Contracts—Goods Sold on Commission—Compromise—Consideration.*—The plaintiff was salesman for the defendant, and was to receive a commission of a certain per cent upon the sales made by him, and also upon goods shipped by the defendant into his territory during the time of his employment, which was terminated, before its expiration, with the defendant's consent; and a difference of opinion arising as to the amount due him as commissions earned under the contract, it was agreed by them that the defendant should pay the agreed commission on all sales of goods then to be shipped, when the goods were shipped. This action was brought by the plaintiff to recover the amount alleged to be due him under this arrangement; and it is held that the compromise agreement as to the terms of settlement was supported by a sufficient consideration. *Peyton v. Shoe Co.*, 280.

11. *Contracts—Goods Sold on Commission—Amount Due—Trials—Evidence.* Where the matter at issue between the parties to an action is as to the amount due the plaintiff in commissions upon the accepted sales of goods he has made for the defendant, it is competent for the plaintiff to testify as to the full amount of his sales, for the purpose of subsequently showing how many of them the defendant had shipped out under his contract; and he may be permitted to refer to corresponding sections of complaint and answer to make his testimony more intelligible, without necessarily making such sections evidence in the case. The plaintiff may also state the amount he claims as owing to him by the defendant, and explain its items, including those he contends were wrongfully charged against him on the defendant's books; and it is further held that the defendant will not be permitted unfairly to hold back shipments merely for the purpose of depriving the plaintiff of his commissions. *Ibid.*

12. *Contracts, Written — Interpretation — Intent.*—In construing a written contract the intent of the parties as embodied in the entire instrument should prevail, giving effect to each and every part if it can be done by fair and reasonable intendment; and in ascertaining this intent resort should be had primarily to the language of the agreement to which, if it expresses plainly, clearly, and distinctly the meaning of the parties, effect must be given by the courts, and other means of interpretation are not permissible. *Gilbert v. Shingle Co.*, 286.

13. *Same—Timber Deeds—Time of Cutting—Statute of Frauds—Parol Evidence.*—A conveyance of standing or fallen timber "of the dimensions

CONTRACTS—*Continued.*

of 10 inches or more in diameter at a distance of 12 inches from the ground, or which may attain that size ten years from the date thereof," etc., and the description of the land, "together with the perpetual right of way, in, to, and through and over the above-mentioned tract or parcel of land at any and all times during the period of twenty years, for the purpose of removing the timber," is construed that the ten-year limitation first mentioned is descriptive of size of the timber conveyed and specifying the time within which the measurement must be had; and the twenty-year limitation in the latter portion is intended to fix, with reference to the date of the deed, the time in which the timber sold must be cut and removed; and parol evidence to show that a different period was agreed upon, or that the ten-year period was that fixed for cutting and removing the timber sold, is inadmissible as tending to vary or contradict the writing. *Ibid.*

14. *Vendor and Purchaser — Contracts — Warranties—Breach—Damages—Conditions—Performance by Purchaser.*—Where the vendor brings an action on a note given for a stallion, and the purchaser claims damages on a written warranty of the vendor that the stallion "be at least 60 per cent foal-getter," and if not as represented and returned by a certain date, he would replace it with another or return the purchase money, it is necessary, to maintain his counterclaim, that the defendant shall have performed the conditions required of him and returned the stallion in the time specified. *Altman v. Williams*, 312.

15. *Contracts—Sale of Business—Good-will—Agreements Not to Enter Business — Breach of Agreement — Trials—Evidence—Nonsuit.*—In an action upon an alleged breach of contract for the sale of a mercantile business, good-will, etc., with provision that the vendor would not again engage in that character of business in the same town for a year and a half, the plaintiff's evidence tended only to show that his vendor had loaned money to another and newly formed partnership between third persons in the same town, engaged in the same character of business; that the telephone number he had used while in business had been given to this new concern, etc., and that in a few specific instances customers who had traded with him occasionally had, at times, traded with the new partnership. *Held*, the defendant had a perfect right to lend his money to the new concern, and that this, and the further instances mentioned, were not evidence sufficient to be submitted to the jury upon the question of his violating his contract by engaging in a business of a similar character to that sold by him to the plaintiff. *Finch v. Michael*, 322.

16. *Corporations—Subscribers to Stock—Management—Release—Contracts—Consideration—Trials—Evidence—Questions for Jury.*—Both by the general law and under our statute, Revisal, sec. 1141, the management of a corporation, before the first directors are elected, vests entirely in the subscribers, and, before the rights of creditors have supervened, the subscribers or stockholders may, by the consent of each and all of them and within the limits of the charter, release one from his subscription to the stock, the consent of one party to such arrangement, as in other contracts, being a sufficient consideration for the consent of the others; and under the circumstances of this case it is held that there was sufficient evidence of the release of the defendant, against whom action was brought for payment of his subscription to stock in a corporation, to be submitted to the jury. *Boushall v. Myatt*, 328.

CONTRACTS—*Continued.*

17. *Contracts, Written—Substitution by Parol—Principal and Agent—Broker's Commission—Statute of Frauds—Evidence.*—An agreement made between the owner of lands and a broker, that the latter should sell the lands divided into lots, etc., and receive as compensation for services to be rendered the difference between an agreed price and that which the lots would bring at the sale, does not come within the meaning of the statute of frauds requiring the contract to be reduced to writing; and where performance of the contract is sought by the broker, it is competent for the defendants to show that the written contract had been subsequently abandoned and a new contract substituted by the parties by parol, which the plaintiff had refused to carry out. *Palmer v. Lowder*, 331.

18. *Contracts, Written—Statute of Frauds—Entire Contract—Parol Evidence.*—When specific performance of a written contract is sought, which the law does not require to be in writing, it is competent for the defendant to show, when it does not vary or contradict the writing, that the entire agreement between the parties had not been embraced in the written contract, and that it in part rested in parol. *Ibid.*

19. *Contracts—Corporations—Assumption of Liabilities—Consideration—Debtor and Creditor.*—An agreement made between two sole remaining shareholders in a corporation upon a valuable consideration moving between themselves, that one should take over the assets and assume the liabilities of the corporation, and the other assist in the collection of the assets under certain circumstances, is valid and binding between the parties; and contemplating the payment of the corporation's debt, its creditor has a right of action thereunder against the partner assuming its liabilities, under the consideration of the contract made in their interest. *Supply Co. v. Lumber Co.*, 160 N. C., 428, cited and applied; *Morehead v. Winston*, 73 N. C., 398, overruled. *Withers v. Poe*, 372.

20. *Contracts, Written—Abandoned—Parol Evidence—Statute of Frauds—Quantum of Proof.*—Parties to a written instrument, unless in violation of some provision of law, may by parol rescind or by matter *in pais* abandon it, the proof required thereof being by the greater weight of the evidence. *Faust v. Rohr*, 360.

21. *Contracts, Written — Partly in Parol — Parol Evidence — Entire Contract.*—Where it is not required in law that a contract to be enforcible must be in writing, it is competent to show by parol that the entire contract was not embraced in the writing, but rested partly in parol, and when not contradictory of the written part, the entire contract may be shown. *Ibid.*

22. *Same—Subsequent Contract.*—A valid contract was made between the parties that one of them should not engage in a certain trade in a certain town for a specified time, in opposition to the other; and thereafter they made a second contract for associating together in the same trade, which was terminated. The present suit is to restrain the defendant from violating his first contract not to engage in that trade, and it is held competent for the defendant to show that it was also agreed between the parties that the original contract should be canceled and annulled, and this provision was omitted from the second contract because the plaintiff said it was unnecessary to refer to it,

CONTRACTS—*Continued.*

the effect of this evidence being that the second contract rested partly in writing and partly by parol, and to show the part not reduced to writing. *Ibid.*

23. *Contracts — Sale of Goods — Loss of Profits — Measure of Damages — Trials — Questions for Jury.*—Loss of profits on goods which the vendor contracted to deliver, but wrongfully failed to do, may be recovered by the purchaser as damages for the breach of the contract, when they were in reasonable contemplation of the parties and contract, and are ascertainable with a reasonable degree of certainty; and it is accordingly held, where the contract thus broken by the vendor was for the sale of thirty-six buggies, that evidence tending to show that the purchaser, a dealer, being unable to supply himself elsewhere in time for his trade, had lost the sale of thirty or more buggies based upon his last year's business, and the demand of his trade for the present season, at an average profit of $15 each, is competent to be submitted to the jury for their determination in fixing the amount of the plaintiff's recovery for the breach of the contract. *Hardware Co. v. Buggy Co.*, 423.

24. *Contracts, Breach of—Issues.*—In an action to recover damages arising from a breach of warranty, two issues should be submitted to the jury: one relating to the warranty and the other to the damages. *Grocery Co. v. Vernoy*, 427.

25. *Contracts—Sale of Goods by Name—Implied Warranty—Trials—Evidence.*—There is an implied warranty in the sale of goods under a certain name indicating kind or quality, that they shall be merchantable and salable as the name implies, whether the defect may be hidden or might possibly be discovered by inspection; and in an action upon the implied warranty in the sale of a car-load of red-marrow beans, there being evidence tending to show that beans by this name are readily salable for table use exclusively, cook easily, and will not keep over summer without rotting, it is competent for the plaintiff to show, by his evidence, that the beans in question could not be cooked soft so as to be edible, remained hard for several years, contrary to the characteristics of the beans of the kind purchased. *Ibid.*

26. *Contracts—Equity—Specific Performance—Subscribed by Party—Interpretation of Statutes—Statute of Frauds.*—The courts of our State will enforce specific performance of a binding and definite contract to convey lands in the absence of fraud, mistake, undue influence, or oppression, and under our statute, Revisal, sec. 976, requiring that such contracts or some memorandum or note thereof shall be put in writing and signed by the party to be charged therewith, etc., it is unnecessary that the writing be subscribed, if the writing in express terms or by reasonable intendment contains a promise to convey on the part of the owner, and his signature, evincing a purpose to come under such obligation, appears anywhere in the instrument. *Flowe v. Hartwick*, 448.

27. *Contracts—Statute of Frauds—Principal and Agent—Parol Authority.*—The requirement to make a binding and valid writing to convey lands, that the instrument shall be signed by the party or his agent thereunto lawfully authorized, does not extend to a written authority from the principal to the agent, for such authority is sufficient if given by parol. *Ibid.*

CONTRACTS—*Continued.*

28. *Contracts to Convey Lands—Defects of Title—Specific Performance—Diminution in Price—Damages.*—When a vendor's title to lands proves to be defective in some particulars, or his estate is different from that which he agreed to convey, unless the defects are of a kind and extent to change the nature of the entire agreement and affect its validity, the vendee may, at his election, compel a conveyance of such title or interests as the vendor may have and recover a pecuniary compensation or abatement of the price proportioned to the amount and value of the defect in title and deficiency in the subject-matter: a principal which usually prevails where the defects existed at the time of making the contract, but which, at times, extends to such as arise later. *Ibid.*

29. *Contracts to Convey—Statute of Frauds—Deeds and Conveyances—Delivery—Evidence—Extraneous Matters—Parol Evidence.*—While it has been decided that an undelivered deed, substantially containing the contract to convey lands, will be allowed the effect of a written memorandum, within the meaning of the statute of frauds, the doctrine only obtains when the writing in the deed sufficiently expresses the contract, and the right of the grantee to demand its delivery does not depend upon extraneous matters resting in parol. *Ibid.*

30. *Contracts to Convey—Deeds and Conveyances—Principal and Agent—Ratification.*—When an unauthorized contract has been made for an alleged principal, who is sought to be bound thereby, it is necessary that the agent must have contracted or professed to have contracted for the principal, and the latter must have signified his assent or intent to ratify, either by word or conduct. Hence, where the tenant for life in lands has executed a written contract to convey the lands upon condition, resting in parol, that all the remaindermen should convey their interest therein, and a deed was signed by the parties, but was left undelivered in the hands of a party in interest, a minor and remainderman, who destroyed the deed after coming of age, it is *Held*, that the contract is not enforcible, there being no evidence that the life tenant assumed to act as the agent of the remaindermen or that they had ratified his acts. *Ibid.*

31. *Contracts — Independent Contractor — Pleadings — Issues — Burden of Proof.*—When the defense of independent contractor is relied upon, it must be alleged in the answer, with the burden of proof upon the defendant. *Embler v. Lumber Co.*, 457.

32. *Contracts — Parol — Independent Contractor — Evidence, Conflicting — Trials—Questions for Jury.*—Where the entire contract is in writing, the question of independent contractor is a question of law arising from the interpretation of its terms; but where the contract relied on rests in parol, and the evidence of its terms is conflicting in that respect, the question of independent contractor is one for the determination of the jury, under proper instructions from the court. *Ibid.*

33. *Same—Burden of Proof—Supervision by Owner.*—The defendant corporation contracted by parol for the erection of a dry-kiln, and in an action to recover damages for an injury received by an employee from a wall thereof upon which he was at work falling upon him, there was evidence tending to show that it resulted from an improper foundation; that the blue-prints furnished the contractor showed that the foundations were to have been made of concrete, but were changed

CONTRACTS—*Continued.*

to brick by the order of the defendant under objection by the contractor that it would be dangerous, with further evidence that the officers of the defendant frequently inspected the work and gave occasional orders respecting it. There was evidence on the defendant's behalf that the erection of the dry-kiln was to be done by an independent contractor. *Held*, the burden of proof was on the defendant to show that the work was to have been done under an independent contract, which could not be passed upon by the court under the conflicting evidence, but was for the determination of the jury. The term "independent contractor" defined by WALKER, J. *Ibid.*

34. *Contracts—Independent Contractor—Dangerous Work—Defenses.*—The defense of independent contractor cannot be made available when the work to be done under the terms of the contract is so intrinsically or inherently dangerous that it will necessarily or probably cause injury to others. *Ibid.*

35. *Contracts — Independent Contractor — Acts of Owner — Negligence — Proximate Cause.*—Where the defendant has contracted with another for the erection of a dry-kiln with a concrete foundation, and, under his orders, the employer has changed the foundation to brick, which change has caused the wall thereof to fall and injure plaintiff, while engaged in laying brick in its erection, the defense of independent contractor is not available, for the negligent act of the owner, in causing the change to be made, was the proximate cause of the injury, for which he is directly liable. *Ibid.*

36. *Injunction—Conflicting Evidence—Timber Contract—Breach—Measure of Damages.*—In this action to recover damages for a breach of contract of defendant to cut timber from plaintiff's land at a certain price, the plaintiff excepted and appealed from the refusal of the trial judge to give certain of his prayers for instruction directing a verdict in a certain sum upon the issue as to the measure of damages, evidently based upon the theory that under the terms and conditions of the contract he should be permitted to recover damages for all the timber upon the entire tract of land which should have been cut by the defendant within the time specified. There was evidence in defendant's behalf tending to show that the plaintiff entered upon the land, stopped the defendant from cutting the timber, and sold it to another party, with further conflicting evidence as to the amount of timber actually cut, etc., and it is *Held*, that the plaintiff's requested prayers were properly refused, and that the case was properly left to the jury. The charge of the court is approved. *Smith v. Holmes*, 561.

37. *Judgments — Default and Inquiry — Breach of Contracts — Lumber — Measure of Damages — Speculative Profits — Appeal and Error.*—A judgment by default and inquiry for the failure to file answer in an action to recover damages for the breach of a contract in the failure of the defendant to deliver lumber sold, the cause of action is established by the judgment, leaving only the inquiry as to damages to be determined; and where the judge has correctly instructed the jury that the rule for the admeasurement of damages was the difference between the contract price and the market price at the place and time appointed by the contract for the delivery, the question is not presented, on the defendant's appeal, as to whether the plaintiff should be permitted to recover speculative profits, and no error is found. *Lumber Co. v. Furniture Co.*, 565.

CONTRACTS—*Continued.*

38. *Contracts, Breach of — Measure of Damages — Diminution.*—In this action to recover damages for defendant's breach of contract in not delivering lumber sold, no evidence appears in the record that the plaintiff failed to exercise due care and diligence to prevent loss to defendant after he was aware of its breach, or to diminish the amount of damages, and the Court finds no error upon the defendant's contention in that respect. *Ibid.*

39. *Appeal and Error—Objections and Exceptions—Parol Evidence—Written Contracts.*—The rule that parol evidence is inadmissible to vary or contradict a written instrument, etc., must be invoked in some proper way; and it is not available to the party relying thereon when he is not the appellant in the action. *Sykes v. Everett*, 600.

40. *Injunction—Trade Name—Name of Person—Contracts—Enforcement.*—A man has the right to the use of his own name in connection with his business, provided he does so honestly and does not resort to unfair methods by which he wrongfully encroaches upon another's rights or commits a fraud upon the public; but he may, by contract, conclude himself from the use of his own name in a given business, and the agreement will be enforced by the courts. *Zagier v. Zagier*, 616.

41. *Independent Contractor—Dangerous Character of Work—Negligence of Contractor—Contributory Negligence.*—A railroad company which in the construction of its roadbed makes a cut 30 feet deep across the main street of a town cannot escape liability for an injury to a pedestrian who has fallen into the cut, while passing along the street a dark, drizzly night, caused by the negligence of its contractor in not properly safeguarding a temporary narrow footbridge across it, with rails or guards or providing lights to give warning of the danger, on the ground that the work was being done by an independent contractor, for work of this character is necessarily and inherently dangerous; and it is further held that the case was properly submitted to the jury upon the issues of negligence and contributory negligence. *Watson v. R. R.*, 164 N. C., 176, and that line of cases, cited and applied. *Dunlap v. R. R.*, 669.

42. *Independent Contractor — Supervision of Work — Negligence of Contractor.*—A railroad company may not successfully defend an action to recover for an injury received by the plaintiff proximately caused by its negligence in falling into a deep cut across the main street of a town where the plaintiff was walking, on the ground that the work was being done by an independent contractor, when it appears that the work was being done under the direction of the railroad company. *Ibid.*

43. *Contracts, Written — Breach — Damages — Later Contract — Collateral Parol Agreement — Pleadings — Court's Discretion — Amendments — Issues.*—In an action to recover damages for a breach of a written contract for the sale of shares of the capital stock in a certain corporation, the defendant contended that this contract was superseded by a later one which the plaintiff admitted executing, but attempted to show by his evidence a separate agreement by parol that he could hold the defendant under the terms of the first contract if the defendant did not "treat him right" under the later one. This phase of the matter not having been alleged, the plaintiff asked leave of the trial court to amend the complaint, which was refused. *Held*, the

CONTRACTS—*Continued.*

matter of amending pleadings lies within the discretion of the trial judge, and is not reviewable on appeal. *Semble*, the alleged contemporary parol agreement was too uncertain to be made available, and it is *Further held*, the amendment, had it been allowed, would have necessitated trying the case on the later contract, introducing new issues of which the defendant had no notice. *Adickes v. Chatham*, 681.

44. *Contracts — Breach — Damages — Second Contract — Amendments — Court's Discretion — Nonsuit.*—Where upon a trial for damages for a breach of a written contract it is admitted that the contract sued on had been superseded by another and different one, requiring answers to issues not raised by the pleadings, and a requested amendment to the complaint has been refused by the trial judge, a judgment of nonsuit is properly allowed. *Ibid.*

45. *Contracts—Breach—Damages—Second Contract—Nonsuit.*—The plaintiff sued for damages on breach of contract for the sale of certificates of capital stock in a corporation held by D., by the terms of which the plaintiff and defendant would have practically been created partners in equal interest with D., who was not a party to the contract. D. refused to perform the contract and failed to furnish the stock. The plaintiff afterwards acquired the stock and entered into a new contract with the defendant. This action is upon the first contract, and it is held that it would not lie, for the later contract necessarily superseded and put an end to it. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See Negligence.

CORPORATIONS.

1. *Corporations—Distribution of Assets—Act of Treasurer—Award and Satisfaction—Estoppel—Credits.*—In an action by a corporation and some of its stockholders for dissolution, and against its treasurer for an accounting and distribution of its assets among the stockholders, it is held that the treasurer cannot successfully plead accord and satisfaction by showing that he, of his own authority, had sent statements and checks to the stockholders for their distributive shares in the assets, which had been cashed by them, for the treasurer's accounting should have been made to the corporation, which cannot be estopped by his action; when the corporation is not indebted, and not otherwise, he is entitled to a credit in the settlement for the sum he has thus distributed. *Montcastle v. Wheeler*, 258.

2. *Corporations — Officers — Principal and Agent — Insurance — Reinsurance—Declarations—Evidence.*—The rule as to the competency of declarations of an agent to bind his principal applies to corporations and their officers or agents, and the declarations, to be competent, must be with regard to matters within the scope of the agent's authority to act and made during the course of his duties as such agent; and in this action against two insurance companies on a policy issued by one of them, which, being a foreign corporation, has withdrawn from soliciting new business here, on the ground that the other defendant was organized here for the purpose of assuming, and did assume, the policies of the former, a letter written by a local agent of the domestic corporation, who had been the agent of the foreign corporation, and after the policy sued on had matured, stating that

CORPORATIONS—*Continued.*

the general manager said he would endeavor to secure payment from the home office of the foreign corporation, and if not, it would be paid by the domestic corporation, is incompetent as evidence of the alleged arrangement, not only as concerning matters beyond the scope of his authority to bind his company, but as hearsay and *res inter alios acta*. *Morgan v. Benefit Society*, 262.

3. *Corporation — Officers—Vice President—Authority—Trials—Evidence—Nonsuit.*—In an action against a corporation to recover for medical attention, and care of its employee by the plaintiff sanatorium, the defendant resisted recovery upon the ground that it had not authorized the services rendered. There was evidence tending to show that the employee was carried to the sanatorium by the salaried physician of the defendant company, and thereafter its vice president called up the plaintiff by phone and directed that special care be given this patient; that the bill should be sent to him and that the defendant would pay it; and, also, that formerly the defendant had paid for the attention given by the plaintiff to another employee on such authorization. *Held*, the position of vice president of a corporation does not necessarily empower this officer to bind the company by such acts; but the evidence in this case was sufficient to be submitted to the jury upon the question of his authority, and judgment of nonsuit was properly denied. *Sanatorium v. Yadkin River Co.*, 326.

4. *Corporations—Subscriptions to Capital Stock—Bona Fides—Test.*—A subscription to the capital stock of a corporation is *bona fide* whenever made by one who subscribed in good faith with a reasonable expectation and apparent prospect of being able to pay assessments on his stock as they might thereafter be called for, and when there is no evidence presented or offered tending to show that the subscriptions were not *bona fide*, under this test, one who has subscribed to the stock under an agreement that the subscriptions should be *bona fide* may not avoid the obligation on his subscription in an action brought against him for its payment, on the ground that the subscribers at a preliminary meeting had refused to accept as the test of their good faith the cash payment at once and in full for the amount of their subscription. *Boushall v. Wyatt*, 328.

5. *Corporations—Subscribers to Stock—Management—Release—Contracts—Consideration—Trials—Evidence—Questions for Jury.*—Both by the general law and under our statute, Revisal, sec. 1141, the management of a corporation, before the first directors are elected, vests entirely in the subscribers, and, before the rights of creditors have supervened, the subscribers or stockholders may, by the consent of each and all of them and within the limits of the charter, release one from his subscription to the stock, the consent of one party to such arrangement, as in other contracts, being a sufficient consideration for the consent of the others; and under the circumstances of this case it is held that there was sufficient evidence of the release of the defendant, against whom action was brought for payment of his subscription to stock in a corporation, to be submitted to the jury. *Ibid.*

6. *Contracts — Corporations — Assumption of Liabilities—Consideration—Debtor and Creditor.*—An agreement made between two sole remaining shareholders in a corporation upon a valuable consideration moving between themselves, that one should take over the assets and

CORPORATIONS—*Continued.*

assume the liabilities of the corporation, and the other assist in the collection of the assets under certain circumstances, is valid and binding between the parties; and contemplating the payment of the corporation's debts, its creditor has a right of action thereunder against the partner assuming its liabilities, under the consideration of the contract made in their interest. *Supply Co. v. Lumber Co.*, 160 N. C., 428, cited and applied; *Morehead v. Winston*, 73 N. C., 398, overruled. *Withers v. Poe*, 372.

7. *Corporations—Subscriptions to Stock—Principal and Agent.*—Subscriptions to the shares of stock in a prospective corporation may be made by an individual through his duly authorized agent, and also by a partnership in like manner, and the same agent, when duly empowered, may act for any number or all of the subscribers. *Gilmore v. Smathers*, 440.

8. *Corporations — Capital Stock — Trusts and Trustees — Subscribers to Stock.*—The capital stock of a corporation is a trust fund for the benefit of the creditor of the corporation and its stockholders, and its directors or other governing officers cannot release an original subscriber to its capital stock, or make any arrangement with him by which the company, its creditors, or the State shall lose any of the rightful benefits of his subscription. *Ibid.*

9. *Corporation — Authorized Capital — Subscribers to Stock—Parol Evidence—Corporate Action—Stockholders' Liability.*—Where a corporation commences business with a capital stock authorized by its charter which has been paid in cash by its subscribers, according to their subscriptions thereto, and thereafter becomes bankrupt, there can be no further liability upon its stockholders by reason of the fact that the charter authorized a larger capitalization, when there has been no corporate action taken in conformity with the charter or general law to increase the capital stock beyond that with which the business had been started; and the liability of the stockholders, therefore, depending solely upon whether they have paid in accordance with their subscription, the principles relating to varying a written contract by parol does not apply. Although the stock was issued to two sets of subscribers, it was all embraced by the original subscription to the authorized capital. *Ibid.*

10. *Corporations—Subscribers' Liability—Tender—Interest—Court Costs.*—In this action against certain stockholders of a bankrupt corporation, brought by its trustees, to recover the balance alleged to be due upon their original subscription to the stock, it appearing that they were obligated to only a certain sum, which they tendered and plaintiffs refused to accept, it is held that a judgment of the trial court was proper that they pay the amount ascertained without interest or court cost from the date of the tender. *Ibid.*

11. *Corporations—Evidence—Pleadings—Prima Facie Case.*—Where there is an allegation that a party to an action is a corporation, and the answer refers to it as a corporation and proceeds to reply to the allegations of the pleadings, and there is testimony on the part of a witness claiming to be an officer thereof, that it was in fact a corporation, and it has been dealt with as such, it makes out a *prima facie* case of the fact of incorporation and its power to contract in that capacity. *Smathers v. Hotel Co.*, 469.

CORPORATIONS—*Continued.*

12. *Corporations — Officers—Fraud—Contradiction—Evidence.*—A corporation must act through its officers, etc., and where a corporation claims to have acquired in good faith a note secured by a deed in trust sought to be set aside for fraud, it is competent for the officer who conducted the transaction in the corporation's behalf to deny the specific intent which it is alleged vitiates the transaction, and to contradict by his testimony the bad motive imputed to the corporation in acquiring the note. *Ibid.*

13. *Corporations — Subscriptions to Stock — Trusts and Trustees—Unpaid Stock—Creditors.*—Subscriptions of indebtedness for stock due a corporation are a trust fund for the benefit of its creditors, and whatever may be the rights of the stockholders as among themselves, the creditors have the right to have such fund collected and applied to the discharge of their debts, which may be required by the courts, when necessary, and in a proper and appropriate action. *Bernard v. Carr*, 481.

14. *Corporations — Stock Subscriptions — Consideration — Acceptance of Stock.*—It is not lawful for a stockholder in a corporation to pay for his stock only by lending his credit to the concern, or by indorsing the corporate note; but no other consideration is necessary to be shown, in order to fix him with a stockholder's liability to the corporation creditors, than his acceptance of and holding the stock issued to him. *Ibid.*

15. *Corporations—Unpaid Subscriptions—Trustee in Bankruptcy—Right of Action.*—A trustee in bankruptcy of a corporation may, since the amendment to the bankruptcy act of 1910, maintain an action against the shareholders of the corporation to compel payment of their unpaid subscriptions to its stock to the extent necessary to protect its unpaid creditors; and he is not bound by any illegal acts of the corporation with respect to the issuance of the shares. *Ibid.*

16. *Same — Bankrupt Courts — Orders—State Courts—Collateral Attack.*—Where upon petition filed by the trustee of a bankrupt corporation in proceedings in the Federal court, a citation is issued to a stockholder to show why an assessment should not be made against him to collect the unpaid amount of his subscription, and the trustee is authorized to bring his action in the State court for the purpose of enforcing payment, and these proceedings appear to be regular in all respects, the validity thereof cannot be questioned in the State courts. *Ibid.*

17. *Corporations—Officers—Compensation—Agreement in Advance—Trials—General Rule—Limitations to Rule—Evidence—Nonsuit.*—In an action brought by an officer against a corporation to recover for services rendered, it is error for the trial judge to nonsuit the plaintiff upon evidence tending to show that the corporation was composed of himself and two others, all of whom were elected officers, with the plaintiff as president, who met and decided that the plaintiff should enter the duties of salesman of the concern at a certain minimum salary, and that the services were accordingly rendered by the plaintiff, the recovery of which is the subject-matter of the action, for from evidence of this character an express promise in advance on the part of the defendant to pay for such services may be reasonably inferred, and presents an issue of fact to be determined by the jury. The principles of law limiting the more general rule that an officer of a corpo-

CORPORATIONS—*Continued.*

ration may not recover for services rendered when compensation therefor has not been authoritatively agreed upon in advance, etc., discussed by HOKE, J. *Chiles v. Mfg. Co.*, 574.

COSTS. See Courts.

COUNTERCLAIM. See Contracts, 9; Actions; Married Women, 3; Malicious Prosecution; Pleadings.

COUNTIES.

1. *Counties—Taxation—Schools—Tax List—County Expenses—Interpretation of Statutes.*—In an action involving the question of whether the school funds of Wake County should be charged with its proportionate expense of preparing and computing the tax lists of the county, it is held that Revisal, sec. 4111, providing, among other things, that the sheriff shall annually pay to the treasurer of the county school fund the whole amount for school purposes, less his lawful commissions, should be construed with section 83, Machinery Act of 1913, providing the compensation for making out the tax lists, and that it shall be paid by the county treasurer out of the county funds; and with Revisal, sec. 4110, that the school tax should be kept in separate columns; and with Revisal, sec. 4154, that, except in certain instances, the money coming into the hands of the treasurer of the school board shall not be paid out by him except upon the order of the county board of education; the various statutes relating to the same subject and being *in pari materia;* and when so construed, the treasurer of the board of education and of the county of Wake are held to be distinctive offices, though held by the same person, and the taxes set apart for the school fund are not chargeable with the expense of making out the tax lists. *Board of Education v. Commissioners*, 114.
2. *Counties — Taxation — School Funds—Mandamus—Alternate Writ.*—In this action of mandamus to compel the county and its commissioners to pay over to the treasurer of the school fund money they had unlawfully retained for preparing and computing the tax list of the county, the judgment appealed from by the commissioners is affirmed, with the modification that an alternate writ issue before a peremptory writ be applied for. *Ibid.*
3. *Counties—Torts of Officers—Trespass.*—Counties are instrumentalities of government given corporate powers for executing the purposes for which they were created, and, in the absence of statutory provisions, are not liable in damages for the torts of their officers. Hence, an action will not lie against a county for wrongful trespass and damages. *Keenan v. Commissioners*, 356.
4. *Interpretation of Statutes — Counties—Deeds and Conveyances—Conditions—Open Squares.*—Where a county owning a site upon which to build its courthouse is authorized by statute to buy, sell, and exchange real estate surrounding it upon such terms and conditions as it may deem just and proper, and for the best interest of the county, "for the purpose of preventing the erection of any building near the courthouse and thereby lessen the danger of fire" and "to enlarge the public square," and in pursuance of this authority have acquired conveyance of lands from adjoining owners upon condition that they shall be used as a public square and kept open for that purpose, etc., it is *Held*, that whether the conditions be called conditions subsequent or otherwise,

COUNTIES—*Continued.*

they were within the purview of the authority conferred upon the county by the statute; and, coming within the intent of the parties as expressed in the conveyance, and forming a material part of the consideration for the lands, they are valid and binding upon the county. *Guilford v. Porter*, 366.

5. *Same — Specific Performance—Equity—Injunction—Alleyways—Power of Courts.*—A county, under the purview of a statute authorizing it, having acquired lands from adjacent owners to its courthouse square upon a valid condition, expressed in the conveyance, that the property should be kept clear as a part of the open square around the courthouse, may be restrained, by proceedings of an equitable nature, from an intended breach of the covenants of the deeds by conveying the square to another corporation for the purpose of erecting a large building thereon to take up nearly the entire square; nor will the courts assume to pass upon the sufficiency of an 18½-foot alley for the defendants' needs, to be left between the proposed building and those of defendants; for the defendants are entitled to the continued performance of the conditions upon which the deeds were made. *Ibid.*

COURTS. See Equity, 7; Process; Bankruptcy; Judicial Sales.

1. *Courts — Pleadings—Amendments—Answer—Waiver.*—When a defendant answers an amended complaint which has been permitted by the court, his doing so is a waiver of any objection thereto he might otherwise have had. *Rice v. R. R.*, 1.

2. *Courts—Discretion—Verdict Set Aside—Term—Waiver.*—The power of a judge of the Superior Court to set aside a verdict is confined to the term wherein the verdict was rendered; but by consent of the parties, expressed or implied, they may waive this legal right and give effect to an order rendered in vacation or at a subsequent term, setting the verdict aside. *Decker v. R. R.*, 26.

3. *Same — Substitute Judgment—Compromise—Time Given for Consent—Intent—Interpretation—Practice—New Trial.*—Upon motion made in the Superior Court by a party defendant to set aside a verdict of the jury as being against the weight of the evidence, the judge said he would grant the motion as a matter in his discretion, but thought the plaintiff should recover something, stating if the defendant would pay a certain less amount and the plaintiff would take it, he would sign a judgment in that sum. Whereupon the attorneys for both parties requested time in which to communicate with their clients, and until Tuesday of the following week, a criminal term, was given for that purpose. The judge signed an order setting aside the verdict, which was to stand if the parties did not agree, and also a judgment in the amount stated to be substituted for the order, if the parties should agree thereto; and this without objection. The defendant agreed to pay this sum, and on the Tuesday fixed for the purpose the plaintiff's attorney stated he had not yet heard from his client, but on the following day stated that his client had refused to accept the compromise judgment. *Held*, (1) the plaintiff having waived his legal right that the judge should exercise his discretion to set aside the verdict at the term it was rendered, cannot avail himself of the fact that this was not done; (2) the order setting aside the verdict was the judgment of the court at that term, and the compromise judgment was only to become effective as a substitute if there-

COURTS—*Continued.*

after agreed to by both of the parties, and upon their failure to agree the order for a new trial remained in effect; (3) the reason for the delay being to give the parties time to hear from their clients, and Tuesday being supposed to be sufficient for the purpose, but not the last day, the action of the court on Wednesday, the day following, was valid, especially as plaintiff's conduct implied consent that the court might act on that day; (4) the misunderstanding having arisen from the failure of the court and the parties to effect a compromise, an order granting a new trial would otherwise be proper. *Ibid.*

4. *Pleadings—Amendments—Court's Discretion.*—The refusal of the trial court to permit a party to amend his pleadings is a matter within its discretion, and not reviewable on appeal. *Cauley v. Dunn*, 32.

5. *Tenants in Common — Clerks of Court — Adverse Interests—Nonsuit—Certiorari.*—Every proper party to proceedings to partition lands among tenants in common have an interest in its final division among them; and where issue is joined it is the duty of the clerk of the Superior Court to transfer the cause to the trial docket of the court. Hence, when the proceedings have become adversary, putting at issue the rights of one of the parties defendant, the action of the clerk in permitting the plaintiffs to take a nonsuit is a nullity (Revisal, sec. 2485), and upon proper application to the Superior Court the writ of *certiorari* will issue. *Haddock v. Stocks*, 70.

6. *Courts — Arguments of Counsel — Per Curiam Opinions—Statement of Fact—Jury—Appeal and Error.*—It is not objectionable for counsel in arguing propositions of law to the court, in the presence of the jury, to cite a *per curiam* opinion by the Supreme Court, and state the facts in that case, in his endeavor to show the similarity between them and the case at bar, and to contend, for that reason, that the *per curiam* opinion is authority for his position. *Betts v. Telegraph Co.*, 75.

7. *Judgments Conditional—Courts—Pleadings—Amendments — Discretion.* An order allowing a plaintiff to amend his complaint within thirty days, with provision that if he fail either to file his complaint within the time allowed or pay the cost imposed as a condition, the action shall stand dismissed without further order, is an alternative or conditional judgment and void, leaving it open to the discretion of a succeeding judge to allow the amended pleading to be filed. *Lloyd v. Lumber Co.*, 97.

8. *Courts — Sale of Lands — Decree of Confirmation—Failure to Pay Purchase Price—Interlocutory Orders—Limitation of Actions.*—Where the court confirms a report of the sale of lands, made under its decree, and directs the commissioner appointed for the sale to collect the purchase price and then make conveyance to the purchaser, the decree of confirmation is interlocutory with regard to these further directions; and where the purchaser has entered into possession of the lands without paying the purchase price, he may not avail himself of the bar of the ten years statute of limitations (Revisal, secs. 1424-1425), for his entry was rightful under the decree, and he must show some hostile act of possession on his part to make good his plea. *Davis v. Pierce*, 135.

9. *Courts—Judicial Sales—Sales of Lands—Failure to Pay Purchase Price —Motion in Cause—Interlocutory Orders—Interpretation of Statutes.* The remedy to enforce a decree under a judicial sale of land for the

COURTS—*Continued.*

collection of the purchase price of the land is by motion in the cause (Revisal, sec. 403), the matter remaining under the control of the court (Revisal, sec. 1524), and in proper instances the court may decree a resale of the land if the purchaser does not pay the price within a specified time—in this case, within sixty days. *Ibid.*

10. *Appeal and Error—Improper Remarks of Court—Objections and Exceptions—Presence of Jury.*—The appellant may not urge for error on appeal improper remarks of the trial judge without duly noting an exception which appears of record; and certainly when it appears, as in this case, the remarks were not made in the hearing of the jury, or where the appellant is the plaintiff, and has not shown he has a cause of action. *Yellowday v. Perkinson*, 144.

11. *Pleadings — Amendments — Power of Courts—Trials—Issues—Instructions.*—It is within the discretion of the trial court to permit amendments to the pleadings during the progress of the trial (Revisal, sec. 307), and where by such amendment certain matters formerly at issue have been eliminated, it is proper for the court to rule out evidence relating to the matters eliminated, and to reject issues and prayers for special instructions relating thereto. *Tilghman v. R. R.*, 163.

12. *Evidence—Depositions—Trials—Witnesses—Courts.*—when the deposition of a witness, taken when he was in another State, has been read on the trial of the cause, in his absence, the trial judge may, in his discretion, permit the witness, then present, to orally testify after his deposition has been read in evidence. *Ibid.*

13. *Courts — Expression of Opinion — Predication Upon Findings—Libel—Trials—Instructions.*—Where the trial judge predicates his statements in his charge upon what the jury may find the facts to be, it is not an expression of opinion forbidden by the statute; the jury may consider on the issue as to damages that the defendant had pleaded in defense the truth of the alleged libelous matters, should they find the plea untrue. *Ivie v. King*, 174.

14. *Courts — Jurisdiction—Pleadings—Judgment—Estoppel.*—When a court having jurisdiction of the case and the parties renders judgment therein, it estops the parties and their privies as to all issuable matters contained in the pleadings; and though not issuable in a technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined in the hearing. *Ferebee v. Sawyer*, 199.

15. *Trials—Verdicts—Motion to Set Aside—Court's Discretion—Appeal and Error.*—Motions to set aside a verdict on the ground that it is against the weight of the evidence should be addressed to the conscience and sound discretion of the trial judge, and will not be considered on appeal, in the absence of the abuse of this discretionary power. *Pruitt v. R. R.*, 246.

16. *Justice of the Peace—Judgment Against One Defendant—Appeal—Parties—Appeal and Error.*—Where in an action cognizable in the court of a justice of the peace two insurance companies are sued for the payment of a matured policy, alleging joint responsibility thereon, and judgment is rendered against both of them, with appeal to the Superior Court by only one, it is error for the trial judge, on motion of the

COURTS—*Continued.*

plaintiff, to order that the other defendant be made a party in the court, as its presence is unnecessary. *Morgan v. Benefit Society*, 263.

17. *Court's Discretion—Evidence—Witness—Repetition.*—In this case it is held that the refusal of the court to permit defendant's medical expert witness to further testify as to the incorrect methods employed by a medical expert witness who had testified in plaintiff's behalf, is not erroneous, it appearing it was a repetition by the witness of his testimony already given upon the trial. *Ferebee v. R. R.*, 290.

18. *Appeal and Error—Former Appeal—Courts—Improper Remarks.*—Upon the consideration to be given by the jury to the testimony of interested witnesses, *Herndon v. R. R.*, 162 N. C., 317, is approved and the charge of the judge is recommended as the correct form; and in this case, sent back for a new trial by the Supreme Court, it is not held for error that the trial court correctly charged upon this phase of the controversy by following the directions laid down in the former appeal, and added that he did so because the Supreme Court had held that it must be done; "but after you have done so, and you shall conclude that the witness had told the truth, you will give the same weight to his evidence that you would to that of any other credible witness." *Ibid.*

19. *Divorce—Consent Decree—Support of Minor Children—Motion in Cause —Power of Court—Statutes.*—The trial court is authorized by statute (Revisal, 1570), both before and after final judgment in an action for divorce, either *a vincula* or *a mensa et thoro*, "to make such orders respecting the care, custody, tuition, and maintenance of the minor children of the marriage as may be proper, and from time to time modify," etc., such orders, and where consent judgment in a suit *a mensa et thoro* has been entered in the action, without providing for such children, upon motion in the original cause the court has power to make such further orders as it deems proper requiring the father to provide for the support of his children, whether born before or after the rendition of the consent judgment. *Sanders v. Miller*, 317.

20. *Judgments, Irregular — Course and Practice of Courts — Rendered in Wrong County—Power of Courts.*—In the absence of statute and without the consent of the parties litigant, the trial judge is without power to render a judgment outside of the county wherein the cause is pending, and a judgment thus rendered is contrary to the course and practice of the courts. *Cox v. Boyden*, 320.

21. *Same—Motions in Cause—Procedure.*—Where a judgment rendered outside of the county wherein the cause was pending states that it was done with the consent of the parties, one of them, whose substantial right is affected, may, by motion in the cause, move to set aside the judgment upon the ground that his consent was not in fact obtained; and it is error for the judge before whom the motion is made to refuse to entertain it for lack of power to do so. *Ibid.*

22. *Limitation of Actions—Judgments—Course and Practice—Interpretation of Statutes.*—Revisal, sec. 513, requiring that application to relieve against a judgment for mistake, surprise, or excusable neglect be made within one year, does not apply to a judgment rendered contrary to the course and practice of the courts, as where the judgment was signed in a different county from the one in which the action was pending, without the consent of the complaining party. *Ibid.*

COURTS—*Continued.*

23. *Appeal and Error — Objections and Exceptions — Courts—Statements—Arguments—Briefs.*—A statement made by the judge upon the trial, excepted to but not argued, is deemed to have been abandoned. *Page v. Page*, 346.

24. *Landlord and Tenant — Justice's Court — Court's Jurisdiction—Title to Lands—Superior Court.*—The jurisdiction conferred by the landlord and tenant act upon justices of the peace does not obtain where the title to the land is in dispute; and when, in the course of the trial, it appears that the matters involved do not fall within the jurisdiction conferred in these respects, the justice should dismiss the action; and upon appeal, the Superior Court, acquiring no further jurisdiction than the court wherein the action was commenced, may not proceed with the trial. *McLaurin v. McIntyre*, 350.

25. *Same — Mortgage — Fraud — Equities.*—The mortgagor and mortgagee having agreed after the latter had acquired the lands at a foreclosure sale, under a paper-writing whereby the mortgagor was given another opportunity to purchase upon his payment of rent and the performance of certain other conditions, the mortgagee brings his action before a justice of the peace in summary ejectment, wherein a controversy arose, under conflicting evidence, as to whether the defendant had relinquished his rights under the paper-writing, or had executed another writing wherein he became merely a tenant, concerning which the defendant contended, upon competent evidence, that he had not signed, or had signed it in ignorance of its terms, or through fear of by coercion. *Held*, the controversy involved the disputed title to real property, out of which certain equities arose, and not being within the jurisdiction of the justice of the peace, was properly dismissed by him; and, further, the Superior Court acquired no jurisdiction on appeal to determine the controversy *de novo*. *Ibid.*

26. *Superior Courts — Verdicts Taken by Clerks of Court — Agreement of Counsel—Notification to Counsel—Judgments Signed Out of Term—Appeal and Error.*—By agreement of counsel, the clerk of the Superior Court can represent the judge in taking the verdict of the jury; and when so done, and counsel representing one of the parties are not present, owing to the failure of the deputy clerk to notify them as he had promised to do, the validity of the verdict is not thereby affected, especially when no prejudice to the complaining party has been shown. Agreements of counsel that the clerk should take the verdict of the jury and judgment be mailed to the judge to be signed as out of term is discussed and disapproved, though not held for error. *Barger v. Alley*, 362.

27. *Trials — Instructions Construed — Railroads—Usefulness—Character of Plaintiff — Prejudice — Expression of Opinion.*—Where damages are sought of a railroad company for the negligent killing of plaintiff's intestate, a charge, construed as a whole, is not held for error as an expression of opinion forbidden by our statute, which in effect instructs the jury that they should not decide the case from any sympathy or consideration for the deceased, or any admiration for his good qualities or detestation for his bad qualities, if he should have any; or consider that the defendant is a railroad, explaining the usefulness of railroads; and saying that to award damages against them except upon the law and evidence would be robbery, tending to cripple them; and that not to award damages to the plaintiff upon the law

COURTS—*Continued.*

and testimony would be equal robbery; that as honest men and good jurors they, uninfluenced by moving appeals and powerful oratory, should coolly, quietly, without sympathy, passion, or prejudice, try to pass upon the evidence, and reconcile it, and answer the issues submitted. *McNeill v. R. R.*, 390.

28. *Evidence—Motions—Inspection and Copy of Papers—Interpretation of Statutes—Court's Discretion.*—Upon motion to allow inspection or copy of books, papers, etc., before trial (Revisal, 1656), it must be made to appear that the instrument in question relates to the merits of the action or is pertinent to the issue; or the motion should be denied; and when it is of the character authorized by the statute to be copied or inspected, etc., it is expressly left within the discretion of the trial judge whether or not he will make the order sought; and should he refuse to do so, it still rests within his discretion to compel the production of the writing later, or upon trial, when its competency and pertinency as evidence bearing on the issue may be better determined. *Evans v. R. R.*, 415.

29. *Courts — Findings of Fact — Counsel — Evidence—Appeal and Error.*— Findings of fact by a court, under an agreement of the parties, supported by competent evidence, or evidence to the admission of which no objection has been duly made, are conclusive on appeal. *Gilmore v. Smathers*, 440.

30. *Corporations—Subscribers' Liability—Tender—Interest—Court Costs.*— In this action against certain stockholders of a bankrupt corporation, brought by its trustees, to recover the balance alleged to be due upon their original subscription to the stock, it appearing that they were obligated to only a certain sum, which they tendered and plaintiffs refused to accept, it is held that a judgment of the trial court was proper that they pay the amount ascertained without interest or court cost from the date of the tender. *Ibid.*

31. *Justice's Courts—Appeal—Docketing Transcript—Interpretation of Statutes.*—An appeal from a justice's court not docketed in the Superior Court by the term thereof required by the statute is properly dismissed. *Tedder v. Deaton*, 479.

32. *Justice's Courts — Appeal — Recordari—Laches—Findings of Fact—Appeal and Error—Court's Discretion.*—Where, upon application to the Superior Court for a writ of *recordari* to issue to a court of a justice of the peace to bring up an appeal, the judge finds as facts, upon evidence, that the appellant has been guilty of laches in not giving the legal notice of appeal (Revisal, secs. 1491, 1492) and otherwise neglectful in failing to look after his appeal, and refuses to grant the writ, his judgment will not be disturbed in the Supreme Court; and it is *Held*, that praying for the appeal and the payment of the fees in the justice's court by the appellant are not, in themselves, sufficient to entitle him to the order, as a matter of right, or to take the matter out of the discretion of the trial judge. *Ibid.*

33. *Telegraphs — Issues — Appeal and Error—Punitive Damages—Courts—Trials—Instructions.*—An action to recover damages for mental anguish, physical suffering, etc., of a telegraph company, for its negligent failure to transmit or deliver a telegram relating to sickness or death, ordinarily may be submitted to the jury under two issues, though the question of punitive damages arises therein; and where a

COURTS—*Continued.*

third issue, as to punitive damages, has been erroneously submitted, or there is no evidence as to it, the court should withdraw it or instruct the jury to answer it in the negative. *Webb v. Telegraph Co.*, 483.

34. *Pleadings—Waiver—Insurance—Supreme Court—Amendments.*—While it is usually necessary to plead a waiver in order to make it available on the trial, the Supreme Court may allow an amendment there, within its sound discretion, and not disturb a verdict and judgment the party may have obtained in the Superior Court; and it appearing in this case that the plaintiff has failed to plead that the defendant had waived a condition contained in its policy of life insurance, requiring proof of death of the insured, and that the action had been commenced in a justice's court, where the pleadings are ordinarily informal, and that full opportunity had been given the defendant to produce and introduce testimony upon the question, the verdict below is left undisturbed. *Shuford v. Insurance Co.*, 547.

35. *Courts — Lex Loci Contractus — Statutes — Extraterritorial Effect—Wagering Contracts—Cotton Futures—Public Policy—Conflict of Laws.* Our statute prohibiting dealing in wagering contracts in cotton futures has no extraterritorial effect, and ordinarily the law governing a contract is that of the State or county wherein the contract was made; and while our courts may not enforce here a contract declared void by our statutes or contrary to our public policy, it has no power to interfere in any manner with the enforcement by the courts of another State of a contract valid according to its own laws, or with their action to determine their validity. *Carpenter v. Hayes*, 551.

36. *Supreme Court — Retaxing Cost — Full Cost of Transcript — Rules of Court.*—Where the defendant is the successful party on appeal, and on his motion to retax costs in the Supreme Court it appears in his written application in this Court that there was no unnecessary or superfluous matter in the transcript, and that the whole thereof was pertinent and necessary to a proper statement of the facts upon which the assignments of error were based, and the allowance specifically made in Rule 31 (164 N. C., 549) was not sufficient to pay for the cost of printing, which is not denied by the other party, it presents a proper instance for the Court to specifically order that the full cost of printing the transcript be taxed against the plaintiff and the surety on his prosecution bond, under the further provisions of Rule 31. *Hardy v. Insurance Co.*, 569.

37. *Removal of Causes—Citizenship—Issue of Fact—Jurisdiction—Federal Courts.*—An issue of fact raised by the complaint and petition as to whether a corporation, seeking to remove a cause brought against it by a resident plaintiff, to the Federal court, is a foreign corporation and entitled to have its motion granted for diversity of citizenship, is one for the determination of the Federal court where the petition upon its face is regular and sets forth facts sufficient for the removal of the case and the bond accompanying it is a proper one. *Hyder v. R. R.*, 584.

38. *Evidence—Depositions—Agreements—Objections and Exceptions—Trials — Leading Questions — Court's Discretion.—Semble*, an agreement to waive all irregularities in the taking of depositions, and that they should be opened and read subject to objections and exceptions, does

COURTS—*Continued.*

not confine the party thus agreeing to the objections and exceptions already noted in the depositions; but when it sufficiently appears that upon the trial the judge ruled upon the objections and exceptions then taken, exceptions to his not having done so cannot be sustained, especially when they relate chiefly to the leading character of the questions asked, which are directed to the sound discretion of the trial judge, and are not reviewable on appeal in the absence of its abuse. *Howell v. Solomon*, 588.

39. *Court's Discretion—Verdicts—Motions—Weight of Evidence.*—A motion to set aside a verdict of the jury as being against the weight of the evidence is addressed to the sound discretion of the trial judge, and in the absence of evidence of its abuse is not reviewable on appeal. *Ibid.*

40. *Appeal and Error—Removal of Causes—Federal Courts—Order—Refusing Removal.*—An appeal presently lies from an order denying an application, upon proper petition and bond, to remove a cause to the Federal court for diversity of citizenship under the Federal removal act. *Pruett v. Power Co.*, 598.

41. *Same — Trial Courts — New Trial—Interpretation of Statutes.*—Where the defendant has filed a sufficient petition and bond for the removal of a cause from the State to the Federal court on the ground of diversity of citizenship, and appeals from an order of the trial court refusing to remove the cause, the appeal involves the right of the State court to try the action, including in its scope all the issues presented in the record; and pending the appeal it is error for the trial court to proceed with the trial and determine these issues, over the objection of the defendant; and when this is done, and the appeal has regularly been prosecuted in accordance with the rules of law and practice regulating appeals, a new trial will be ordered, though the Supreme Court may have affirmed the order of the trial court, appealed from, retaining the cause. Revisal, sec. 602. *Ibid.*

42. *Appeal and Error — Record — Trials — Instructions—Exceptions—Presumptions—Supreme Court—Discretionary Powers.*—When exceptions are taken to the refusal of the trial judge to give proper instructions of law upon the evidence and issues in controversy, which were duly requested, it must appear of record that these instructions were not substantially given in the charge; and when the record does not set out the charge it will be presumed that the court correctly charged the law applicable to the case, though the Supreme Court, acting under its discretionary powers, may order the charge to be sent up when it thinks that a clear miscarriage of justice may thereby be prevented. *Hornthal v. R. R.*, 627.

43. *Municipalities—Cities and Towns—Shade Trees—Streets and Sidewalks —Interpretation of Statutes—Discretionary Powers—Courts.* — The board of commissioners of a town or city are charged with the duty, among others, of keeping its streets, which includes its sidewalks, in proper repair (Revisal, sec. 2930), and in the exercise of this authority, unless done negligently or maliciously, the municipality is not responsible in damages to its citizen, owning property abutting upon the street, for cutting down shade trees on the sidewalk in front of his property; nor is this principle affected by the facts in this case, that the street was wider in front of the plaintiff's property than elsewhere,

COURTS—*Continued.*

it appearing that the plaintiff had dedicated a strip of land to the public use as a sidewalk, the trees in question being over the outer edge of the sidewalk next to the street. *Munday v. Newton*, 656.

44. *Contracts, Written — Breach — Damages — Later Contract—Collateral Parol Agreement — Pleadings — Court's Discretion — Amendments — Issues.*—In an action to recover damages for a breach of a written contract for the sale of shares of the capital stock in a certain corporation, the defendant contended that this contract was superseded by a later one which the plaintiff admitted executing, but attempted to show by his evidence a separate agreement by parol that he could hold the defendant under the terms of the first contract if the defendant did not "treat him right" under the later one. This phase of the matter not having been alleged, the plaintiff asked leave of the trial court to amend the complaint, which was refused. *Held*, the matter of amending pleadings lies within the discretion of the trial judge, and is not reviewable on appeal. *Semble*, the alleged contemporary parol agreement was too uncertain to be made available, and it is *Further held*, the amendment, had it been allowed, would have necessitated trying the case on the later contract, introducing new issues of which the defendant had no notice. *Adickes v. Chatham*, 681.

45. *Contracts—Breach—Damages—Second Contract—Amendments—Court's Discretion — Nonsuit.*—Where upon a trial for damages for a breach of a written contract it is admitted that the contract sued on had been superseded by another and different one, requiring answers to issues not raised by the pleadings, and a requested amendment to the complaint has been refused by the trial judge, a judgment of nonsuit is properly allowed. *Ibid.*

COVENANTS. See Contracts, 5; Deeds and Conveyances.

COVERTURE. See Limitation of Actions.

CRIMINAL LAW.

1. *Intoxicating Liquors — Carrying Into Prohibited Territory — Criminal Law—Equity—Injunction.*—Where the transportation of intoxicating liquors into prohibited territory is declared a misdemeanor and made punishable by statute, except in certain instances, the carrier must exercise vigilance and sound discretion and take notice of the use to which it is intended to put the liquor; and equity will not undertake to determine upon injunction whether the shipments of liquor are intended for an illegal or legal purpose. Nor will our courts enjoin the enforcement of the criminal law, at the suit of the carrier, upon the ground that it is threatened with continuous indictments for transporting the liquor to the prohibited territory. *Express Co. v. High Point*, 103.

2. *Criminal Law—Injunction—Cities and Towns—Railroads.*—The courts will not interfere by injunction with the enforcement of the criminal laws of the State, except in very restricted instances, and such relief is not available where a municipality, in the reasonable exercise of power conferred upon it for the public good, has enacted a valid ordinance relating to the placing of poles upon its streets, which does not unduly interfere with the plaintiff's rights or obstruct it in the performance of its duties as a *quasi*-public corporation. *R. R. v. Morehead City*, 118.

DAMAGES. See Libel and Slander; Telegraphs; Vendor and Purchaser; Deeds and Conveyances.

1. *Master and Servant—Federal Employers' Liability Act—Contributory Negligence—Damages.*—Under the Federal Employers' Liability Act an instruction that the jury should "deduct," in proper instances, a reasonable amount for contributory negligence, instead of saying the damages should be "diminished on account of the contributory negligence of the plaintiff," is not held for error. *Tilghman v. R. R.*, 163.

2. *Master and Servant—Federal Employers' Liability Act—Contributory Negligence—Measure of Damages.*—*Semble*, that an instruction under the Federal Employers' Liability Act is erroneous, that if the negligence of the plaintiff was equal to the negligence of the defendant, he could not recover, for in such cases the plaintiff would be entitled to the full amount of the damages, less an allowance of one-half to be deducted on account of his contributory negligence. *Ibid.*

3. *Liens — Contracts—Material Men—Amount Due Contractor—Trials—Instructions—Measure of Damages.*—In an action by the material man against the owner of a dwelling to recover the price of material furnished by him to the contractor and used in the building (Revisal, sec. 2020), and the evidence discloses that the contractor has abandoned his contract and it is conflicting as to the amount the owner is due the contractor under the contract, the rule for the ascertainment of what amount, if any, is due to the contractor, is the contract price, less the amount paid to him, and the reasonable cost of completing the building; and if the amount thus due exceeds the claim of the plaintiff, and the materials furnished were used in the house, he should recover the amount of his claim; and if less, he can only recover the amount due the contractor. *Bain v. Lamb*, 304.

4. *Vendor and Purchaser — Contracts—Warranties—Breach—Damages—Conditions—Performance by Purchaser.*—Where the vendor brings an action on a note given for a stallion, and the purchaser claims damages on a written warranty of the vendor that the stallion "be at least 60 per cent foal-getter," and if not as represented, and returned by a certain date, he would replace it with another or return the purchase money, it is necessary, to maintain his counterclaim, that the defendant shall have performed the conditions required of him and returned the stallion in the time specified. *Altman v. Williams*, 312.

5. *Railroads — Easements — Municipal Authority—Damages.*—The defendant railroad company in this case petitioned the city to change the location of one of the streets by using for street purposes a strip of land the defendant owned, and to permit it to use the street running in front of plaintiff's property for its roadway and railroad purposes, which was granted, and the road constructed in accordance with a blue-print, etc., filed with the petition and under the direction and supervision of the city engineer and with the approval of the city authorities. *Held*, the location of the road through the city was a matter to be determined by the city authorities, and the plaintiff is not entitled to injunctive relief, the remedy being in an action for damages. *Waste Co. v. R. R.*, 340.

6. *Railroads—Easements—Abutting Lands—Ingress to Lands—Damages—Evidence.*—Damages are recoverable of a railroad company which has constructed its railroad along and upon a city street upon which

DAMAGES—*Continued.*

the plaintiff's lands abut, whether the plaintiff has shown any title to the street, or not, which arise from the inconvenience the plaintiff has sustained by reason of the interruption of access to his property, by rendering it less convenient for the purposes to which he had put it; and it is held competent, in this case, for the plaintiff to show that by the construction of the railroad at his place the plaintiff's ingress and egress had been impaired to and from leased property used in connection with its business conducted there. *Ibid.*

7. *Railroads—Easements—Abutting Lands—Depreciation—Damages—Evidence.*—When compensatory damages are recoverable from a railroad company by an owner of lands abutting on the street by reason of its construction of its roadway upon the street, it is competent for the plaintiff to show the diminution in value to his property by reason of the construction complained of, and while witnesses testifying in behalf of the plaintiff may not be able to express in dollars and cents the amount of the damages caused, they may, in proper instances, give their opinion that the property has been damaged a certain per cent of its value. *Ibid.*

8. *Railroads — Easements — Abutting Lands—Measure of Damages.*—The plaintiff sues a railroad company for damages to his property arising from its constructing and operating its railway upon the street in front of his lot abutting thereon, and it is held that the defendant's prayer for instruction asking that the jury should not take into consideration any effect upon the mere appearance of the plaintiff's property caused by the construction of the road was substantially incorporated in the charge given, of which the defendant cannot complain. *Ibid.*

9. *Trespass—Authorized—Adjoining Owners—Lessor and Lessee—Measure of Damages.*—Where an action for wrongful trespass and damages for quarrying rock on the plaintiff's land is brought against the lessor of adjoining lands upon the theory that the defendant authorized the trespass and entry of his lessee and received the profits, which is denied, with further defense that if the lessee quarried beyond the line of the leased land upon the plaintiff's land, it was done without his authority, the only damages recoverable by the plaintiff are for the defendant's authorized act of his lessee in going beyond the line of the leased lands and committing the trespass and for which he received the proceeds. *Keenan v. Commissioners*, 356.

10. *Contracts — Sale of Goods — Loss of Profits — Measure of Damages — Trials—Questions for Jury.*—Loss of profits on goods which the vendor contracted to deliver, but wrongfully failed to do, may be recovered by the purchaser as damages for the breach of the contract, when they were in reasonable contemplation of the parties and contract, and are ascertainable with a reasonable degree of certainty; and it is accordingly held, where the contract thus broken by the vendor was for the sale of thirty-six buggies, that evidence tending to show that the purchaser, a dealer, being unable to supply himself elsewhere in time for his trade, had lost the sale of thirty or more buggies, based upon his last year's business, and the demand of his trade for the present season, at an average profit of $15 each, is competent to be submitted to the jury for their determination in fixing the amount of the plaintiff's recovery for the breach of the contract. *Hardware Co. v. Buggy Co.*, 423.

DAMAGES—*Continued.*

11. *Contracts to Convey Lands — Defects of Title — Specific Performance— Diminution in Price—Damages.*—When a vendor's title to lands proves to be defective in some particulars, or his estate is different from that which he agreed to convey, unless the defects are of a kind and extent to change the nature of the entire agreement and affect its validity, the vendee may, at his election, compel a conveyance of such title or interests as the vendor may have and recover a pecuniary compensation or abatement of the price proportioned to the amount and value of the defect in title and deficiency in the subject-matter: a principle which usually prevails where the defects existed at the time of making the contract, but which, at times, extends to such as arise later. *Flowe v. Hartwick*, 448.

12. *Measure of Damages—Trials—Instructions.*—The charge of the court upon the measure of damages for a personal injury received by the plaintiff is approved upon the facts in this case under authority of *Johnston v. R. R.*, 163 N. C., 451, and that line of cases. *Embler v. Lumber Co.*, 457.

13. *Railroads—Easements—Measure of Damages.*—In awarding compensation to the owner of lands for an easement acquired by a railroad company thereon, recovery may be had for the impaired value, including, as a rule, the market value of the land actually taken or covered by the right of way, with damages to the remainder of the tract or portions of the land used by the owner as one tract, deducting from the estimate the pecuniary benefits or advantages which are special or peculiar to the tract in question, but not those which are shared by the owner in common with other owners in the same vicinity. *R. R. v. Armfield*, 464.

14. *Same — Incidental Depreciation—Smoke, Etc.—Sentimental and Speculative Damages.*—In awarding damages to the owner of land in condemnation proceedings brought by a railroad company to acquire a right of way through them, it is proper, in ascertaining the amount, to consider, among other things, the inconvenience and annoyance likely to arise in the orderly exercise of the easement which interfere with the use and proper enjoyment of the property by the owner and which sensibly impair its value, including the injury and annoyance from jarring, noise, smoke, cinders, etc., from the operating of trains, to the extent it exists from close proximity of the property and not attributable to the defendant's negligence; excluding, however, consideration of sentiment or personal annoyance detached from any effect on the pecuniary value of the property or allowance of damages of a purely speculative character. *R. R. v. Mfg. Co.*, 166 N. C., 168, cited and distinguished. *Ibid.*

15. *Telegraphs — Nominal Damages — Issues—Special Instructions—Appeal and Error—Harmless Error—Punitive Damages—Trials—Evidence— Questions of Law.*—Where a telegraph company is sued for its negligent delay in the delivery of a message, and issues of negligence, amount of compensatory and punitive damages are separately submitted, exceptions to the second issue, upon which the jury has found only nominal damages in accordance with the defendant's special request for instructions, become immaterial, so far as the defendant is concerned, it appearing that the company has negligently delayed its delivery; and while punitive damages are recoverable when the amount of compensatory damages are only nominal, the evidence, to

DAMAGES—*Continued.*

sustain such recovery, must not only tend to show an unexplained delay of the message which, being a failure of the defendant to perform a public duty, will sound in tort, but some acts on the part of the defendant or circumstances of aggravation which will amount to willful, wanton, or malicious conduct, in regard to the message sued on. The grounds upon which punitive damages may be awarded, and whether it is necessary that the corporation, as principal, must in some way have recognized or participated in the wrongful conduct of its local agent, and whether the recovery is not necessarily dependent upon the company's profits or loss at the particular locality, discussed by WALKER, J. *Webb v. Telegraph Co.*, 483.

16. *Telegraphs — Tort — Nominal Damages — Notice of Importance—Parol Evidence — Compensatory Damages.*—The breach of duty of a telegraph company to promptly transmit or deliver a message it has accepted for that purpose, though it does not give notice of its importance on its face, makes it liable for nominal damages, at least, and verbal communications made to the local agent receiving it, with respect to its importance, are admissible upon the issue of compensatory damages. *Ibid.*

17. *Telegraphs — Issues—Appeal and Error—Punitive Damages—Courts—Trials—Instructions.*—An action to recover damages for mental anguish, physical suffering, etc., of a telegraph company, for its negligent failure to transmit or deliver a telegram relating to sickness or death, ordinarily may be submitted to the jury under two issues, though the question of punitive damages arises therein; and where a third issue, as to punitive damages, has been erroneously submitted, or there is no evidence as to it, the court should withdraw it or instruct the jury to answer it in the negative. *Ibid.*

18. *Measure of Damages—Evidence—Personal Injury.*—In an action to recover damages for a personal injury alleged to have been caused by the defendant's negligence, it is competent for the plaintiff to testify, upon the question of the measure of damages, as to his trade or business and proficiency therein, and how the injury had reduced his earning capacity. *Ridge v. R. R.*, 510.

19. *Judicial Sales—Interference by Owner of Land—Damages—Evidence—Profits.*—The interest of a grantee in a timber deed is subject to execution and sale under a judgment obtained against him by his creditor, and the purchaser at such sale has the right to cut and remove the timber upon the terms and conditions and within the period specified in the deed; and in an action to recover damages against the owner of the lands for interfering with this right, it is competent for the purchaser to show by his evidence that he could have cut the whole or the greater part of the timber within the remaining period allowed under the terms and conditions of the timber deed, had not the defendant by his acts, threats, and other conduct wrongfully prevented him, and recovery may be had for the profits of all the timber which he might have cut and removed within the time, except for the acts of the defendant, using the means then at hand or reasonably available to him. *Williams v. Parsons*, 529.

20. *Injunction—Conflicting Evidence—Timber Contract—Breach—Measure of Damages.*—In this action to recover damages for a breach of contract of defendant to cut timber from plaintiff's land at a certain price,

DAMAGES—*Continued.*

the plaintiff excepted and appealed from the refusal of the trial judge to give certain of his prayers for instruction directing a verdict in a certain sum upon the issue as to the measure of damages, evidently based upon the theory that under the terms and conditions of the contract he should be permitted to recover damages for all the timber upon the entire tract of land which should have been cut by the defendant within the time specified. There was evidence in defendant's behalf tending to show that the plaintiff entered upon the land, stopped the defendant from cutting the timber, and sold it to another party, with further conflicting evidence as to the amount of timber actually cut, etc., and it is *Held*, that the plaintiff's requested prayers were properly refused, and that the case was properly left to the jury. The charge of the court is approved. *Smith v. Holmes*, 561.

21. *Judgments—Default and Inquiry—Breach of Contracts—Lumber—Measure of Damages — Speculative Profits — Appeal and Error.*—A judgment by default and inquiry for the failure to file answer in an action to recover damages for the breach of a contract in the failure of the defendant to deliver lumber sold, the cause of action is established by the judgment, leaving only the inquiry as to damages to be determined; and where the judge has correctly instructed the jury that the rule for the admeasurement of damages was the difference between the contract price and the market price at the place and time appointed by the contract for the delivery, the question is not presented, on the defendant's appeal, as to whether the plaintiff should be permitted to recover speculative profits, and no error is found. *Lumber Co. v. Furniture Co.*, 565.

22. *Contracts, Breach of—Measure of Damages—Diminution.*—In this action to recover damages for defendant's breach of contract in not delivering lumber sold, no evidence appears in the record that the plaintiff failed to exercise due care and diligence to prevent loss to defendant after he was aware of its breach, or to diminish the amount of damages, and the Court finds no error upon the defendant's contention in that respect. *Ibid.*

23. *Municipal Corporations — Cities and Towns — Discretionary Powers — Streets and Sidewalks—Negligent Construction—Damages—Constitutional Law—Taking of Private Property.*—A city is not liable to owners of lands abutting upon the street for any detriment to their property resulting from the grading of the street, done in the discretionary power of the city in making needed improvements, unless the damage done thereto resulted from a negligent grading of the street, or the State has given its consent by statute. The principles upon which this doctrine rests discussed by WALKER, J., and differentiated from those applying to the taking of private property for public use without just compensation. *Hoyle v. Hickory*, 619.

24. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Negligence—Witness, Nonexpert—Evidence—Maps—Measure of Damages.*—Where damages are sought by the owner of lands adjoining a street of a city or town, alleged to have been caused by the negligent construction of the street by the city authorities, evidence of its negligent construction is not confined to the testimony of experts, for such construction may be shown by other witnesses in plaintiff's behalf, using photographs of the locality in explanation and illustration of the

DAMAGES—*Continued.*

testimony, so as to give the jury a better idea as to whether or not damages had been caused, or as to their extent. *Ibid.*

25. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Negligent Construction—Measure of Damages.*—Upon an issue as to the amount of damages sustained by the plaintiff to his lands abutting a city street, alleged to have been caused by the negligent construction of the street by the city authorities, it is competent for the plaintiff to show the cost of restoring his lot to its former condition and value, the jury to give the evidence such weight as they think proper. *Ibid.*

26. *Common Carriers—Bills of Lading—Written Claim—Reasonable Stipulations—Damages—Penalty Statutes.*—Stipulations in the bill of lading of a common carrier that it would not be liable for loss or damage or delay in the shipment unless claim is made in writing, etc., within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed, are regarded as a reasonable protection to the carrier, and under the circumstances of this case it is *Held*, the failure of the plaintiff to comply with these stipulations as to the written claim bars his right to recover damages and the statutory penalty. *Forney v. R. R.*, 641.

DEAD BODIES.

1. *Dead Bodies—Mutilation—Damages—Parties—Next of Kin.*—In the order of their priority of inheritance of the personal property of the deceased, the next of kin may maintain an action to recover damages for the negligent mutilation of his dead body after death. *Floyd v. R. R.*, 55.

2. *Same—Father and Mother—Interpretation of Statutes.*—The father in his lifetime is now, by statute, entitled to all the personal property of his deceased child, in preference to its mother, upon the intestacy of the child without wife or children (chapter 172, Public Laws 1911, now Pell's Revisal, Supplement, sec. 132); and hence the mother of a deceased minor child, in the lifetime of the father, may not recover for the mutilation of its body after death. *Semble*, the same result would follow from the interpretation of Revisal, sec. 132, subsec. 6, before the amendment of 1911, chapter 172. *Ibid.*

3. *Same—Joinder of Parties.*—The mother may not recover damages for the mutilation of the dead body of her minor child, when the father is alive, is made a formal party plaintiff, and disavows all personal interest in the recovery; for the suit is then, in effect, one for the recovery by the mother alone. *Ibid.*

DEBTOR AND CREDITOR. See Bankruptcy; Corporations.

DECEASED. See Evidence, 11.

DEEDS AND CONVEYANCES. See Contracts.

1. *Deeds and Conveyances—Intent—Estates—Husband and Wife—Tenants in Common.*—A deed is interpreted as a whole to ascertain its intent, and the common-law rule as to the formal parts does not now obtain. Therefore, when thus construing a conveyance of land to husband and wife, it appears that they do not take the estate in

DEEDS AND CONVEYANCES—*Continued.*

entireties, but as tenants in common, the law of *jus accrescendi* does not apply. *Holloway v. Green*, 91.

2. *Deeds and Conveyances — Interpretation—Presumptions—Fee Simple—Interpretation of Statutes—Restraint on Alienation.*—Our statute, Revisal, sec. 946, provides that conveyances of land, without the use of the word "heirs," etc., are to be construed in fee, unless it clearly appears from the wording of the conveyance that an estate of less dignity was intended; and where a conveyance is thus construed to be in fee, any attempt of restraint upon alienation is void, but where relevant, the words therein used may be construed to ascertain whether the intent of the grantor was to convey a fee or an estate of less dignity. *Ibid.*

3. *Same — Husband and Wife — Tenants in Common.*—A conveyance of land, in the habendum, reserved possession in the grantor until the happening of a certain event, and then the possession to go to the grantees, husband and wife, "with the further limitation that neither party of the second part shall sell his or her one-half interest in the said land while the other is living, but, at the death of either, the survivor may dispose of his or her interest in fee, the one-half belonging to the other dying to go to his heirs or devisees in fee." *Held*, (1) after the termination of the interest reserved in the grantors the fee in the lands goes to the grantees, husband and wife, as tenants in common, not in entireties, the last clause of the conveyance having been inserted to prevent the possibility of survivorship; (2) the attempted restraint on alienation is void, though construed as intending to prevent one of the grantees from introducing a stranger as tenant in common with the other. *Ibid.*

4. *Deeds and Conveyances—Timber Deeds—Growth Within the Term—Present Interest — Equity — Injunction.*—A deed to timber growing upon lands "of and above 10 inches at the base when cut, now standing or growing, or which may be during the time allowed for cutting," with certain restrictions upon the grantors that no tree or timber shall be sold or carried off of the land by them which may attain the size specified during the term, conveys a present interest to the grantees in the trees of that size at the time of the conveyance, and of the smaller trees which may attain that size during the period for cutting, etc., and entitles them to equitable relief by injunction against the owners of the land who are attempting to cut and carry away timber under the size stipulated, at the time, but which will attain it within the time prescribed, according to competent evidence. *Mfg. Co. v. Thomas*, 109.

5. *Deeds and Conveyances—Description—Identification—Parol Evidence.*—A description of lands in a deed being "a certain tract of land in Franklin County, State of North Carolina, adjoining the lands of P. A. D., known as the J. A. Place," is sufficient to admit of parol evidence of identification. *Speed v. Perry*, 122.

6. *Fraud — Deeds and Conveyances — Consideration — Evidence.*—Where fraud and undue influence is alleged in procuring a deed, the consideration paid by the purchaser is an important and material fact, and in the absence of peculiar conditions, gross inadequacy may become controlling. *McPhaul v. Walters*, 182.

DEEDS AND CONVEYANCES—*Continued.*

7. *Same—Mortgagor and Mortgagee—Inadequacy of Consideration—Trials —Questions for Jury.*—In this action to set aside a deed for fraud and undue influence there was evidence tending to show that the grantee was also a mortgagee of the plaintiff at the time of the execution of the deed, and falsely represented that the deed in question was only a mortgage, and thus induced its execution; that the defendant had paid only $8 an acre for the land, which was worth at the time $30 an acre, and it is *Held,* that the evidence of inadequacy of the consideration paid is, under the circumstances, proper for the consideration of the jury upon the question of fraud. *Ibid.*

8. *Fraud—Deeds and Conveyances—Consideration—Inadequacy—Price—Remote Period—Evidence.*—It is the inadequacy of the consideration paid by the purchaser of lands, at the time of the deed which is attacked for fraud, that is evidence thereof, and the admission of evidence of its value nine years thereafter is held for reversible error. *Ibid.*

9. *Pleadings—Fraud—Allegations—Issues.*—Allegations of the complaint, in substance, that a deed sought to be set aside for fraud was obtained when the relationship of mortgagor and mortgagee existed between the parties, and that the plaintiff was induced to sign the deed by the false representations that it was a mortgage, is held sufficient to raise the issue; and upon a new trial awarded in this case the Court suggests that the question of actual and constructive fraud be determined upon separate issues. *Ibid.*

10. *Pleadings — Deeds and Conveyances—Insufficient Description—Appeal and Error.*—In an action upon a note given for the purchase price of lands and to foreclose a mortgage given thereon to secure it, the position is not open to the defendant that the description in the mortgage was insufficient, when it is not denied in the answer that the mortgage covered the *locus in quo. Crowell v. Jones,* 386.

11. *Deeds and Conveyances—Stakes—Beginning Points—Definite Location.* While it is true, as a rule, that a stake is not sufficiently definite to be considered as a beginning corner in the description of the lands conveyed, this rule obtains only in cases where there are no data presented in the description from which the true location of the stake can be determined, and does not apply to this case, wherein the location of the stake is definitely given as "the point in the center of the public road where it crosses the Piedmont Railway Company," etc. *Ibid.*

12. *Fixtures — Deeds and Conveyances — Flouring Mills.*—A flouring mill with engine, boiler, and usual machinery and fixtures, attached to lands, will pass to the grantee of the lands without being mentioned in the conveyance. *Ibid.*

13. *Deeds and Conveyances — Covenants of Seizin — Indefeasible Fee — Breach—Measure of Damages—Verdicts.*—A covenant of seizin is ordinarily one for an indefeasible title, and being *in præsenti,* a right of action accrues to the covenantee for its breach at the time he receives his conveyance; and unless he has bought the paramount title for a less amount, the rule of damages is the amount of the purchase price, where there has been an entire failure of title, and a proportionate diminution when the failure goes only to a part of the property, the purchase price being the basis of estimate, and the propor-

DEEDS AND CONVEYANCES—*Continued.*

tion being that of value and not of quantity; and the trial court having correctly charged this principle with relation to defendant's counterclaim, in plaintiff's action to foreclose a mortgage given for the purchase price, it is held that a verdict in plaintiff's favor upon the issue will not be disturbed. *Ibid.*

14. *Interpretation of Statutes—Counties—Deeds and Conveyances—Conditions—Open Squares.*—Where a county owning a site upon which to build its courthouse is authorized by statute to buy, sell, and exchange real estate surrounding it upon such terms and conditions as it may deem just and proper, and for the best interest of the county, "for the purpose of preventing the erection of any building near the courthouse and thereby lessen the danger of fire" and "to enlarge the public square," and in pursuance of this authority have acquired conveyance of lands from adjoining owners upon condition that they shall be used as a public square and kept open for that purpose, etc., it is *Held*, that whether the conditions be called conditions subsequent or otherwise, they were within the purview of the authority conferred upon the county by the statute; and, coming within the intent of the parties as expressed in the conveyance, and forming a material part of the consideration for the lands, they are valid and binding upon the county. *Guilford v. Porter*, 366.

15. *Same—Specific Performance—Equity—Injunction — Alleyways — Power of Courts.*—A county, under the purview of a statute authorizing it, having acquired lands from adjacent owners to its courthouse square upon a valid condition, expressed in the conveyance, that the property should be kept clear as a part of the open square around the courthouse, may be restrained, by proceedings of an equitable nature, from an intended breach of the covenants of the deeds by conveying the square to another corporation for the purpose of erecting a large building thereon to take up nearly the entire square; nor will the courts assume to pass upon the sufficiency of an 18½-foot alley for the defendants' needs, to be left between the proposed building and those of defendants; for the defendants are entitled to the continued performance of the conditions upon which the deeds were made. *Ibid.*

16. *Deeds and Conveyances—Legal Significance—Caveat—Wills—Parol Evidence.*—Where a paper-writing sought to be probated as a will gives unmistakable evidence of its legal character as a deed, *i. e.*, passes a present irrevocable interest, though not necessarily the immediate possession, and made upon a valuable consideration, parol evidence is inadmissible to show a contrary intent, that it was to operate as the will of the maker. *Phifer v. Mullis*, 405.

17. *Deeds and Conveyances — Caveat — Wills—Consideration of Services—Equitable Fee — Registration — Delivery—Presumptive Evidence.*—A paper-writing made by a man and his wife, agreeing to convey to their granddaughter certain described lands, and stating that she shall have the same in consideration of taking care of the makers, that is, she shall well and truly take care of them during their natural lives, etc., and that the conditions of the agreement are such that if the said granddaughter should die before said parties of the first part, then the property belonging to the said parties of the first part at their death shall descend to their lawful heirs and assigns as the law directs: *Held*, the granddaughter, in consideration of the services to be performed, and conditioned upon the consideration of her performing

DEEDS AND CONVEYANCES—*Continued.*

them, took, upon her accepting the deed, an equitable fee *in præsenti* in the lands described, the enjoyment of which was postponed until after the death of the grantors, and then vested absolutely, if she had performed the conditions; and it is *Further held*, that the registration of the deed after the death of one of its makers, and found in the possession of the grantee, is evidence of its delivery. *Ibid.*

18. *Deeds and Conveyances — Equitable Estates — Estate in Fee—Limitations—Uses and Trusts—Contingent Uses.*—While at common law an estate in fee cannot be made to cease as to one and to take effect as to another by way of limitation, depending upon a contingent event, it may do so under the doctrine of springing and shifting uses, or conditional limitations; and construing this deed in this case to effectuate the clear intention of the grantors without regard to the severely technical rules of the common law, it is held that the grantors intended to reserve the legal title to the land in themselves for life and to convey an equitable fee therein to the grantee, subject to the life estate of the grantors, to be divested in case she does not survive them, or fails to perform, during their lives, the conditions therein named, and if these conditions are not fulfilled, then the limitations to the makers' heirs shall take effect. *Ibid.*

19. *Wills — Caveat — Issues — Deeds and Conveyances—Execution.*—Upon proceedings to caveat a paper-writing sought to be established as a will, the issue should only relate to the question of *devisavit vel non*, and where it is established from the legal character of the paper offered that it is not a will, but a deed, the courts in that proceeding will not pass upon the validity of its execution. *Ibid.*

20. *Contracts to Convey—Statute of Frauds—Deeds and Conveyances—Delivery—Evidence—Extraneous Matters—Parol Evidence.*—While it has been decided that an undelivered deed, substantially containing the contract to convey lands, will be allowed the effect of a written memorandum, within the meaning of the statute of frauds, the doctrine only obtains when the writing in the deed sufficiently expresses the contract, and the right of the grantee to demand its delivery does not depend upon extraneous matters resting in parol. *Flowe v. Hartwick*, 448.

21. *Contracts to Convey—Deeds and Conveyances—Principal and Agent—Ratification.*—When an unauthorized contract has been made for an alleged principal, who is sought to be bound thereby, it is necessary that the agent must have contracted or professed to have contracted for the principal, and the latter must have signified his assent or intent to ratify, either by word or conduct. Hence, where the tenant for life in lands has executed a written contract to convey the lands upon condition, resting in parol, that all the remaindermen should convey their interest therein, and a deed was signed by the parties, but was left undelivered in the hands of a party in interest, a minor and remainderman, who destroyed the deed after coming of age, it is *Held*, that the contract is not enforcible, there being no evidence that the life tenant assumed to act as the agent of the remaindermen or that they had ratified his acts. *Ibid.*

22. *Deeds and Conveyances — Indefiniteness of Description — Void Conveyances.*—A conveyance of land as an undivided half interest of a tract of land containing 200 acres, more or less, lying and being in a certain

county on the waters of a certain creek, and covered by a certain State grant, is too indefinite of description to permit of parol evidence of identification, it appearing that the grant referred to was a 640-acre tract and that the land described in the conveyance was an indefinite part of this tract. *Higdon v. Howell*, 455.

23. *Deeds and Conveyances—Description—Parol Evidence.*—A description contained in a deed or contract to convey lands is sufficiently definite to admit of parol evidence of identification when it is capable of being reduced to certainty by reference to something extrinsic to which the instrument refers. *Patton v. Sluder*, 500.

24. *Same—Acquired by Adjoining Owner—Identity of Lands—Interpretation of Statutes.*—When P., the owner of a tract of land, has acquired by deed lands adjoining his own, sufficiently described by metes and bounds, and thereafter conveys them with the same description and designated lines and boundaries, which description is used in the subsequent conveyances, with reference to the original deed for further description, and the possession of the land has been held successively by those under whom a party claims, and he tenders a deed thereto under his contract to convey, with the same description set out in his claim of title, and the other party refuses to accept it, it is *Held*, that the *locus in quo* did not lose its identity because P. owned the adjoining tract at the time of acquiring the title thereto, and that parol evidence of identification of the lands to fit the description in the deed is competent both under the later decisions of our Court and our statutes, Revisal, secs. 948, 1005; and it is *Further held*, that this principle is not affected by the fact that the original deeds call for a less number of acres than the later ones, the description of the lands and boundaries given being identical. *Ibid.*

25. *Deeds and Conveyances—Color—Adverse Possession—Wire Fence—Evidence—Trials—Instructions—Limitations of Actions.*—The plaintiff in this action claims title to the land in dispute by adverse possession under color, and there is evidence on defendant's part that her agent entered upon the land, being on the east side of a certain wire fence, and cut timber therefrom in 1908, and the plaintiff, in response to his request, pointed out the wire fence as the dividing line between the lands. There was also evidence of plaintiff's adverse possession of the land on the east of this fence prior to 1908, sufficient to ripen his title. The court charged the jury, according to defendant's request for special instruction, in substance, that if the plaintiff pointed out the wire fence as the dividing line "and stated that the lands on the east thereof belonged to defendant, and the wire fence was constructed by permission of the defendant," that would be a recognition of the ownership of the defendant of the lands on the east side of the fence, and the possession of these lands by plaintiff thereafter would not be hostile, etc.: *Held*, it was not error for the court to modify this instruction by charging this would be so unless the plaintiff's title had ripened by adverse possession before 1908; and if it had, occurrences or conversations thereafter had between the parties could not divest it; and it is *Further held*, that construing the charge as a whole, the principles of law were clearly and correctly charged upon this phase of the controversy and the jury could not have been misled or confused in their deliberations to the defendant's prejudice. *Padgett v. McKay*, 504.

DEEDS AND CONVEYANCES—*Continued.*

26. *Timber Deeds—Realty—Incidents of Timber Interests.*—A conveyance of timber growing upon lands, as ordinarily drawn, conveys a fee-simple interest in such timber, is realty, and determinable as to all such timber not cut and removed within the time specified in the deed; and while such estate exists it is clothed with the same attributes and subject to the same laws of devolution and transfer as other interests in realty. *Williams v. Parsons*, 529.

27. *Same—Judicial Sales—Interference by Owner of Land—Damages—Evidence—Profits.*—The interest of a grantee in a timber deed is subject to execution and sale under a judgment obtained against him by his creditor, and the purchaser at such sale has the right to cut and remove the timber upon the terms and conditions and within the period specified in the deed; and in an action to recover damages against the owner of the lands for interfering with this right, it is competent for the purchaser to show by his evidence that he could have cut the whole or the greater part of the timber within the remaining period allowed under the terms and conditions of the timber deed, had not the defendant by his acts, threats, and other conduct wrongfully prevented him, and recovery may be had for the profits of all the timber which he might have cut and removed within the time, except for the acts of the defendant, using the means then at hand or reasonably available to him. *Ibid.*

28. *Timber Deed—Judicial Sales—Time for Cutting, Etc.—Expiration—Ejectment—Injunction.*—Where the rights of a purchaser at a judicial sale of the interest of a grantee in a conveyance of standing timber has been wrongfully interfered with by the owner of the land, and the time for cutting and removing the timber under the terms of the deed has expired, relief by ejectment or mandatory injunction is not available. *Ibid.*

29. *Deeds and Conveyances—Timber Deeds—Adverse Possession—Admitted Into Possession—Possessory Action.*—*Semble*, the possession of land by the owner is not regarded as adverse to the claim of a vendee of the timber growing thereon, under a separate deed, or to a purchaser of his title to the timber at an execution sale thereof, nothing else appearing; and under the circumstances of this case, it appearing that the purchaser at the execution sale was admitted into the possession by the owner of the lands, and thereafter was prevented by the owner of the lands from exercising his rights under his timber deed, it is held that the position is not available to the owner of the lands that his possession put the purchaser to his action therefor. *Ibid.*

30. *Deeds and Conveyances—Registration—Immediate Parties—Delivery—Parol Evidence—Trials—Burden of Proof.*—It may be shown that a deed registered after the death of the grantor had never been executed or delivered, as between the immediate parties, the burden of proof being on the plaintiff. *Linker v. Linker*, 651.

31. *Deeds and Conveyances — Delivery — Evidence—Issues—Answers—Instructions.*—Where the issues in an action to set aside a deed, one as to its actual signing and delivery and the other as to the mental capacity of the maker, it is proper for the trial judge to instruct the jury not to consider the second issue, should they find the first one in the negative. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

32. *Deeds and Conveyances — Witness to Deeds — Weight of Evidence— Wills—Witnesses of the Law.*—The testimony of a witness to a deed sought to be set aside for lack of execution and delivery has no greater weight than that of any other witness under oath. It is otherwise with witnesses to a will, who are witnesses of the law. *Cornelius v. Cornelius*, 52 N. C., 593. *Ibid.*

33. *Pleadings — Allegations — Information and Belief — Denial—Issues— Deeds and Conveyances—Delivery.—Allegations of the complaint*, made upon information and belief, and denied by the answer, that a deed sought to be set aside had never in fact or in law been executed by the grantor, is sufficient to raise the issue as to whether the grantor signed and delivered the deed to the grantee. *Ibid.*

34. *Deeds and Conveyances—Lines and Boundaries—General Reputation— Remoteness—Evidence—Corroboration.*—Common reputation is competent evidence on questions of location of a given line or boundary of lands when it is of comparatively remote origin, existed before the controversy arose, and is supported by evidence of occupation and acquiescence tending to give the land some fixed and definite location; and when general reputation of this character is introduced upon the trial, evidence of the reputation existent at a subsequent period may be received by way of corroboration. *Corpening v. Westall*, 684.

35. *Same—Sufficiently Remote.*—Where damages for wrongfully cutting timber on lands is made largely to depend upon the establishment of the true dividing line between adjoining owners, general reputation of an old market line, claimed by one of the parties to be the true one, existing before the controversy arose, is competent which tends to show that this line existed as far back as the Civil War, and before; was then pointed out by old persons, now dead, as such; and thereupon it is further competent for a witness at the trial to testify that he had known this line as far back as 1880 as the line contended for, and that at that time the same general reputation was prevalent; and it is *Further held*, that the rejection of the evidence in such cases, being on the principal question presented and determinative of the issue, constitutes reversible error. *Ibid.*

36. *Deeds and Conveyances—True Title—Color of Title—Possession—Presumptions—Interpretation of Statutes—Limitations of Actions.*—The occupation of lands is presumed in law to be under and in subordination to the true title until the contrary is made to appear (Revisal, sec. 386); and where the plaintiff, in an action to recover lands, has shown his title by proper grant from the State and mesne conveyances to himself, the presumption is, unless it is made to appear to the contrary, that the occupation thereof by others is under his title. Hence, when the defendant relies on a deed made to his ancestor as color, and adverse possession of others thereunder to ripen his title, it is necessary to show that their occupancy was under or connected with the deed under which he claims, or the presumption will obtain that they were under the true title shown by the plaintiff. *Land Co. v. Floyd*, 686.

37. *Same—Tenants—Trials—Evidence—Questions for Jury.*—The plaintiff having shown a sufficient and connected title to the land in contro-

DEEDS AND CONVEYANCES—*Continued.*

versy in himself, it is necessary for the defendant, claiming by adverse possession under a deed to his ancestor, as color, to show a continuity of such possession for seven years; and it is held in this case that the possession by a tenant or his ancestor for one year, under his deed, and the occasional entry upon the land by his heirs at law after his death, for the purpose of cutting a few logs, is insufficient evidence of adverse possession in character and continuity to be submitted to the jury. *Ibid.*

DEFAULT AND INQUIRY. See Judgments.

DEMURRER. See Pleadings, 18, 19.

DEPOSITIONS. See Evidence, 2, 3, 7.

DESCENT AND DISTRIBUTION.

1. *Descent and Distribution—Whole Blood—Rules of Descent.*—Rules IV and VI of Descents are construed together; and thereunder a collateral relation of the owner of lands, in order to inherit them, must be of the blood of the ancestor from whom the lands originally descended. *Nobles v. Williams*, 112.
2. *Executors and Administrators—Lands—Rules of Descent—Heirs at Law—Parties—Actions.*—The undevised land of a testator immediately descends, at his death, to his heirs at law, and his executors cannot maintain an action to set aside a deed for it, in the absence of some power in the will authorizing him to do so, or when there are no debts for the payment of which the lands may be sold. An executor may sell land conveyed by his testator when the deed is fraudulent or otherwise void, as against creditors, under the statute. Revisal, sec. 72. *Speed v. Perry*, 122.

DISCRETION. See Courts, 2, 7.

DIVORCE.

1. *Divorce—Consent Decree—Support of Minor Children—Motion in Cause—Power of Court—Statutes.*—The trial court is authorized by statute (Revisal, 1570), both before and after final judgment in an action for divorce, either a *vinculo* or *a mensa et thoro*, "to make such orders respecting the care, custody, tuition, and maintenance of the minor children of the marriage as may be proper, and from time to time modify," etc., such orders, and where consent judgment in a suit *a mensa et thoro* has been entered in the action, without providing for such children, upon motion in the original cause the court has power to make such further orders as it deems proper requiring the father to provide for the support of his children, whether born before or after the rendition of the consent judgment. *Sanders v. Sanders*, 317.
2. *Same—Charge Upon Husband's Lands—Appeal and Error—Presumptions—Evidence—Custody of Children.*—The trial judge, on motion in the original cause wherein a judgment for divorce has been rendered, may direct the father to pay a sum certain at regular intervals for the support and maintenance of his minor children and decree that it shall constitute a lien upon his lands; and where the order of the court does not provide for the custody or tuition of the children, the

DIVORCE—*Continued.*

appellate court will not reverse the order solely on that account, the matters being within the discretion of the trial court, and where the record is silent, the presumption is that the court below acted upon sufficient evidence to warrant the omission. *Ibid.*

3. *Divorce—Minor Children—Property—Support—Duty of Father.*—There is a legal as well as a moral duty of the father to support his infant children, if he is able to do so, whether they have property or not, and after as well as before a decree of divorcement, though the custody of the children be awarded to the mother. *Ibid.*

4. *Appeal and Error—Divorce—Improvident Appeal.*—Upon appeals by the wife and children in separate actions, the appeal of the children will be considered as improvidently taken if the relief sought is identical with that afforded under the judgment obtained in the action of the mother. *Ibid.*

5. *Divorce a Mensa — Husband's Misconduct — Provocation—Statutes—Trials—Questions for Jury—Former Appeal—Appeal and Error—Weight of Evidence—Courts.*—In this action for divorce *a mensa et thoro*, brought by the wife, it is *Held*, that the separate issues as to the husband's conduct and the wife's provocation are sufficiently raised by the pleadings, Revisal, sec. 1562 (4), and the verdict of the jury thereon in the plaintiff's favor, rendered upon competent evidence and correct rulings of law, will not be disturbed; the question of the sufficiency of the evidence to sustain the verdict is one that should have been addressed to the discretion of the trial judge; and it is *Further held*, that the former appeal in this case, deciding that the wife was not entitled to alimony *pendente lite*, did not affect the right of the plaintiff to introduce further evidence in her favor upon the issues raised. *Page v. Page*, 346.

6. *Divorce a Mensa—Misconduct—Continued Acts—Evidence.*—Where the wife sues the husband for divorce *a mensa et thoro*, under Revisal, 1562 (4), it is not error to admit on the trial evidence of his misconduct occurring "more than ten years ago" when it is a part of the whole course of his dealings coming down to "within six months of the beginning of the action." *Ibid.*

7. *Divorce a Mensa — Condonation — Requisites — Evidence.* — Evidence merely of forgiveness by the plaintiff, in her action for divorce against her husband *a mensa et thoro*, is insufficient to establish condonation, for condonation is forgiveness upon condition to abstain from like offenses afterwards, which revives their original status when violated. *Ibid.*

8. *Divorce a Mensa—Custody of Children—Bonds—Appeal and Error.*—In this action for divorce the order of the judge appointing the plaintiff custodian for the court of a minor child of the marriage, pending appeal, requiring a bond in a certain sum to keep the child within the jurisdiction of the court and amenable to its orders, etc., is found to be without error. *Ibid.*

9. *Divorce a Mensa — Custody of Child—Former Decision—Appeal and Error—Improvident Appeal.*—In this suit for divorce *a mensa* it was directed on a former appeal (166 N. C., 90) that the lower court retain jurisdiction of a minor child of the marriage until the hearing, etc., and to refrain from changing the custody of the child or permitting it to be carried out of the State, and the judgment of the

DIVORCE—*Continued.*

lower court having already been sustained as in accordance with the former appeal, this appeal becomes irrelevant and improvident. *Ibid.*

10. *Husband and Wife—Estates by Entiretics—Divorce—Tenants in Common—Statutes.*—Under our Constitution and the later statutes, as formerly, husband and wife hold lands conveyed to them in entireties with the right of survivorship, this estate in its essential features and attributes being made dependent upon their oneness of persons in legal contemplation. Therefore, when this unity of person is entirely severed by divorce absolute, the peculiar features of the estate arising out of such unity, and made dependent upon it, should also disappear, and the owners, having acquired the estate subject to this principle, thereafter hold as tenants in common, subject to partition in proceedings regularly brought for that purpose by them or the grantees of their interests. Revisal, secs. 2109, 2110, deals with the rights of husband and wife growing out of the marriage relation, such as dower, curtesy, and the like, and has no application to estate by entireties. *McKinnon v. Caulk*, 411.

DOWER.

1. *Dower—Allotment Before Division—Heirs at Law.*—The widow of a deceased owner of lands held by him in common with others may have her dower interest therein set apart to her before division of the lands among the heirs at law. *Dudley v. Tyson*, 67.
2. *Same—Partition—Actions—Interpretation of Statutes.*—The widow of a deceased owner of an undivided one-half interest in lands held in common with his sister had her dower interest of one-sixth of the lands laid off to her; and the heirs at law of the deceased having purchased the interest of the other tenant in common, the widow and some of the heirs at law bring suit against the other parties in interest, for partition of the lands subject to the widow's right of dower to be now allotted therein: *Held*, the action in this form can be maintained. Revisal, sec. 2517. *Ibid.*
3. *Dower Proceedings—Actions—Collateral Attack—Partition.*—An allotment to the widow in dower proceedings cannot be attacked collaterally in proceedings for partition of the lands of the deceased ancestor by his heirs at law. *Ibid.*

DUE COURSE. See Bills and Notes, 2, 3.

EASEMENTS. See Cities and Towns, 1; Railroads.

ELECTION. See Contracts, 5.

ELECTRICITY.

1. *Electricity—Negligence—High Degree of Care—Trials—Instructions—Ordinary Care—Appeal and Error.*—While corporations engaged in the business of furnishing electric power and light to their patrons are not regarded as insurers against injury, they owe the duty to the public and to their patrons to exercise a high skill and the most consummate diligence and foresight in the construction, maintenance, and inspection of their plants, wires, and appliances consistent with the practical operation of their business; and when in an action for damages there is evidence tending to show that the plaintiff was injured on the street of a city by coming in contact with the defend-

ELECTRICITY—*Continued.*

ant's live wire, heavily charged with electricity, lying down upon the sidewalk, it is reversible error for the trial judge to charge the jury, in effect, upon the issue of defendant's negligence, that the care required of the defendant in such instances was that of the ordinarily prudent man. *Turner v. Power Co.*, 630.

2. *Trials—Issues—Electric Wires—Control and Ownership.*—It being contended in this action against an electric power company that the wire with which the plaintiff came in contact, causing the injury, was not operated by the defendant or under its control, a separate issue upon that question should be submitted to the jury. *Ibid.*

EMPLOYMENT OF CHILDREN. See Negligence.

ENTIRETIES. See Husband and Wife, 4.

EQUITY. See Estates.

1. *Equity—Cloud on Title—Tax Deeds—Interpretation of Statutes.*—Revisal, sec. 1589, is highly remedial in its nature and should be construed liberally, and thereunder a suit may be maintained to cancel a tax deed as a cloud upon title to lands, without requiring that the plaintiff must have possession under his paper title as a condition precedent to his right of action. *Christman v. Hilliard*, 4.

2. *Intoxicating Liquors — Carrying Into Prohibited Territory — Criminal Law—Equity—Injunction.*—Where the transportation of intoxicating liquors into prohibited territory is declared a misdemeanor and made punishable by statute, except in certain instances, the carrier must exercise vigilance and sound discretion and take notice of the use to which it is intended to put the liquor; and equity will not undertake to determine upon injunction whether the shipments of liquor are intended for an illegal or legal purpose. Nor will our courts enjoin the enforcement of the criminal law, at the suit of the carrier, upon the ground that it is threatened with continuous indictments for transporting the liquor to the prohibited territory. *Express Co. v. High Point*, 103.

3. *Deeds and Conveyances—Timber Deeds—Growth Within the Term—Present Interest—Equity—Injunction.*—A deed to timber growing upon lands "of and above 10 inches at the base when cut, now standing or growing, or which may be during the time allowed for cutting," with certain restrictions upon the grantors that no tree or timber shall be sold or carried off of the land by them which may attain the size specified during the term, conveys a present interest to the grantees in the trees of that size at the time of the conveyance, and of the smaller trees which may attain that size during the period for cutting, etc., and entitles them to equitable relief by injunction against the owners of the land who are attempting to cut and carry away timber under the size stipulated, at the time, but which will attain it within the time prescribed, according to competent evidence. *Mfg. Co. v. Thomas*, 109.

4. *Cities and Towns—Ordinances—Railroads—Rights of Way—Streets—Obstructions—Equity—Injunction.*—The enforcement of an ordinance making it unlawful and a misdemeanor to maintain any telegraph line at any point upon any of its streets more than 24 inches beyond

EQUITY—*Continued.*

or outside of the curb line separating the sidewalk from the driveway of the street, providing that the same may be removed under the direction and control of the mayor at the cost of the corporation, etc., maintaining them, and also providing a fine of $50 for a conviction of violating the ordinance, will not be enjoined at the suit of a railroad company upon whose right of way the town has grown up since its acquisition, it appearing that the right of way has since become a part of a principal street of the town, and the telegraph poles thereon are within the driveway of the street; that the placing as required by the ordinance can be made at a comparatively small expense, and the business of the company will not be seriously interfered with by making the change. *R. R. v. Goldsboro,* 155 N. C., 356, and that line of cases, cited and applied; *Muse v. R. R.,* 149 N. C., 443, cited and distinguished. *R. R. v. Morehead City,* 118.

5. *Criminal Law—Injunction—Cities and Towns—Railroads.*—The courts will not interfere by injunction with the enforcement of the criminal laws of the State, except in very restricted instances, and such relief is not available where a municipality, in the reasonable exercise of power conferred upon it for the public good, has enacted a valid ordinance relating to the placing of poles upon its streets, which does not unduly interfere with the plaintiff's rights or obstruct it in the performance of its duties as a *quasi-public* corporation. *Ibid.*

6. *Pleadings—Answers—Counterclaim—Title to Lands—Slander of Title—Equity—Injunction—Trials—Nonsuit.*—The right of a plaintiff to abandon his action and submit to a judgment of nonsuit at any time before verdict rendered, or what is tantamount to it, does not apply where the defendant has pleaded as a counterclaim a cause of action arising out of a contract or transaction set forth in the complaint as a ground for the plaintiff's cause; and where in an action for the possession of land the defendant sets forth his title and, asking for injunctive relief, alleges the insolvency of the plaintiff, his frequent acts of trespass, and that his claim of title constitutes slander upon the defendant's title, depriving him of the opportunity to sell his land, etc., the plaintiff may not take a voluntary nonsuit and deprive the defendant of his right to try out the action to obtain the relief he has demanded. *Yellowday v. Perkinson,* 144.

7. *Courts—Jurisdiction—Equity—Injunction—Venue.* — Where the court erroneously orders a cause of action removed to the county of the defendant's residence, upon the ground that it was an action to recover personal property, the main relief sought being that for an accounting, and at the same time continues the plaintiff's restraining order, arising in said cause, to the final hearing, exception to the latter order on the ground that it was made in a county where the court was without jurisdiction cannot be sustained. *Clow v. McNeill,* 212.

8. *Reformation of Instruments — Equity — Mutual Mistake—Parol Evidence.*—Where the specific performance of a written contract is sought in an action, it is competent for the defendant to show by parol evidence the omission of certain parts of the agreement by mistake or inadvertence of the parties, their draftsman, or agent, in drawing up the instrument. *Palmer v. Lowder,* 331.

9. *Railroads — Easements — Equity — Restraining Order — Injunction.*—*Semble,* an owner of a lot on a city street, after having been refused a

EQUITY—*Continued.*

restraining order in the Superior Court against a railroad company from continuing the construction of the roadway in front of his property on the street, and from which order he has not appealed, is not entitled to consideration in equity upon his application thereafter for a permanent injunction against the continued use of the road by the common carrier, which had been put into full operation. *Griffin v. R. R.*, 150 N. C., 315, cited and applied. *Waste Co. v. R. R.*, 340.

10. *Same—Municipal Authority—Damages.*—The defendant railroad company in this case petitioned the city to change the location of one of the streets by using for street purposes a strip of land the defendant owned, and to permit it to use the street running in front of plaintiff's property for its roadway and railroad purposes, which was granted, and the road constructed in accordance with a blue-print, etc., filed with the petition and under the direction and supervision of the city engineer and with the approval of the city authorities. *Held*, the location of the road through the city was a matter to be determined by the city authorities, and the plaintiff is not entitled to injunctive relief, the remedy being in an action for damages. *Ibid.*

11. *Landlord and Tenant — Mortgage — Fraud — Equities.*—The mortgagor and mortgagee having agreed after the latter had acquired the lands at a foreclosure sale, under a paper-writing whereby the mortgagor was given another opportunity to purchase upon his payment of rent and the performance of certain other conditions, the mortgagee brings his action before a justice of the peace in summary ejectment, wherein a controversy arose, under conflicting evidence, as to whether the defendant had relinquished his rights under the paper-writing, or had executed another writing wherein he became merely a tenant, concerning which the defendant contended, upon competent evidence, that he had not signed, or had signed it in ignorance of its terms, or through fear or by coercion. *Held*, the controversy involved the disputed title to real property, out of which certain equities arose, and not being within the jurisdiction of the justice of the peace, was properly dismissed by him; and, further, the Superior Court acquired no jurisdiction on appeal to determine the controversy *de novo*. *McLaurin v. McIntyre*, 350.

12. *Interpretation by Statutes—Specific Performance—Equity—Injunction —Alleyways—Power of Courts.*—A county, under the purview of a statute authorizing it, having acquired lands from adjacent owners to its courthouse square upon a valid condition, expressed in the conveyance, that the property should be kept clear as a part of the open square around the courthouse, may be restrained, by proceedings of an equitable nature, from an intended breach of the covenants of the deeds by conveying the square to another corporation for the purpose of erecting a large building thereon to take up nearly the entire square; nor will the courts assume to pass upon the sufficiency of an 18½-foot alley for the defendants' needs, to be left between the proposed building and those of defendants; for the defendants are entitled to the continued performance of the conditions upon which the deeds were made. *Guilford v. Porter*, 366.

13. *Trusts and Trustees—Parol Trusts—Evidence—Common Law.*—There being no statute in North Carolina to the contrary, the common-law rule prevails here, that a trust may be created by parol agreement

EQUITY—*Continued.*

entered into between the parties before or at the time of the transmission of the legal title to lands, and that when created it attaches to and becomes a part of the title, the difference between establishing a parol trust and that under a sufficient writing being only in the mode and degree of proof. *Lutz v. Hoyle*, 632.

14. *Same — Equitable Mortgage — Equity of Redemption — Foreclosing— Power of Sale — Court's Decree.*—Where it is established that a purchaser of lands agreed by parol at the time of the purchase that he would bid in the lands at a certain price and hold them for the benefit of the other party to the agreement, and convey to him upon a part payment of the purchase price at a specified time, and take a mortgage for the balance, etc., and subsequently refuses to carry out this agreement, in a suit to declare a parol trust upon the land it is *Held*, that the effect of the conveyance is to vest in the plaintiff an equitable estate of redemption; which cannot be foreclosed in the absence of an abandonment of the right and in the absence of a power of sale, legally ascertained, except by decree of a court of equity, the relation of the parties being that of mortgagor and mortgagee. *Ibid.*

15. *Trusts and Trustees—Parol Trusts—Equitable Mortgage—Readiness to Pay—Equity of Redemption.*—A parol trust in plaintiff's favor engrafted upon the title to lands acquired by the defendant, and the relation of mortgagor and mortgagee (without power of sale) having been established, an answer to the issue finding that the plaintiff was not ready, able, and willing to pay the money secured, does not necessarily bar the plaintiff's right to redeem. *Ibid.*

16. *Trusts and Trustees—Parol Trusts—Equitable Mortgage—Ready, Etc., to Pay—Issues—Verdict.*—The plaintiff having established by parol an interest in his favor in the nature of an equitable mortgage in the lands, conveyed to the defendant, it is *Held*, that an answer to an issue including the findings of facts, that the plaintiff was not and is not ready, able, and willing to comply with the terms of the agreement, does not bar the plaintiff of his equitable interest, it appearing of record that the plaintiff had offered to pay the full amount of the purchase price, with interest, etc., into court for the use of the defendant, and that actual payment was waived by him; and it is *Further held*, under the instruction of the court, in this case, that the jury must have found by their answer to this issue that the plaintiff could not have paid the money from his own earnings, which does not preclude the right of the plaintiff to have obtained the money from other sources. *Ibid.*

ESTATES. See Husband and Wife, 1, 4.

1. *Wills—Estates—Limitations Over—"Blood Relative"—Heirs—Rule in Shelley's Case.*—A devise of an estate for life with limitation over to G. "to have and to hold during her natural life and at her death to her nearest blood relative," does not create a fee simple in the remainderman after the death of the first taker, for the term "nearest blood relative" is not equivalent to the word "heirs." The rule in *Shelley's case* does not apply. *Miller v. Harding*, 53.

2. *Estates for Life—Reinvestment—Findings of Fact—Appeal and Error.* In this case the plaintiff contended that she took a fee-simple estate under the construction of a will devising lands to her, and requested

ESTATES—*Continued.*

that should she be held to take a life estate, the lands be sold and reinvested for her. The lower court correctly holding, upon the evidence, that the plaintiff took only a life estate, found as facts that her present income was sufficient for her support in her condition of life, that her income would be increased by the sale, etc., but that she would be the only one materially benefited, and refused to order the lands sold; and on appeal it is held that the Supreme Court is bound by these findings, and no error is found. *Ibid.*

3. *Estates—Leases—Tenants—Remaindermen—Rents — Interpretation of Statutes.*—The common law relating to the crops of a tenant growing upon lands, at the termination of the life estate of his lessor, withholding from the remainderman his part of the rent for the land during the current crop year, and accruing after the life estate has fallen in, has been changed by statute, Revisal, sec. 1990, the effect of which is to extend the lease for the current crop year, upon the consideration of the payment of rent; and where the rent under the contract of lease is for a certain fixed sum of money, the remainderman is entitled only to his proportionate part of that sum, according to the period of payment elapsing after the termination of the life estate of the lessor. *Hayes v. Wrenn*, 229.

4. *Deeds and Conveyances—Caveat—Wills—Consideration of Services—Equitable Fee—Registration—Delivery—Presumptive Evidence.* — A paper-writing made by a man and his wife, agreeing to convey to their granddaughter certain described lands, and stating that she shall have the same in consideration of taking care of the makers, that is, she shall well and truly take care of them during their natural lives, etc., and that the conditions of the agreement are such that if the said granddaughter should die before said parties of the first part, then the property belonging to the said parties of the first part at their death shall descend to their lawful heirs and assigns as the law directs: *Held*, the granddaughter, in consideration of the services to be performed, and conditioned upon the consideration of her performing them, took, upon her accepting the deed, an equitable fee *in præsenti* in the lands described, the enjoyment of which was postponed until after the death of the grantors, and then vested absolutely if she had performed the conditions; and it is *Further held*, that the registration of the deed after the death of one of its makers, and found in the possession of the grantee, is evidence of its delivery. *Phifer v. Mullis*, 405.

ESTOPPEL.

1. *Judgment—Estoppel.*—In a former suit to foreclose a mortgage on certain lands fully described in the pleadings, the *locus in quo* was sold by a commissioner duly appointed for the purpose, under a decree ordering the sale, which conformed to the description contained in the pleadings, and the plaintiff in this action claims under the commissioner's deed, containing the same description. The defendant in the present action was also a party defendant in the suit to foreclose, and it is held that he is estopped by the judgment therein from showing that the boundaries set out in the present case and in the former suit did not correctly describe the lands contained in the mortgage. *McMillan v. Teachey*, 88.

ESTOPPEL—*Continued.*

2. *Courts—Jurisdiction—Pleadings—Judgment—Estoppel.*—When a court having jurisdiction of the case and the parties renders judgment therein, it estops the parties and their privies as to all issuable matters contained in the pleadings; and though not issuable in a technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined in the hearing. *Ferebee v. Sawyer*, 199.

3. *Judgments—Mortgages—Sales — Notice — Estoppel.*—The mortgagor of lands brought suit to restrain the mortgagee from making conveyance thereof under a sale of foreclosure under the power contained in the mortgage, and issue was joined, among others, upon the question of the sufficiency of notice of the postponement of the sale, and judgment was rendered establishing, among other things, the sufficiency thereof. In the present action the purchaser at the sale sues the mortgagor for possession of the lands, and it is *Held*, the present defendant is estopped by the judgment in the former proceedings to deny the sufficiency of the notice of postponement. *Ibid.*

4. *Corporations—Distribution of Assets—Act of Treasurer—Award and Satisfaction—Estoppel—Credits.*—In an action by a corporation and some of its stockholders for dissolution, and against its treasurer for an accounting and distribution of its assets among the stockholders, it is held that the treasurer cannot successfully plead accord and satisfaction by showing that he, of his own authority, had sent statements and checks to the stockholders for their distributive shares in the assets, which had been cashed by them, for the treasurer's accounting should have been made to the corporation, which cannot be estopped by his action; when the corporation is not indebted, and not otherwise, he is entitled to a credit in the settlement for the sum he has thus distributed. *Montcastle v. Wheeler*, 258.

5. *Trusts and Trustees—Parol Trusts—Leases—Estoppel.*—In this action to establish an equity arising "in the defendant's title to land" it is *Held*, that an issue as to whether the plaintiff was estopped by certain leases from maintaining his action for specific performance was correctly answered under the authority of *Hauser v. Morrison*, 146 N. C., 252. *Lutz v. Hoyle*, 632.

6. *Processioning Lands—Issues—Title—Estoppel—Judgment.*—While prior to the act of 1903, now Revisal, 717, title to lands were not affected by proceedings to procession lands, now the dividing line may be established without putting the title in issue, or the parties may also join issue upon the title; and where the first course is pursued a judgment in the proceeding is an estoppel as to where the line is located, and in the second event the case is transferred to the Superior Court in term upon issues joined as to the title, and a judgment of the court therein estops the parties both as to the title and the location of the line. *Whitaker v. Garren*, 658.

7. *Same—Controverted Matters—Evidence—Interpretation of Statutes.*—As to whether a party in an action involving title to lands is estopped by a judgment formerly rendered in processioning proceedings to determine the true dividing line between himself and another, parol evidence is admissible to show whether or not the title as well as the boundary of the land was properly embraced in and determined by

ESTOPPEL—*Continued.*

the judgment in former proceedings, or whether the issue as to the true location of the line was raised and determined by merely showing occupancy of the parties without involving the issue as to title, Revisal, sec. 326; and in this case it is held for error under the defendant's exceptions that the trial judge withdrew from the consideration of the jury the processioning proceedings, which had been introduced, and instructed them not to consider them in any view, it therein appearing that the parties were claiming under mesne conveyances under separate grants from the State, and that the court "settled and adjudged the true line between the said grants, and between the parties, in accordance with the defendant's contention." *Ibid.*

8. *Judicial Sale—Commissioner's Deed—Judgments — Estoppel.*—A deed made by a commissioner appointed in proceedings to sell lands of a decedent to pay his debts can only convey so much of the lands as are embraced in the description set out in the petition, and authorized by the order of sale, and being inoperative as to other lands therein attempted to be conveyed, a decree of confirmation of the report of sale made in general terms, so far as the lands sold are described, referring to the petition and decree of sale, cannot operate as an estoppel by judgment so as to bar the claim of the heirs at law to the lands not authorized, but included in the commissioner's deed, though they were parties to the proceedings to sell the lands. *Horton v. Jones*,. 664.

9. *Judgments—Motions to Set Aside—Excusable Neglect—Reversing Previous Order—Judgment—Estoppel.*—Where an order refusing to set aside a judgment for excusable neglect, etc., on motion made within twelve months (Revisal, sec. 513), has without objection been set aside by the same judge, at the next succeeding term of court, the original motion is left pending and the movant is not estopped by the former judgment denying his motion. *Pierce v. Eller*, 675.

EVIDENCE. See Trials; Libel and Slander; Deeds and Conveyances; Reference, 3, 4; Mechanics' Liens, 1; Contracts; Divorce; Corporations, 11, 12; Principal and Agent; Bills and Notes, 1; Trusts.

1. *Limitations of Actions—Adverse Possession—Evidence—Taxes.*—A test of adverse possession, in an action involving the title to lands, is whether the acts in evidence are sufficient to expose the occupant to an action of trespass; and while the listing and payment of taxes alone are insufficient, they may become a relevant fact in connection with other circumstances tending to show an adverse and hostile possession. *Christman v. Hilliard*, 4.

2. *Evidence — Depositions—Commissioner—Mistake in Name—Notices.*—Where the notice to take depositions correctly states the name of the commissioner appointed to take them, gives the time and place, and is otherwise regular, and it appears that the commission was issued to the commissioner with a slight error in the name—in this case "Brocks" for "Brooks"—it is error for the trial judge to exclude the depositions, as evidence, on that account, it appearing that the depositions were properly signed by the commissioner, etc. *Hardy v. Insurance Co.*, 22.

EVIDENCE—*Continued.*

3. *Evidence—Depositions—Irregularities—Waiver.*—Where a party agrees that depositions, which have been taken by his opponent, may be opened and read upon the trial, reserving only the right to object to incompetent testimony therein, he waives his right to object to the irregularity of taking the depositions. *Ibid.*

4. *Insurance, Life—Evidence—Application—False Statements.*—Where a life insurance company resists recovery upon its policy and raises issues as to whether the insured had made false representations in his application for the policy, that he had never theretofore been examined for life insurance and rejected as an unsuitable risk, etc., it is error for the trial judge to exclude defendant's evidence directly bearing upon these issues, for such facts, if they existed, are material, as they would have had a substantial influence upon the insurer in deciding whether to issue the policy or not. *Ibid.*

5. *Evidence—Witnesses — Medical Experts — Opinion — Facts at Issue—Trials.*—The plaintiff sues to recover damages of the defendant for the death of his intestate, caused by moving her from one of its tenant-houses to another during an illness of typhoid fever. *Held*, a question is competent, asked the witness, a medical expert, as to the causes of the intestate's death predicated upon the symptoms of the patient and attendant facts, assumed to have been found by the jury, and not objectionable as an expression of opinion upon a fact at issue to be passed upon by them; and while in this case the question asked included the question of proximate cause, it is further held that the case, if established, was so clearly the proximate cause that the error was rendered harmless. *Lynch v. Mfg. Co.*, 98.

6. *Evidence — Witnesses — Medical Experts—Text-books.*—Upon examination of a medical expert it is not permissible to read extracts from medical books for the purpose of cross-examining the witness and attacking the credibility of his evidence, or asking the witness if the opinion from the text-book was true or not; for the author has not made a statement under oath, subject to cross-examination, and such practice would permit by indirection what is expressly forbidden as evidence; but when the witness has testified as such expert, professing to have special training and knowledge from standard works of his profession, a general question of this kind may be allowed with the view of testing the value of his opinion. *Ibid.*

7. *Evidence—Depositions—Trials—Witnesses—Courts.*—When the deposition of a witness, taken when he was in another State, has been read on the trial of the cause, in his absence, the trial judge may, in his discretion, permit the witness, then present, to orally testify after his deposition has been read in evidence. *Tilghman v. R. R.*, 163.

8. *Courts—Evidence—Expert Witnesses—Recross-examination—New Matter.*—It is within the discretion of the trial judge to permit an expert witness to testify to new matter on his recross-examination. *Ibid.*

9. *Railroads—Train Orders—Copies—Identification — Witnesses — Nonexpert Evidence.*—Where damages are sought in an action against a railroad company for a wrongful death alleged to have been inflicted on the deceased by reason of an erroneous train order, made out in original and carbon, causing a collision of two trains, wherein the deceased met his death, it is competent for a witness who has not

EVIDENCE—*Continued.*

qualified as an expert to testify that he had inspected the original order, and that the copy exhibited was not genuine. *Ibid.*

10. *Same—Meeting Points—Similarity of Names.*—A railroad company having two stations on its road with similar names, "Grandy" and "Granite," wired from its proper department for two trains going in opposite directions to meet at one of these points, which they failed to do, resulting in a collision and the injury to the plaintiff, and the controversy turned upon the question which point was named in the order, the plaintiff contending that the order he received instructed "Grandy" as the meeting point. The plaintiff having been fully examined and testified he had no doubt that the order read "Grandy" instead of "Granite," was permitted to say that a paper-writing exhibited to him looked nearer like the one he had received than that introduced by the defendant, and that it read that the trains should pass at "Grandy," the name of the station as appearing upon the order being indistinct; and this is held no error. *Ibid.*

11. *Evidence—Deceased—Transactions and Communications—Husband and Wife—Interpretation of Statutes.*—In an action against an administrator to recover the value of services the plaintiff alleges he has rendered the deceased, the wife of the plaintiff has no "direct, legal, or pecuniary interest in the event" which would bar her testimony as to a transaction with the deceased, under Revisal, sec. 1631, and it is competent for her to testify to the contract relied upon by her husband, the plaintiff. *Linebarger v. Linebarger*, 143 N. C., 231, cited and distinguished. *Helsabeck v. Daub*, 205.

12. *Schools, Separate—White and Colored Races—Statutes—Parent—Party in Interest—Evidence—Negro Blood—General Reputation—Hearsay.*—Children having any admixture of colored blood are by statute (Revisal, sec. 4086) forbidden entrance into the public schools for white children; and where a witness has testified as to the general reputation of the grandmother of the child, whose parent is seeking to enter him in a school for white children, that she was of mixed blood, but on cross-examination that she had heard such reputation had sprung up through jealousy of two or three white men in the neighborhood in the last few years, the latter is admissible as to the general reputation. Where the parentage of an ancestor of the child is relevant, testimony of general reputation of such parentage should be elicited, and a question, "Who was said to be her mother?" is held incompetent, in this case, as hearsay. *Medlin v. Board of Education*, 239.

13. *Schools, Separate—White and Colored Races—Negro Blood—Statutes—Parent and Child—Party in Interest—Declarations of Parent—Impeaching Evidence.*—Where the entrance of a child into a white public school is denied on the ground that it had an admixture of colored blood in its veins (Revisal, sec. 4086), and the father of the child brings suit against the county board of education to compel its admission to such school, the father is but a nominal party, the party in interest being the child, and testimony of other witnesses of his declarations to them that he had married a negress can only be received as hearsay evidence in impeachment of his contradictory testimony, given by him as a witness, and not as substantive evidence. In this case, if it were erroneous on the trial for the judge to confine

EVIDENCE—*Continued.*

the admissibility of the evidence of this character to the purposes of impeachment, the distinction is too slight to be the ground for a new trial. Supreme Court Rule 27, 164 N. C., 548. The tendency of the court and of the times not to afford the appellant a new trial unless prejudicial error has been committed by the trial court, discussed by CLARK, C. J. *Ibid.*

14. *Corporations—Officers—Principal and Agent—Insurance—Reinsurance—Declarations—Evidence.*—The rule as to the competency of declarations of an agent to bind his principal applies to corporations and their officers or agents, and the declarations, to be competent, must be with regard to matters within the scope of the agent's authority to act and made during the course of his duties as such agent; and in this action against two insurance companies on a policy issued by one of them, which, being a foreign corporation, has withdrawn from soliciting new business here, on the ground that the other defendant was organized here for the purpose of assuming, and did assume the policies of the former, a letter written by a local agent of the domestic corporation, who had been the agent of the foreign corporation, and after the policy sued on had matured, stating that the general manager said he would endeavor to secure payment from the home office of the foreign corporation, and if not, it would be paid by the domestic corporation, is incompetent as evidence of the alleged arrangement, not only as concerning matters beyond the scope of his authority to bind his company, but as hearsay and *res inter alios acta*. *Morgan v. Benefit Society*, 262.

15. *Appeal and Error — Nonsuit — Incompetent Evidence.*—Where the only evidence to sustain the cause of action alleged by the plaintiff is incompetent, but erroneously admitted, and an appeal has been taken by the defendant for the refusal of judgment of nonsuit thereon, the Supreme Court will not overrule the trial court and grant the nonsuit, for the plaintiff would then have been deprived of the opportunity of substituting other and competent evidence which might have been available; and therefore a new trial will be ordered. *Ibid.*

16. *Contracts, Written—Interpretation — Admeasurements by Engineer—Prima Facie Correct—Fraud or Mistake.*—Written contracts should be construed so as to effectuate the intent of the parties as embodied in the entire instrument, giving effect to each and very part when it can be done by fair and reasonable intendment. Hence, in construing the contract sued on in this case, that the plaintiffs were to cut and remove all timber from the defendant's 100-foot right of way, between certain stations, for a certain price per acre, etc., according to admeasurement made by the defendant's engineer in charge, it is *Held*, that the plaintiffs are not entitled to receive the price per acre inclusive of spaces upon the right of way already open and clear of trees, etc., for such is not only a reasonable interpretation of the language employed bearing directly upon the question, but any other interpretation would ignore entirely the stipulation that the work was to be paid for according to the admeasurements of the defendant's engineer; and while the engineer's estimates are not made conclusive under the terms of the contract, his determination of the question should be taken as *prima facie* correct and controlling unless impeached for fraud or mistake. *Lefler v. Lane*, 268.

EVIDENCE—*Continued.*

17. *Timber Deeds—Time of Cutting—Statute of Frauds—Parol Evidence.*—A conveyance of standing or fallen timber "of the dimensions of 10 inches or more in diameter at a distance of 12 inches from the ground, or which may attain that size ten years from date thereof," etc., and the description of the land," together with the perpetual right of way, in, to, and through and over the above-mentioned tract or parcel of land at any and all times during the period of twenty years, for the purpose of removing the timber," is construed that the ten-year limitation first mentioned is descriptive of size of the timber conveyed and specifying the time within which the measurement must be had; and the twenty-year limitation in the latter portion is intended to fix, with reference to the date of the deed, the time in which the timber sold must be cut and removed; and parol evidence to show that a different period was agreed upon, or that the ten-year period was that fixed for cutting and removing the timber sold, is inadmissible as tending to vary or contradict the writing. *Gilbert v. Shingle Co.*, 286.

18. *Evidence—Expert Witnesses—Cause and Effect of Injury.*—It is competent for a medical expert, during the examination of the plaintiff in his action to recover damages of the defendant for a personal injury alleged to have negligently been inflicted by it, to indicate the wound on the plaintiff's person, and testify from its character that it had apparently been produced "by some force coming from above, carrying the head and upper part of the spine forward," and state his reasons, when relevant to the inquiry, and other competent witnesses, have testified as to the manner, place, and time the injury has been received. *Ferebee v. R. R.*, 290.

19. *Evidence — Medical Experts — Qualification — Osteopaths.*—Where the trial court has found as a fact that one testifying as a medical expert has qualified himself to give the testimony sought of him, it is immaterial to what school of medical thought and practice the witness belongs, and an exception that the witness was an osteopath cannot be sustained.

20. *Evidence—Measure of Damages—Nervous Conditions.*—It is competent for witnesses who have qualified as medical experts and who had attended the plaintiff, to testify, when relevant to the measure of damages in an action for a personal injury, as to the effect on plaintiff's nervous system in amputating his arm; that they found the plaintiff "rundown and weak, with rather a troubled expression, indicating sorrow and suffering." *Ibid.*

21. *Evidence—Irrelevant Matter—Appeal and Error.*—The admission of irrelevant evidence, not prejudicial to the appellant, will not be held for error. *Ibid.*

22. *Divorce — Charge Upon Husband's Lands—Appeal and Error — Presumptions—Evidence—Custody of Children.*—The trial judge, on motion in the original cause wherein a judgment for divorce has been rendered, may direct the father to pay a sum certain at regular intervals for the support and maintenance of his minor children and decree that it shall constitute a lien upon his lands; and where the order of the court does not provide for the custody or tuition of the children, the appellate court will not reverse the order solely on that account, the matters being within the discretion of the trial court, and where the record is silent, the presumption is that the court be-

EVIDENCE—*Continued.*

low acted upon sufficient evidence to warrant the omission. *Miller v. Miller*, 317.

23. *Statutes—Federal Employers' Liability Act—Compensatory Damages—Evidence.*—In this action brought under the Federal Employers' Liability act to recover damages sustained by the father for the wrongful death of his son, an employee of the defendant railway company, there was evidence tending to show that the relationship between the plaintiff and the deceased was affectionate, and that the latter had contributed to the support of the former, and it is held sufficient to support a verdict awarding more than nominal damages. *Irvin v. R. R.*, 164 N. C., 5; *Dooley v. R. R.*, 163 N. C., 454, cited and approved. *Saunders v. R. R.*, 376.

24. *Trespass—Adjoining Lands—Dividing Line—Judgment Rolls—Parties—Evidence.*—Where in an action for wrongful trespass and damage to lands it becomes necessary to locate the true dividing line between the parties, a judgment roll in a former action to which the defendant was not a party is incompetent as evidence against him of the location of the dividing line. *Keenan v. Commissioners*, 356.

25. *Witnesses—Hypothetical Questions—Trials—Evidence.*—A hypothetical question, asked an expert witness upon evidence that the party thereafter expected to introduce, is incompetent. *Ibid.*

26. *Deeds and Conveyances — Caveat—Wills—Consideration of Services—Equitable Fee — Registration — Delivery—Presumptive Evidence.*—A paper-writing made by a man and his wife, agreeing to convey to their granddaughter certain described lands, and stating that she shall have the same in consideration of taking care of the makers that is, she shall well and truly take care of them during their natural lives, etc., and that the conditions of the agreement are such that if the said granddaughter should die before said parties of the first part, then the property belonging to the said parties of the first part at their death shall descend to their lawful heirs and assigns as the law directs: *Held*, the granddaughter, in consideration of the services to be performed, and conditioned upon the consideration of her performing them, took, upon her accepting the deed, an equitable fee *in præsenti* in the lands described, the enjoyment of which was postponed until after the death of the grantors, and then vested absolutely if she had performed the conditions; and it is *Further held*, that the registration of the deed after the death of one of its makers, and found in the possession of the grantee, is evidence of its delivery. *Phifer v. Mullis*, 405.

27. *Evidence—Motions—Inspection and Copy of Papers—Interpretation of Statutes—Court's Discretion.*—Upon motion to allow inspection or copy of books, papers, etc., before trial (Revisal, 1656), it must be made to appear that the instrument in question relates to the merits of the action or is pertinent to the issue; or the motion should be denied; and when it is of the character authorized by the statute to be copied or inspected, etc., it is expressly left within the discretion of the trial judge whether or not he will make the order sought; and should he refuse to do so, it still rests within his discretion to compel the production of the writing later, or upon trial, when its competency and pertinency as evidence bearing on the issue may be better determined. *Evans v. R. R.*, 415.

EVIDENCE—*Continued.*

28. *Evidence—Goods Sold and Delivered — Verified Account.*—A verified account in due form of goods sold makes out a *prima facie* case of the amount due, etc., under Revisal, sec. 1625. *Lipinsky v. Revell*, 508.

29. *Negligence—Evidence—Res Ipsa Loquitur.*—When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as under the ordinary course of things does not happen if those who have the control of it use the proper care, it furnishes evidence, in the absence of explanation by the defendant, that the accident arose from the want of care, under the doctrine of *res ipsa loquitur*. *Ridge v. R. R.*, 510.

30. *Same—Railroads.*—When there is evidence that an employee of a railroad company was on the roof of a box car in a train of sixteen cars in the course of his duties, and was injured by the roof of the car blowing off, in a wind so slight that he had stood thereon without difficulty, and that the roofs of the others cars remained intact, the doctrine of *res ipsa loquitur* applies. *Ibid.*

31. *Evidence—Res Ipsa Loquitur—Burden of Proof.*—The doctrine of *res ipsa loquitur* applying to the evidence of a case does not relieve the plaintiff of the burden of proof required of him, the effect of this doctrine being only that sufficient evidence has been introduced to take the case to the jury. *Ibid.*

32. *Railroads—Master and Servant—Evidence—Negligence—Res Ipsa Loquitur.*—It is negligence for a railroad company to permit the walkway upon the top of its box cars, which its employees are required to use in the course of their duties, to become so rotten, or otherwise defective, that an ordinary wind will blow it off; and conditions of this character being particularly within the knowledge of the railroad company, and not necessarily known to the train crew using it, the doctrine of *res ipsa loquitur* does not become inapplicable merely for the reason that it is invoked by an employee who has been injured by a defect of this character, especially when the employee thus injured was inexperienced, and learning the business of railroading at the time of the injury. *Ibid.*

33. *Railroads—Master and Servant—Safe Place to Work—Inspection—Foreign Car—Negligence—Evidence.*—In an action to recover damages against a railroad company for an injury to the plaintiff received while in the course of his employment by the top of a box car being blown off by the wind, striking him and carrying him to the ground, there was evidence tending to show that the planks of the roof of the car, an old one, were seen by the plaintiff, just prior to the injury, "jumping up and down"; that the car belonged to another railroad company, but it could readily have been inspected by the defendant, under the circumstances, considering its location and the defendant's usual methods of inspection. *Held*, it was sufficient evidence that the planks on top of the car were not properly nailed or fastened, and of the defendant's actionable negligence in failing to discover the defects of the car by reasonable inspection and remedy it. *Ibid.*

34. *Master and Servant—Railroads—Inspection of Cars—Trials—Absence of Witnesses—Evidence.*—Where there is evidence that a personal injury was inflicted upon an employee of a railroad by reason of the failure of the company to inspect a defective box car, the absence of

EVIDENCE—*Continued.*

the railroad's inspector as a witness justifies the jury in drawing inferences unfavorable to the defendant, in an action for damages, upon the issue of its negligence in this respect. *Ibid.*

35. *Evidence—Opinion—Expert—Evidence as to Fact.*—In this action to recover damages for a personal injury it is held competent for a medical expert to testify, within his own knowledge, that the plaintiff's vertebrae had been crushed in the accident, for which damages are claimed, and for him and other physicians, who have qualified, to give their expert opinion as to the effect of this condition upon the plaintiff. *Ibid.*

36. *Same—Federal Employers' Liability Act.*—The doctrine of *res ipsa loquitur* applies, in proper instances, to an action brought under the Federal Employers' Liability act. *Ibid.*

37. *Same—Vis Major—Concurrent Negligence.*—It is the duty of the master to furnish the servant with a reasonably safe place to do his work, under the rule of the ordinarily prudent man with reference to his own safety, and when the master fails in this respect and his negligence concurs with conditions over which he has no control, in producing an injury to an employee, it will be held as the proximate cause of the consequent injury; and where an injury to its train hand is caused by the negligence of a railroad company to provide a box car reasonably safe for the purpose of his going along its top in the performance of his duties, and in consequence, during a windstorm, the roof of the car is blown off and hurls the plaintiff to the ground to his injury, without other or intervening cause, the doctrine of *vis major* will not apply, and the negligence of the defendant will be held the proximate cause of the resulting injury. *Ibid.*

38. *Judicial Sales—Interference by Owner of Land—Damages—Evidence—Profits.*—The interest of a grantee in a timber deed is subject to execution and sale under a judgment obtained against him by his creditor, and the purchaser at such sale has the right to cut and remove the timber upon the terms and conditions and within the period specified in the deed; and in an action to recover damages against the owner of the lands for interfering with this right, it is competent for the purchaser to show by his evidence that he could have cut the whole or the greater part of the timber within the remaining period allowed under the terms and conditions of the timber deed, had not the defendant by his acts, threats, and other conduct wrongfully prevented him, and recovery may be had for the profits of all the timber which he might have cut and removed within the time, except for the acts of the defendant, using the means then at hand or reasonably available to him. *Williams v. Parsons*, 529.

39. *Evidence—Depositions—Agreements—Objections and Exceptions—Trials—Leading Questions—Court's Discretion.*—*Semble*, an agreement to waive all irregularities in the taking of depositions, and that they should be opened and read subject to objections and exceptions, does not confine the party thus agreeing to the objections and exceptions already noted in the depositions; but when it sufficiently appears that upon the trial the judge ruled upon the objections and exceptions then taken, exceptions to his not having done so cannot be sustained, especially when they relate chiefly to the leading character of the ques-

EVIDENCE—*Continued.*

tions asked, which are directed to the sound discretion of the trial judge, and are not reviewable on appeal in the absence of its abuse. *Howell v. Solomon*, 588.

40. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Negligence—Witness, Nonexpert—Evidence—Maps—Measure of Damages.*—Where damages are sought by the owner of lands adjoining a street of a city or town, alleged to have been caused by the negligent construction of the street by the city authorities, evidence of its negligent construction is not confined to the testimony of experts, for such construction may be shown by other witnesses in plaintiff's behalf, using photographs of the locality in explanation and illustration of the testimony, so as to give the jury a better idea as to whether or not damages had been caused, or as to their extent. *Hoyle v. Hickory*, 619.

41. *Evidence—Transactions with Deceased—Interpretation of Statutes.*—In a suit to set aside a deed made by the deceased father of a party defendant, it is incompetent for the son to testify as to the consideration of the deed or his father's intention to make it, being testimony relating to a transaction prohibited by Revisal, sec. 1631. *Linker v. Linker*, 651.

EVIDENCE PAROL. See Deeds and Conveyances, 5, 16, 23, 30; Contracts; Wills; Corporations; Telegraphs, 16.

EXCUSABLE NEGLECT. See Judgments.

EXECUTION. See Partnerships; Judgments.

EXECUTORS AND ADMINISTRATORS.

*Executors and Administrators—Lands—Rules of Descent—Heirs at Law—Parties—Actions.*—The undevised land of a testator immediately descend, at his death, to his heirs at law, and his executor cannot maintain an action to set aside a deed for it, in the absence of some power in the will authorizing him to do so, or when there are no debts for the payment of which the lands may be sold. An executor may sell land conveyed by his testator when the deed is fraudulent or otherwise void, as against creditors, under the statute. Revisal, sec. 72. *Speed v. Perry*, 122.

EXPERT EVIDENCE. See Evidence, 5, 6, 8, 9, 17, 25.

EXPLOSIVES. See Negligence, 42, 43.

EXPRESSION OF OPINION. See Courts.

FACTORIES. See Negligence, 6, 7, 8.

FEDERAL COURTS. See Commerce.

FEDERAL EMPLOYERS' LIABILITY ACT. See Railroads; Master and Servant; Evidence, 36.

FEDERAL STATUTES. See Statutes, 50.

FIXTURES. See Deeds and Conveyances, 12.

FRAGMENTARY APPEAL. See Appeal and Error.

FRAUD. See Deeds and Conveyances, 6, 8, 9; Evidence, 16; Vendor and Purchaser, 5; Bills and Notes, 13; Pleadings, 5.

*Railroads — Relief Departments — Advisory Boards—Final Arbitration—Fraud—Notice of Meetings—Trials—Evidence—Nonsuit.*—It having been held on a former appeal in this case that the plaintiff was concluded by the action of the advisory committee of the defendant railroad company's relief department, when such is not fraudulent or oppressive (157 N. C., 194), by amendment the plaintiff, upon another trial, seeks to invalidate the adverse conclusion of the committee upon the grounds stated, and his evidence tends to show that the committee acted in his absence after failing to notify him, as it had promised to do, of the meeting at which it would consider his claim, and the evidence of the defendant, which was not denied, that its superintendent caused a letter of notification to be mailed him, and it appears that several days thereafter the committee received a letter from plaintiff's attorneys inclosing affidavits upon which he based his claim, without intimating his desire or intention to be present, and there is no evidence that the board did not consider the matter fairly and impartially, or that, under the rules, the plaintiff would have been admitted to its consideration of the question had he been present: *Held*, there was not sufficient evidence of fraud on the part of the committee, and a motion to nonsuit is allowed. *Nelson v. R. R.*, 185.

GAMING.

1. *Contracts, Wagering—Cotton Futures—Pleadings—Counterclaim—Malicious Prosecution—Abuse of Process.*—Where action is brought here to recover the purchase price of cotton and commissions thereon by a New York concern upon a contract made there, and the defendant sets up our statute against wagering contracts of this character and pleads as a counterclaim that he has been damaged by reason of attachment proceedings which had been sued out in an action brought by the plaintiffs in New York, but where he had nothing which was subject to the writ, and thereunder no levy had been made, it is *Held*, that the counterclaim is not one arising from an abuse of the process, it appearing that there has been no illegal use of it, but for a malicious prosecution of the New York action, requiring that the plaintiff allege and show its termination or that his person or property has been interfered with; and failing in this, the defendant's demurrer to his cause of action should be sustained. The principles relating to abuse of process and malicious prosecution discussed by WALKER, J. *Carpenter v. Hanes*, 551.

2. *Courts—Lex Loci Contractus—Statutes—Extraterritorial Effect—Wagering Contracts—Cotton Futures—Public Policy—Conflict of Laws.*—Our statute prohibiting dealing in wagering contracts in cotton futures has no extraterritorial effect, and ordinarily the law governing a contract is that of the State or country wherein the contract was made; and while our courts may not enforce here a contract declared void by our statutes or contrary to our public policy, it has no power to interfere in any manner with the enforcement by the courts of another State of a contract valid according to its own laws, or with their action to determine their validity. *Ibid.*

GENERAL REPUTATION. See Deeds and Conveyances, 34.

GUARDIAN AD LITEM. See Process, 1.

HARMLESS ERROR. See Appeal and Error, 23.

HOSPITALS.

1. *Sanitariums for Profit—Negligence of Employees.*—The owner of a private sanitarium receiving sick persons for treatment with the expectation and hope of gain and profit is held to the duty of ordinary care and protection of those intrusted to him, the rule not obtaining in such instances which applies to charitable institutions, for the latter are held responsible only for the exercise of due care in the selection of employees, and not for injuries resulting from their negligence. *Green v. Biggs*, 417.
2. *Charitable Hospitals—Selection of Employees—Ordinary Care — Demurrer.*—A hospital maintained for charitable purposes is liable in damages caused by its failure to use ordinary care in the selection of its employees, and where one who has been received as a patient therein alleges in his complaint, in an action to recover damages, that he has been injured by reason of the failure of the defendant to exercise the care required in this respect, a demurrer thereto on the ground that the complaint does not state facts sufficient to constitute a cause of action is bad. *Hoke v. Glenn*, 594.

HOSPITALS FOR INSANE. See Officers.

HUSBAND AND WIFE. See Evidence, 11; Married Women.

1. *Deeds and Conveyances—Intent—Estates—Husband and Wife—Tenants in Common.*—A deed is interpreted as a whole to ascertain its intent, and the common-law rule as to the formal parts does not now obtain. Therefore, when thus construing a conveyance of land to husband and wife, it appears that they do not take the estate in entireties, but as tenants in common, the law of *jus accrescendi* does not apply. *Holloway v. Green*, 91.
2. *Deeds and Conveyances—Interpretation—Presumptions—Fee Simple—Interpretation of Statutes—Restrain on Alienation.*—Our statute, Revisal, sec. 946, provides that conveyances of land, without the use of the words "heirs," etc., are to be construed in fee, unless it clearly appears from the wording of the conveyance that an estate of less dignity was intended; and where a conveyance is thus construed to be in fee, any attempt or restraint upon alienation is void, but where relevant, the words therein used may be construed to ascertain whether the intent of the grantor was to convey a fee or an estate of less dignity. *Ibid.*
3. *Same—Husband and Wife—Tenants in Common.*—A conveyance of land, in the habendum, reserved possession in the grantor until the happening of a certain event, and then the possession to go to the grantees, husband and wife, "with the further limitation that neither party of the second part shall sell his or her one-half interest in the said land while the other is living, but, at the death of either, the survivor may dispose of his or her interest in fee, the one-half belonging to the other dying to go to his heirs or devisees in fee." *Held*, (1) after the termination of the interest reserved in the grantors the fee in the lands goes to the grantees, husband and wife, as tenants in common, not in entireties, the last clause of the conveyance having been inserted to prevent the possibility of survivorship; (2) the attempted restraint

HUSBAND AND WIFE—*Continued.*

on alienation is void, though construed as intending to prevent one of the grantees from introducing a stranger as tenant in common with the other. *Ibid.*

4. *Husband and Wife—Estates by Entireties—Divorce—Tenants in Common—Statutes.*—Under our Constitution and the later statutes, as formerly, husband and wife hold lands conveyed to them in entireties with the right of survivorship, this estate in its essential features and attributes being made dependent upon their oneness of person in legal contemplation. Therefore, when this unity of person is entirely severed by divorce absolute, the peculiar features of the estate arising out of such unity, and made dependent upon it, should also disappear, and the owners, having acquired the estate subject to this principle, thereafter hold as tenants in common, subject to partition in proceedings regularly brought for that purpose by them or the grantees of their interests. Revisal, secs. 2109, 2110, deals with the rights of husband and wife growing out of the marriage relation, such as dower, curtesy, and the like, and has no application to estate by entireties. *McKinnon v. Caulk*, 411.

IMPROPER REMARKS. See Courts, 10.

INDEPENDENT CONTRACTOR. See Contracts.

INJUNCTION. See Equity, 2, 3.

1. *Injunction—Trade Name—Name of Person—Contracts—Enforcement.*—A man has the right to the use of his own name in connection with his business, provided he does so honestly and does not resort to unfair methods by which he wrongfully encroaches upon another's rights or commits a fraud upon the public; but he may, by contract, conclude himself from the use of his own name in a given business, and the agreement will be enforced by the courts. *Zagier v. Zagier*, 616.

2. *Pleadings—Trade Names — Injunction — Sufficient Allegations.*—In an action to restrain the use of a name in a given business, a complaint is held sufficient which alleges, in substance, that the defendant had expressly contracted with the plaintiff for a valuable consideration not to do business of a given kind in a certain city under the name of Z.; and that he had wrongfully begun and conducted the business therein under the name of Z., and that the plaintiff, also engaged there in that business under the designated name, had been greatly wronged and damaged in a stated sum. *Ibid.*

INSOLVENCY. See Insurance, 2.

INSPECTION. See Evidence, 27.

INSTRUCTIONS. See Trials; Appeal and Error, 45.

INSURANCE. See Corporations, 2.

1. *Insurance, Life — Evidence — Application — False Statements.*—Where a life insurance company resists recovery upon its policy and raises issues as to whether the insured had made false representations in his application for the policy, that he had never theretofore been examined for life insurance and rejected as an unsuitable risk, etc., it is error for the trial judge to exclude defendant's evidence directly

INSURANCE—*Continued.*

bearing upon these issues, for such facts, if they existed, are material, as they would have had a substantial influence upon the insurer in deciding whether to issue the policy or not. *Hardy v. Insurance Co.*, 22.

2. *Insurance, Fire—Agents—Commissions—Insolvency of Company—Unearned Premiums—Claims Assigned.*—The local agents of a fire insurance company are entitled to their commissions upon the business they have written for the company, and when the company has become insolvent and the policy-holders have been duly notified to present their claims to the receiver for the unearned part of their premiums, the local agents, who have paid the claims of some of the policy-holders, on insurance they have secured, and have had the claims assigned to them, are entitled to the full amount thereof, without deduction for commissions they have received. *Hay v. Insurance Co.*, 82.

3. *Same—Special Contract—Burden of Proof.*—Where a fire insurance company has become insolvent and in the hands of a receiver, and its local agent has paid some of the policy-holders the unearned premiums on their policies which had been secured by his agency, and brings action for their repayment, the burden is upon the defendant company to show some special contract or agreement with the agent whereby the commissions he had received were to be deducted from the amount of the claims, when such is relied upon. *Ibid.*

4. *Insurance, Fire—License—Voidable Policy—Right of Action—Insured—Interpretation of Statutes.*—While Revisal, sec. 4763, provides that no action shall be maintained in the courts of this State upon a policy of fire insurance issued by a company not authorized to do business in this State by the Insurance Commissioner, etc., the company issuing the policy in violation of this section may not receive the premiums and rely upon the statute to invalidate the policy, for such would permit it to take advantage of its own wrong. *Ibid.*

5. *Same—Foreign Agencies—Principal and Surety.*—Where a foreign insurance company, authorized to do business here under our laws, issues its policy on property situated within the State, but through an agency in another State which is unauthorized to write it here, because of not having obtained the license required by Revisal, secs. 4706, 4765, the policy is valid as to the right of action of the insured thereon; and in this case the surety on the bond, given to the Insurance Commissioner by the company in lieu of the cash deposit required, is responsible for the default of the insurer. *Ibid.*

6. *Insurance, Life—Premium Notes—Conditions of Forfeiture—Subsequent Agreements—Waiver—Trials—Question for Jury.*—The delivery of a life insurance policy absolute and unconditional is a waiver of the stipulation for a previous or contemporaneous payment of the first premium; and where the insurer has received the insured's note for the payment of this premium upon condition that the policy shall be avoided unless the note is paid at maturity, the condition will be upheld unless the time for its payment has been postponed by valid agreement or the stipulation, made for the benefit of the company, has in some way been waived by it, or the company has so acted in reference to the matter as to induce the policy-holder, in the exercise of reasonable business prudence, to believe that prompt payment is

INSURANCE—*Continued.*

not expected and that forfeiture on that account will not be insisted upon. *Murphy v. Insurance Co.*, 334.

7. *Same—Renewal Notes—Principal and Agent.*—Where the insured has had the policy of life insurance sued on delivered to him by the company, and for the payment of the first premium has given his note with provision that unless paid at maturity the policy should become null and void, and there was evidence tending to show that this note was indorsed to its agent, likewise indorsed by him and given to the local bank for collection, and by it transmitted to the bank of the home office for collection, and that the insured, before the maturity of the note, went to the company's home office to make arrangements for an extension of time of payment, was referred by it to the bank there, which accepted a part payment on the note and a renewal note extending the time of payment for the balance; that the company sent written notice to the insured's address to pay the extension note given by him, advising him to get remittance there by its due date to keep his policy from lapsing; that the insured died after the date the first premium note was due, but before that of the renewal note, for which payment was offered at the home office of the company before maturity, and refused: *Held*, sufficient for the determination of the jury upon the question of whether there was a valid agreement to postpone the payment of the first note or a waiver of its conditions, by which the insured was given until the due date of the renewal note to make payment of the balance due on his first premium. *Ibid.*

8. *Insurance, Life—Premium Notes—Renewals—Conditions of Policy—Waiver—Specified Officers—Approval—Trials—Questions for Jury.*—Where the insured has given his note for the payment of his first premium on his life insurance policy with provision that the policy should become null and void if the note is not then paid, and it is shown that the insured applied at the home office of the company for a renewal of the note, which was accorded by the company's bank, to which the insured was referred; that the insured subsequently received a notice from the home office, in its official envelope signed by its cashier, son of the secretary, that the premium (renewal) note was due on a certain date, and be sure to get remittance there by that date, to keep the policy from lapsing, it is *Held*, sufficient for the determination of the jury upon the question as to whether the notice was sent with the knowledge and approval of the officers designated in the policy, the president, vice president, and secretary, as having sole power in behalf of the company to extend the time for the payment of the premium, etc., so as to bind the company therewith. *Ibid.*

9. *Pleadings—Waiver—Insurance—Supreme Court—Amendments.*—While it is usually necessary to plead a waiver in order to make it available on the trial, the Supreme Court may allow an amendment there, within its sound discretion, and not disturb a verdict and judgment the party may have obtained in the Superior Court; and it appearing in this case that the plaintiff has failed to plead that the defendant had waived a condition contained in its policy of life insurance, requiring proof of death of the insured, and that the action had been commenced in a justice's court, where the pleadings are ordinarily

INSURANCE—*Continued.*

informal, and that full opportunity had been given the defendant to produce and introduce testimony upon the question, the verdict below is left undisturbed. *Shuford v. Insurance Co.*, 547.

10. *Insurance — Policies — Proof of Death — Impossible Requirements—Waiver—Principal and Agent—Proof of Agency—Evidence Sufficient.* Where a policy of life insurance provides that payment thereof to the wife of the insured will discharge the insurer from all liability thereunder, and relying upon the statutory seven years absence, and other evidence sufficient upon the inquiry of the whereabouts of the insured, etc., the wife has made demand for payment on the agent of the insurer, who refuses on behalf of the company to pay the amount of the policy without proof of death of the insured by three witnesses, or certificate to that effect by the physician attending him during his last illness, the conditions imposed by the company are impossible of performance, and will be regarded as a waiver by the company of its right to demand the proof of death. The evidence in this case that the agent was authorized by the company to waive the proof of death in its behalf is held sufficient. *Ibid.*

11. *Insurance—Proof of Death—Absence—Evidence—Trials—Questions for Jury.*—Evidence in this action to recover on a life insurance policy, on behalf of the beneficiary, that the deceased had been absent for more than seven years, without hearing from him, whether he were alive or dead; that she had made frequent inquiries for him, had employed an attorney and detective to help find him, who had actively endeavored to do so, without result, etc., is held sufficient, upon the question of the death of the insured, to be submitted to the jury. *Sizer v. Severs*, 165 N. C., 500, cited and applied. *Ibid.*

12. *Insurance—Automobiles—Stipulations—Material Inducements—Consideration.*—Stipulations contained in a policy of insurance on automobiles, relating to matters which influence the insurer in accepting the risk and fixing the rate of premium, are held to be material, and will avoid liability thereunder when disregarded by the insured, without the necessity for the insurer to show that their infraction contributed to the loss. *Lummus v. Insurance Co.*, 654.

13. *Same—Change of Location.*—Stipulations of a policy of insurance on an automobile in consideration of a reduced rate of premium, requiring that the machine shall be kept at the private stables or garage of the insured on his certain premises, with certain privileges respecting its location while en route or being cleaned and repaired, are held to be material and valid, and a recovery on the policy will be denied under the circumstances of this case, where a change of the location had been made permanent without the knowledge of the insured, and the automobile had been destroyed by the burning of a machine shop where it had been left by the owner. *Ibid.*

INTERLOCUTORY ORDERS. See Judicial Sales.

INTERPRETATION OF STATUTES. See Statutes.

INTERSTATE COMMERCE. See Commerce.

INTOXICATING LIQUORS.

1. *Intoxicating Liquors — Carrying Into Prohibited Territory — Personal Use — Interstate Commerce — Webb-Kenyon Act — Interpretation of Statutes.*—Chapter 1014, Public Laws 1907, relating to the city of High Point and providing that it shall be unlawful for any person, etc., to sell or dispose of for gain, or keep for sale, within the township, any spirituous wines, intoxicating liquors, etc., and that any person, corporation, etc., bringing within these limits any liquors, the sale of which is prohibited by the act, shall be guilty of a misdemeanor and fined or imprisoned, etc., is a valid exercise of legislative power, extending its prohibition to the purposes of sale and not to its receipt of transportation and delivery for personal use; and the importation of such liquor for personal use being lawful under the statute, the Webb-Kenyon law has no application, where interstate shipments are involved. *Express Co. v. High Point*, 103.

2. *Intoxicating Liquors — Carrying Into Prohibited Territory — Criminal Law—Equity—Injunction.*—Where the transportation of intoxicating liquors into prohibited territory is declared a misdemeanor and made punishable by statute, except in certain instances, the carrier must exercise vigilance and sound discretion and take notice of the use to which it is intended to put the liquor; and equity will not undertake to determine upon injunction whether the shipments of liquor are intended for an illegal or legal purpose. Nor will our courts enjoin the enforcement of the criminal law, at the suit of the carrier, upon the ground that it is threatened with continuous indictments for transporting the liquor to the prohibited territory. *Ibid.*

INVITATION. See Negligence, 43.

ISSUES. See Trials; Libel and Slander; Negligence, 16; Appeal and Error, 26; Contracts, 24; Street Railways, 4; Processioning.

1. *Pleadings—Fraud—Allegations—Issues.*—Allegations of the complaint, in substance, that a deed sought to be set aside for fraud was obtained when the relationship of mortgagor and mortgagee existed between the parties, and that the plaintiff was induced to sign the deed by the false representations that it was a mortgage, is held sufficient to raise the issue; and upon a new trial awarded in this case the Court suggests that the question of actual and constructive fraud be determined upon separate issues. *McPhaul v. Walters*, 182.

2. *Railroads—Injury to Live Stock—Issues—Last Clear Chance.*—The evidence in this case being conflicting as to whether or not by the exercise of reasonable care the engineer on the defendant's train could have avoided killing the plaintiff's horse which attempted to cross the track in front of the train, it was proper to submit a third issue, as to whether the defendant could have avoided the injury by the exercise of ordinary care, in addition to the issues of negligence and contributory negligence. *Hanford v. R. R.*, 277.

3. *Master and Servant—Contributory Negligence—Issues—Damages.*—In an action by an administrator of an employee of a railroad company to recover damages of the company for his wrongful death, coming within the meaning of the Federal Employers' Liability act, an affirmative answer by the jury to the issue of contributory negligence does not preclude an answer to the issue of damages, when the issue as to

ISSUES—*Continued.*

the defendant's negligence has been correctly answered in the affirmative. *Saunders v. R. R.*, 376.

JOINDER. See Parties, 3.

JUDGMENTS. See Courts; Estoppel; Pleadings, 16.

1. *Judgments, Irregular—Course and Practice of Courts — Rendered in Wrong County—Power of Courts.*—In the absence of statute and without the consent of the parties litigant, the trial judge is without power to render a judgment outside of the county wherein the cause is pending, and a judgment thus rendered is contrary to the course and practice of the courts. *Cox v. Boyden*, 320.

2. *Same—Motions in Cause—Procedure.*—Where a judgment rendered outside of the county wherein the cause was pending states that it was done with the consent of the parties, one of them, whose substantial right is affected, may, by motion in the cause, move to set aside the judgment upon the ground that his consent was not in fact obtained; and it is error for the judge before whom the motion is made to refuse to entertain it for lack of power to do so. *Ibid.*

3. *Limitation of Actions—Judgments—Course and Practice—Interpretation of Statutes.*—Revisal, sec. 513, requiring that application to relieve against a judgment for mistake, surprise, or excusable neglect be made within one year, does not apply to a judgment rendered contrary to the course and practice of the courts, as where the judgment was signed in a different county from the one in which the action was pending, without the consent of the complaining party. *Ibid.*

4. *Judgments—Motions—Excusable Neglect—Inadequate Excuse.*—A judgment should not be set aside for excusable neglect when it appears that it was for default of answer filed, and the defendant has permitted term after term of court to pass, stating in his affidavit supporting his motion, as the ground for relief, that he had had an erroneous impression of the plaintiff's name, and had repeatedly inquired of the clerk if complaint had been filed in the case, giving the wrong name as that of the plaintiff, with information that it had not been filed, etc. *Pierce v. Eller*, 167 N. C., 672, cited and applied. *McDowell v. Justice*, 493.

5. *Judgments — Default and Inquiry — Breach of Contracts — Lumber—Measure of Damages—Speculative Profits—Appeal and Error.*—A judgment by default and inquiry for the failure to file answer in an action to recover damages for the breach of a contract in the failure of the defendant to deliver lumber sold, the cause of action is established by the judgment, leaving only the inquiry as to damages to be determined; and where the judge has correctly instructed the jury that the rule for the admeasurement of damages was the difference between the contract price and the market price at the place and time appointed by the contract for the delivery, the question is not presented, on the defendant's appeal, as to whether the plaintiff should be permitted to recover speculative profits, and no error is found. *Lumber Co. v. Furniture Co.*, 565.

6. *Judicial Sales—Vendor and Vendee—Judgments—Execution—Summons.* The plaintiff, a nonresident, made a conditional sale of a piano, retaining title, and after certain payments had been made thereon the piano

JUDGMENTS—*Continued.*

was seized under one execution issued under two separate judgments of a justice of the peace, in one of which cases only the summons had been served, and the sale ordered on the same day, but postponed for a day or two and made at the home of the purchaser, the defendant, who bought at a price much less than its value, and with personal knowledge of the attendant circumstances. There were six or seven bidders present at the sale. *Held*, the defendant was not an innocent purchaser for value, and acquired no title to the piano under the sale as against the rights of the plaintiff. Revisal, sec. 648. *Phillips v. Hyatt*, 570.

7. *Excessive Judgments—Lands in Controversy—Pleadings—Appeal and Error.*—The lands in this controversy admittedly being those embraced within certain boundaries as shown on a map thereof, and the judgment of the court having included more lands than described in the pleadings, and which were not in controversy, the judgment is accordingly modified and costs of appeal taxed equally upon the appellant and appellee. *Horton v. Jones*, 664.

8. *Judgments—Motions to Set Aside—Excusable Neglect—Reversing Previous Order—Judgment—Estoppel.*—Where an order refusing to set aside a judgment for excusable neglect, etc., on motion made within twelve months (Revisal, sec. 513), has without objection been set aside by the same judge, at the next succeeding term of court, the original motion is left pending and the movant is not estopped by the former judgment denying his motion. *Pierce v. Eller*, 672.

9. *Judgments—Motions to Set Aside—Excusable Neglect—Facts Found—Legal Inference—Appeal and Error.*—The findings of fact by the trial judge upon which he bases his decision on motion to set aside a judgment for excusable neglect are conclusive of the facts found, but not as to matters of law or legal inference arising therefrom. *Ibid.*

10. *Same—Old Age—Pleadings—Lands—Bond for Possession—Default.*—It is required of a party litigant that he shall give his case such attention as a man of ordinary prudence gives to his important business, and that he must not sleep on his rights. Hence, setting aside by the trial judge of a judgment obtained against a party on the ground that he was old and feeble will be reversed on appeal, when it appears from the facts found that the judgment in question was one by default in an action against him to recover lands in his possession, and the action had been pending several years without answer filed or bond given to retain possession; that there was no finding that the party was not of sound mind and nothing appearing to show why these necessary steps had not been taken. *Ibid.*

JUDGMENTS, CONDITIONAL. See Courts, 7, 26.

JUDGMENT ROLLS. See Evidence, 24.

JUDICIAL SALES.

1. *Courts—Sale of Lands—Decree of Confirmation—Failure to Pay Purchase Price—Interlocutory Orders—Limitation of Actions.*—Where the court confirms a report of the sale of lands, made under its decree, and directs the commissioner appointed for the sale to collect the purchase price and then make conveyance to the purchaser, the decree of confirmation is interlocutory with regard to these further direc-

JUDICIAL SALES—*Continued.*

tions; and where the purchaser has entered into possession of the lands without paying the purchase price, he may not avail himself of the bar of the ten years statute of limitations (Revisal, secs. 1424-1425), for his entry was rightful under the decree, and he must show some hostile act of possession on his part to make good his plea. *Davis v. Pierce*, 135.

2. *Courts—Judicial Sales—Sales of Lands—Failure to Pay Purchase Price—Motion in Cause—Interlocutory Orders—Interpretation of Statutes.*—The remedy to enforce a decree under a judicial sale of land for the collection of the purchase price of the land is by motion in the cause (Revisal, sec. 403), the matter remaining under the control of the court (Revisal, sec. 1524), and in proper instances the court may decree a resale of the land if the purchaser does not pay the price within a specified time—in this case, within sixty days. *Ibid.*

3. *Mortgages—Sales—Postponement—Sheriffs—Sales by Order of Court—Interpretation of Statutes.*—Revisal, sec. 645, authorizing the postponement of sale from day to day for not more than six days is held to apply to sales by the sheriff or persons acting under court decrees, and not to apply to sales under power contained in a mortgage. *Ferebee v. Sawyer*, 199.

4. *Trusts and Trustees—Active Trusts—Title—Execution Sales—Statute of Uses.*—A trustee created by deed for the purpose of collecting rents and profits from lands and paying them over to the *cestuis que trustent* named in the conveyance is a trustee of an active trust, which is not executed by the statute of uses, and during the continuance thereof the interests in the lands of one of the *cestuis que trustent* may not be sold under execution of a judgment obtained against him, the title to and the possession of the land necessarily being in the trustee. *Rouse v. Rouse*, 208.

5. *Trusts and Trustees—Active Trusts—Title and Possession—Execution Sales—Trustee a Purchaser—Limitation of Actions.*—Where the wife of the grantor is to share in the rents and profits of certain lands, to be held in trust, with his children, and at her death the lands to be divided between his children; and during the lifetime of the wife a personal judgment is obtained against one of the children and his interest in the lands is sold under execution of the judgment and purchased by the trustee named in the deed, who immediately declares his possession of said interest in his own right, and so notifies the judgment debtor, the sale of such interest is void, and the latter having no present right to the possession of his interest in the land, the title and possession being in the trustee for the purposes of the trust, the statute of limitation will not run in favor of the trustee, his possession being also the possession of all of the *cestuis que trustent*. *Ibid.*

6. *Judicial Sales—Interference by Owner of Land—Damages—Evidence—Profits.*—The interest of a grantee in a timber deed is subject to execution and sale under a judgment obtained against him by his creditor, and the purchaser at such sale has the right to cut and remove the timber upon the terms and conditions and within the period specified in the deed; and in an action to recover damages against the owner of the lands for interfering with this right, it is competent for the purchaser to show by his evidence that he could have cut the whole

JUDICIAL SALES—*Continued.*

or the greater part of the timber within the remaining period allowed under the terms and conditions of the timber deed, had not the defendant by his acts, threats, and other conduct wrongfully prevented him, and recovery may be had for the profits of all the timber which he might have cut and removed within the time, except for the acts of the defendant, using the means then at hand or reasonably available to him. *Williams v. Parsons*, 529.

7. *Timber Deed—Judicial Sales—Time for Cutting, Etc.—Expiration—Ejectment—Injunction.*—Where the rights of a purchaser at a judicial sale of the interest of a grantee in a conveyance of standing timber has been wrongfully interfered with by the owner of the land, and the time for cutting and removing the timber under the terms of the deed has expired, relief by ejectment or mandatory injunction is not available. *Ibid.*

8. *Judicial Sales—Purchaser With Notice.*—The general principle that a purchaser at a judicial sale is not bound to look further than to see that the one selling is an officer and employed to do so by a valid execution, etc., does not obtain when the purchaser is one with personal knowledge of defects in the service of summons, as appearing upon the face of the execution, and of other facts and circumstances rendering the sale irregular, if not void, for such purchaser cannot be considered an innocent purchaser for value, etc. *Phillips v. Hyatt*, 570.

9. *Same—Vendor and Vendee — Judgments — Execution—Summons.*—The plaintiff, a nonresident, made a conditional sale of a piano, retaining title, and after certain payments had been made thereon the piano was seized under one execution issued under two separate judgments of a justice of the peace, in one of which cases only the summons had been served, and the sale ordered on the same day, but postponed for a day or two and made at the home of the purchaser, the defendant, who bought at a price much less than its value, and with personal knowledge of the attendant circumstances. There were six or seven bidders present at the sale. *Held*, the defendant was not an innocent purchaser for value, and acquired no title to the piano under the sale as against the rights of the plaintiff. Revisal, sec. 648. *Ibid.*

10. *Equitable Mortgage—Equity of Redemption—Foreclosing — Power of Sale—Courts—Decree.*—Where it is established that a purchaser of lands agreed by parol at the time of the purchase that he would bid in the lands at a certain price and hold them for the benefit of the other party to the agreement, and convey to him upon a part payment of the purchase price at a specified time, and take a mortgage for the balance, etc., and subsequently refuses to carry out this agreement, in a suit to declare a parol trust upon the land it is *Held*, that the effect of the conveyance is to vest in the plaintiff an equitable estate of redemption, which cannot be foreclosed in the absence of an abandonment of the right and in the absence of a power of sale, legally ascertained, except by decree of a court of equity, the relation of the parties being that of mortgagor and mortgagee. *Lutz v. Hoyle*, 632.

11. *Judicial Sale—Commissioner's Deed — Judgments — Estoppel.*—A deed made by a commissioner appointed in proceedings to sell lands of a decedent to pay his debts can only convey so much of the lands as are embraced in the description set out in the petition, and authorized by

JUDICIAL SALES—*Continued.*

the order of sale, and being inoperative as to other lands therein attempted to be conveyed, a decree of confirmation of the report of sale made in general terms, so far as the lands sold are described, referring to the petition and decree of sale, cannot operate as an estoppel by judgment so as to bar the claim of the heirs at law to the lands not authorized, but included in the commissioner's deed, though they were parties to the proceedings to sell the lands. *Horton v. Jones*, 664.

12. *Same—Trials—Evidence—Questions for Jury.*—In this action, involving title to lands, the plaintiff's claim by adverse possession under color is made to depend upon whether the lands were included in an exception of lands in a junior grant from those granted in a senior grant, and by way of estoppel the defendant sets up that in 1855 these lands were sold as being contained in the junior grant under an order of a court of equity to pay the debts of the original owner, and that those under whom the plaintiff claims were parties to these proceedings as his heirs at law. The petition for sale describes the land in accordance with the description contained in the junior grant, the order of sale conformed therewith, but the deed of the commissioner to sell nevertheless included the *locus in quo*. The decree of sale generally referred to the description in the junior grant and the order of sale confirming it, and it is held that it is for the jury to determine whether the *locus in quo* was embraced in the lands covered by the exception in the junior grant, the deed of the commissioner being invalid to pass title to more lands than those described in the petition and order of sale, and the decree therefore and to that extent being inoperative to estop the plaintiff. *Ibid.*

JURISDICTION. See Courts, 14; Equity, 7.

JUSTICE OF PEACE. See Courts, 16, 31, 32.

JUSTIFICATION. See Libel and Slander.

LABORERS. See Mechanics' Liens.

LANDLORD AND TENANT.

1. *Estates — Leases — Tenants—Remaindermen—Rents—Interpretation of Statutes.*—The common law relating to the crops of a tenant growing upon lands, at the termination of the life estate of his lessor, withholding from the remainderman his part of the rent for the land during the current crop year, and accruing after the life estate has fallen in, has been changed by statute, Revisal, sec. 1990, the effect of which is to extend the lease for the current crop year, upon the consideration of the payment of rent; and where the rent under the contract of lease is for a certain fixed sum of money, the remainderman is entitled only to his proportionate part of that sum, according to the period of payment elapsing after the termination of the life estate of the lessor. *Hayes v. Wrenn*, 229.

2. *Landlord and Tenant—Justice's Court—Court's Jurisdiction—Title to Lands—Superior Court.*—The jurisdiction conferred by the landlord and tenant act upon justices of the peace does not obtain where the title to the land is in dispute; and when, in the course of the trial, it appears that the matters involved do not fall within the jurisdiction

LANDLORD AND TENANT—*Continued.*

conferred in these respects, the justice should dismiss the action; and upon appeal, the Superior Court, acquiring no further jurisdiction than the court wherein the action was commenced, may not proceed with the trial. *McLaurin v. McIntyre*, 350.

3. *Same — Mortgage — Fraud—Equities.*—The mortgagor and mortgagee having agreed after the latter had acquired the lands at a foreclosure sale, under a paper-writing whereby the mortgagor was given another opportunity to purchase upon his payment of rent and the performance of certain other conditions, the mortgagee brings his action before a justice of the peace in summary ejectment, wherein a controversy arose, under conflicting evidence, as to whether the defendant had relinquished his rights under the paper-writing, or had executed another writing wherein he became merely a tenant, concerning which the defendant contended, upon competent evidence, that he had not signed, or had signed it in ignorance of its terms, or through fear or by coercion. *Held*, the controversy involved the disputed title to real property, out of which certain equities arose, and not being within the jurisdiction of the justice of the peace, was properly dismissed by him; and, further, the Superior Court acquired no jurisdiction on appeal to determine the controversy *de novo*. *Ibid.*

LAST CLEAR CHANCE. See Issues, 2; Negligence.

LEASES. See Trusts, 10.

LESSOR AND LESSEE. See Trespass; Removal of Causes.

LIBEL AND SLANDER.

1. *Slander—Libel—Communications—Demands—Denials—Latitude—Proof—Trials—Evidence—Nonsuit.*—The purchaser of a car-load of hay, shipped bill of lading attached to draft, paid the draft, received the shipment from the carrier, and then made claim on the seller for shortage of weight, which was refused, and the purchaser put the claim in the hands of his attorneys, who wrote to the seller, and in reply received a letter, upon which the purchaser brought this action for libel, saying that the writer had personally superintended the weighing of the hay, that weight was correctly charged, and that it was only a case in which the purchaser "wanted to get $10 allowance on a car of hay." *Held*, more latitude is permitted in communications of this character, in reply to a demand made by the purchaser, and where a failure to answer may furnish evidence of the justness of the claim; and the admissions of the parties showing that the statement complained of was at least partly true, and believed to be so by the defendant, the plaintiff's action cannot be maintained. *Brown v. Lumber Co.*, 9.

2. *Slander—Libel—Qualified Privilege—Malice—Publication—Appeal and Error.*—In this action of slander it is held that defendant's answer to a letter written by the plaintiff's attorney or agent, denying a claim made for shortage in weights of a shipment of hay, etc., is one of qualified privilege, requiring proof of defendant's malice to sustain the action, and the evidence showing that the defendant believed the truth of his statement complained of, the action cannot be maintained. This result will not be disturbed on appeal because of the fact that the

LIBEL AND SLANDER—*Continued.*

trial judge, erroneously holding that the letter to the attorney was not a publication, dismissed the action upon a wrong ground. *Ibid.*

3. *Libel—Conspiracy to Defame—Professional Character—Actionable Per Se.*—A publication in a newspaper of an article falsely charging an attorney at law and others with conspiracy to slander, is a charge of a criminal offense, and with reference to the attorney acting in his professional capacity, is actionable *per se*, and malice is implied. *Ivie v. King*, 174.

4. *Libel—Actionable Per Se—Justification—Damages—Matters in Mitigation.*—In an action for libel, the defendant may show the truth of his statements in defense, but not that they were made in reply to an attack upon him, as a justification, nor where the article complained of is libelous *per se* is the absence of malice a complete defense, though such matters may be urged in mitigation of damages. *Ibid.*

5. *Libel—Issues—Trials—Instructions.*—In this action for libel proper issues having been submitted to the jury (*Hamilton v. Nance*, 159 N. C., 59), it is held that issues of good faith and absence of malice were unnecessary, the court having correctly charged the jury upon those matters under the issues submitted. *Ibid.*

6. *Libel—Qualified Privilege—Justification.*—The defendant in an action for libel is allowed to repel the libelous charge by denial or explanation; and he has a qualified privilege to reply to a charge in good faith, but his reply must be truthful, and not defamatory of his assailant. *Ibid.*

7. *Libel—Conspiracy—Retraction as to Some—Trials—Evidence.*—Where the defendant has published a libelous article as to several persons, charging a conspiracy, one of whom is the plaintiff, it is competent for the plaintiff in his action to show that a retraction had been filed as to the others, but not as to himself. *Ibid.*

8. *Libel—Attorneys at Law—Speech to Jury—Evidence—Jurors as Witnesses—Justification.*—Where an attorney at law brings an action for an alleged libelous article published in a newspaper by defendant, which charged a conspiracy by the plaintiff and others to defame the character, etc., of the defendant, and relates, among other things, to a speech the plaintiff has made in a certain action, to the jury, it is competent for the plaintiff to introduce in his behalf the jurors as witnesses to show the impression made on their minds by his speech. *Ibid.*

9. *Courts—Expression of Opinion—Predication Upon Findings—Libel—Trials—Instructions.*—Where the trial judge predicates his statements in his charge upon what the jury may find the facts to be, it is not an expression of opinion forbidden by the statute; the jury may consider on the issue as to damages that the defendant had pleaded in defense the truth of the alleged libelous matters, should they find the plea untrue. *Ibid.*

LIENS. See Contracts, 9; Mechanics' Liens.

LIMITATIONS OF ACTIONS.

1. *Railroads—Construction—Negligence—Drain Pipes — Ponding Water—Limitations of Actions.*—Where a plaintiff sues a railroad company for damages arising from sickness in his family alleged to have been caused by the negligence of the defendant in failing to properly keep open a culvert under its track to carry off accumulating or running waters, resulting in ponding the waters upon plaintiff's lands under his dwelling-house, the negligence complained of is not barred by the five-year statute of limitation, running from the time the culvert was constructed, the damages sought having arisen from an alleged subsequent negligent act in connection with the drain. *Rice v. R. R.*, 1.

2. *Limitations of Actions—Adverse Possession—Evidence—Taxes*—A test of adverse possession, in an action involving the title to lands, is whether the acts in evidence are sufficient to expose the occupant to an action of trespass; and while the listing and payment of taxes alone are insufficient, they may become a relevant fact in connection with other circumstances tending to show an adverse and hostile possession. *Christman v. Hilliard*, 4.

3. *Married Women — Coverture — Adverse Possession — Interpretation of Statutes.*—Coverture is not now a defense in bar of the running of the statute of limitations, since 13 February, 1899. Revisal, sec. 363. *Carter v. Reeves*, 131.

4. *Limitations of Actions—Services Rendered—Payment at Death.*—Where the parties have agreed that A. should receive compensation for services rendered B. at the death of B., the statute of limitations does not begin to run until the death of B. *Helsabeck v. Daub*, 205.

5. *Trusts and Trustees—Active Trusts—Title and Possession—Execution Sales—Trustee a Purchaser—Limitation of Actions.*—Where the wife of the grantor is to share in the rents and profits of certain lands, to be held in trust, with his children, and at her death the lands to be divided between his children; and during the lifetime of the wife a personal judgment is obtained against one of the children and his interest in the lands is sold under execution of the judgment and purchased by the trustee named in the deed, who immediately declares his possession of said interest in his own right, and so notifies the judgment debtor, the sale of such interest is void, and the latter having no present right to the possession of his interest in the land, the title and possession being in the trustee for the purposes of the trust, the statute of limitation will not run in favor of the trustee, his possession being also the possession of all of the *cestuis que trustent*. *Rouse v. Rouse*, 208.

6. *Limitation of Actions—Adverse Possession—Color of Title — Instructions—Charge, How Construed—Appeal and Error—Harmless Error.*—Where adverse possession under color of title is relied upon by a defendant in an action to recover lands, a charge of the trial judge upon relevant evidence will not be held as reversible error because he did not, in exact terms, instruct the jury that "possession is making the use of the land to which it is best suited," when it appears that he immediately after the charge given on this phase and in the same connection explained the meaning of that expression to the jury, so that they could not have misunderstood him, and the entire charge upon the question was a correct application of the law to the evi-

dence. The principles of law applicable to the question of adverse possession defined by WALKER, J. *Reynolds v. Palmer*, 454.

7. *Limitations of Actions—Adverse Possession—Trials—Mixed Law and Fact—Questions for Jury—Instructions.*—In this action to recover possession of lands by virtue of a claim of adverse possession under color of title, it is held that the issues raised mixed questions of law and fact, to be determined by the jury under proper instructions from the court. *Ibid.*

8. *Deeds and Conveyances—Color—Adverse Possession—Wire Fence—Evidence—Trials—Instructions—Limitations of Actions.*—The plaintiff in this action claims title to the land in dispute by adverse possession under color, and there is evidence on defendant's part that her agent entered upon the land, being on the east side of a certain wire fence, and cut timber therefrom in 1908, and the plaintiff, in response to his request, pointed out the wire fence as the dividing line between the lands. There was also evidence of plaintiff's adverse possession of the land on the east of this fence prior to 1908, sufficient to ripen his title. The court charged the jury, according to defendant's request for special instruction, in substance, that if the plaintiff pointed out the wire fence as the dividing line "and stated that the lands on the east thereof belonged to defendant, and the wire fence was constructed by permission of the defendant," that would be a recognition of the ownership of the defendant of the lands on the east side of the fence, and the possession of these lands by plaintiff thereafter would not be hostile, etc.: *Held*, it was not error for the court to modify this instruction by charging this would be so unless the plaintiff's title had ripened by adverse possession before 1908; and if it had, occurrences or conversations thereafter had between the parties could not divest it; and it is *Further held*, that construing the charge as a whole, the principles of law were clearly and correctly charged upon this phase of the controversy and the jury could not have been misled or confused in their deliberations to the defendant's prejudice. *Padgett v. McKay*, 504.

9. *Limitations of Actions—Adverse Possession—Color—Trials—Questions for Jury.*—Evidence of adverse possession to ripen title to lands under color is sufficient to be submitted to the jury which tends to prove actual possession for the statutory period by one claiming the title in his own right, and that he has made such use of the land as its condition rendered capable of, with acts of ownership so repeated as to show they were committed in his character as owner, in opposition to the right or claim of any other person, and not as an occasional trespasser; and the charge of the court under the evidence of this case is not objectionable on the ground that the evidence of plaintiff's adverse possession was insufficient to authorize it. *Horton v. Jones*, 664.

10. *Deeds and Conveyances—True Title—Color of Title—Possession—Presumptions—Interpretation of Statutes—Limitations of Actions.*—The occupation of lands is presumed in law to be under and in subordination to the true title until the contrary is made to appear (Revisal, sec. 386); and where the plaintiff, in an action to recover lands, has shown his title by proper grant from the State and mesne conveyances to himself, the presumption is, unless it is made to appear to the con-

LIMITATIONS OF ACTIONS—*Continued.*

trary, that the occupation thereof by others is under his title. Hence, when the defendant relies on a deed made to his ancestor as color, and adverse possession of others thereunder to ripen his title, it is necessary to show that their occupancy was under or connected with the deed under which he claims, or the presumption will obtain that they were under the true title shown by the plaintiff. *Land Co. v. Floyd*, 686.

11. *Same—Tenants—Trials—Evidence—Questions for Jury.*—The plaintiff having shown a sufficient and connected title to the land in controversy in himself, it is necessary for the defendant, claiming by adverse possession under a deed to his ancestor, as color, to show a continuity of such possession for seven years; and it is held in this case that the possession by a tenant of his ancestor for one year, under his deed, and the occasional entry upon the land by his heirs at law after his death, for the purpose of cutting a few logs, is insufficient evidence of adverse possession in character and continuity to be submitted to the jury. *Ibid.*

LIVE STOCK. See Carriers of Goods; Railroads.

MALARIA. See Water and Water-courses.

MALICIOUS PROSECUTION.

*Contracts, Wagering — Cotton Futures — Pleadings—Counterclaim—Malicious Prosecution—Abuse of Process.*—Where action is brought here to recover the purchase price of cotton and commissions thereon by a New York concern upon a contract made there, and the defendant sets up our statute against wagering contracts of this character and pleads as a counterclaim that he has been damaged by reason of attachment proceedings which had been sued out in an action brought by the plaintiffs in New York, but where he had nothing which was subject to the writ, and thereunder no levy had been made, it is *Held*, that the counterclaim is not one arising from an abuse of the process, it appearing that there has been no illegal use of it, but for a malicious prosecution of the New York action, requiring that the plaintiff allege and show its termination or that his person or property has been interfered with; and failing in this, the defendant's demurrer to his cause of action should be sustained. The principle relating to abuse of process and malicious prosecution discussed by WALKER, J. *Carpenter v. Hanes*, 551.

MANDAMUS.

*Counties—Taxation—School Funds—Mandamus—Alternate Writ.*—In this action of mandamus to compel the county and its commissioners to pay over to the treasurer of the school fund money they had unlawfully retained for preparing and computing the tax list of the county, the judgment appealed from by the commissioners is affirmed, with the modification that an alternate writ issue before a peremptory writ be applied for. *Board of Education v. Commissioners*, 114.

MARRIAGE.

*Marriage — General Reputation — Evidence—Corroborative—Communications with Deceased—Interpretation of Statutes.*—Where a party claims land as the heir at law of his deceased father, and the ques-

MARRIAGE—*Continued.*

tion arises as to whether his father and mother were man and wife, it is competent to show the fact of marriage by evidence of general reputation thereof in the family and neighborhood, and it is also competent for a witness to testify that he had heard the mother, since deceased, say that the father was her husband, as corroborative of the evidence of reputation, and in mentioning those whom the witness testified he had heard say they were man and wife; and it is further held that the evidence is not prohibited by Revisal, sec. 1631, as a communication with a deceased person, the mother being dead and the *locus in quo* descending from the father. *Carter v. Reeves*, 131.

MARRIED WOMEN. See Limitations of Actions, 3.

1. *Married Women—Contracts to Convey—Privy Examination — Color of Title—Betterments—Interpretation of Statutes.*—A paper-writing not under seal and signed by a *feme covert* without her privy examination, reading, "Received of W. T. S. $10, to be applied on the purchase of Z. G. land," adjoining certain other tracts of land, is construed as a contract to convey the land, and constitutes color of title thereto; and while the defendant, who was put into possession under the plaintiff's title, may not enforce specific performance because of the defective execution and probate, he is entitled to recover for the betterments he has made upon the lands, in the plaintiff's action for the possession, when he has made them in good faith, believing his title to be good, etc. Revisal, sec. 652 *et seq.* *Gann v. Spencer*, 429.
2. *Married Women — Executory Contracts — Necessaries — Husband and Wife—Interpretation of Statutes.*—A married woman, since the ratification of the Martin act, Public Laws 1911, p. 109, may bind herself by an executory contract, for the purchase of goods, inclusive of necessaries, and she may deal and contract without her husband's consent as freely as if she were unmarried, except in dealing with her husband under Revisal, sec. 2107, and in the conveyance of her real estate. *Lipinsky v. Revell*, 508.
3. *Married Women—Executory Contracts—Joinder of Husband—Parties—Counterclaim of Husband.*—Where a married woman is sued alone upon her executory contract, and her husband is permitted to file answer, it is not error for the court to order that the answer of the husband be stricken out, for he is not a necessary party; and he cannot acquire any rights in setting up a counterclaim against the plaintiff who demands judgment solely against the wife. *Ibid.*

MASTER AND SERVANT. See Hospitals; Railroads.

1. *Master and Servant—Federal Employers' Liability Act—Contributory Negligence—Damages.*—Under the Federal Employers' Liability act an instruction that the jury should "deduct," in proper instances, a reasonable amount for contributory negligence, instead of saying the damages should be "diminished on account of the contributory negligence of the plaintiff," is not held for error. *Tilghman v. R. R.*, 163.
2. *Master and Servant—Federal Employers' Liability Act—Contributory Negligence—Measure of Damages.*—*Semble*, that an instruction under the Federal Employers' Liability act is erroneous, that if the negligence of the plaintiff was equal to the negligence of the defendant, he could not recover, for in such cases the plaintiff would be entitled

MASTER AND SERVANT—*Continued.*

to the full amount of the damages, less an allowance of one-half to be deducted on account of his contributory negligence. *Ibid.*

3. *Master and Servant—Safe Place to Work—Negligence—Trials—Evidence—Questions for Jury.*—Negligence is necessarily a relative term, depending upon the circumstances of each particular case, and the courts will not decide, as a matter of law, the question of negligence, where from the evidence the jury are justified in reaching a conclusion in favor of either the plaintiff or defendant; and where a plaintiff was an employee in the cotton-seed room of a defendant mill, to put cotton seed in a seed conveyor, where he had worked for several weeks, and there is evidence tending to show that the conditions were such that the seed were necessarily piled high in this room for the purposes of storing and feeding the conveyor; that at the time of the injury these seed were piled so high that in leaving his work the plaintiff crawled between the end of the shafting, in operation, and the side of the house, and thus was injured by coming in contact with the shafting; and also evidence that there was another way out which the plaintiff could have safely taken: it is *Held*, it was for the jury to determine, as an issue of fact, whether the plaintiff was injured by the negligent failure of the defendant to provide him a safe way to leave his work. *Forsyth v. Oil Mill*, 179.

4. *Master and Servant—Cotton Mills—Employment of Children—Negligence—Causal Connection—Interpretation of Statutes.*—Revisal, sec. 1981 (*a*), makes it unlawful for any factory or manufacturing plant to work or employ a child therein under 12 years of age, and a willful violation of this section on the part of a mill owner, superintendent, or other person acting in behalf of the establishment, is made a misdemeanor by Revisal, sec. 3362; and it is held that a violation of this statute by reason of which an injury was caused to such child, unlawfully employed, constitutes an actionable wrong, and whenever the injury has arisen from placing the child at work in the mill and subjecting it to the risks naturally incident to such work or environment, it is actionable negligence for which a recovery may be had without the necessity of showing that the child received the injury when engaged in the very work he was employed to do or by reason of it. *McGowan v. Mfg. Co.*, 192.

5. *Same—Knowledge Implied.*—Where with the knowledge of the owners of a cotton mill, or its superintendent or other agents representing the owner or management of the plant, a child under 12 years of age is permitted to work around the mill, though not on its regular pay roll, or has so continuously worked there that the management or its representatives should have observed that he was so engaged, it is in violation of our statute, Revisal, sec. 1981 (*a*), prohibiting the working or employment of children at such places under 12 years of age. *Ibid.*

6. *Same—Trials—Evidence—Acts of Vice Principal—Scope of Employment.*—In this case a child under 12 years of age was injured in the lapper room of the defendant cotton mill. There was evidence tending to show that the plaintiff was not on the pay roll of the mill, but had for a length of time been continuously at work around the mill, with the knowledge and approval of the superintendent and foreman; that the foreman of the lapper room, when plaintiff was passing

MASTER AND SERVANT—*Continued.*

through, ordered and forced him "to throw cotton from the lapper while the machine was in motion," which resulted in the injury complained of. *Held*, evidence sufficient to show that the act of the foreman in causing the said injury was within the scope of his employment, and one for which the defendant is responsible, whether at common law or under the provisions of our statute. Revisal, sec. 1981 (*a*). *Ibid.*

7. *Master and Servant—Federal Employers' Liability Act—Interstate Commerce.*—An employee of a railroad doing an interstate business upon its line of railway extending beyond the borders of the State, and engaged, in a gang of hands, in putting in a new block system along the line of the railway, is engaged in interstate commerce, within the meaning of the Federal Employers' Liability act, and an action to recover damages for his negligent injury or wrongful death while thus employed comes within its provisions; and the Federal act is held to apply to the circumstances of this case, where such employee, while being transported from one location to another, in the course of the work, had left the defendant's car, provided for the accommodation of the work gang, for a necessary purpose, and was injured by another of defendant's trains, moving upon a different track, which had failed in its duty to give the required signals or warnings of its approach. *Saunders v. R. R.*, 375.

8. *Same—Contributory Negligence—Issues—Damages.*—In an action by an administrator of an employee of a railroad company to recover damages of the company for his wrongful death, coming within the meaning of the Federal Employers' Liability act, an affirmative answer by the jury to the issue of contributory negligence does not preclude an answer to the issue of damages, when the issue as to the defendant's negligence has been correctly answered in the affirmative. *Ibid.*

9. *Courts—Federal Employers' Liability Act—Common Law—Negligence—Pedestrians—Warnings—Train Signals.*—There is no difference in the administration of the common law of negligence between the State and Federal courts where the jurisdiction is concurrent, the seeming difference arising in the application of this law to the varying combination of facts, or confusing negligence, which may or may not cause the injury complained of, with actionable negligence, which unites cause and effect: and where suit is brought in the State court, under the Federal Employers' Liability act, against a railroad company for the wrongful death of plaintiff's intestate, and it is shown that while the intestate, an employee of the defendant, in its interstate business, was walking upon or across the defendant's railroad track, in a populous town and where the conditions were dangerous, owing to a double main line and several spur or side tracks, and the customary use of the right of way by pedestrians, the defendant's freight train approached at a speed of from 20 to 25 miles an hour, without signals or other warnings, required by the dangerous condition of the locality and the company's rules, and running over plaintiff's intestate, caused the death complained of, it is *Held*, that the defendant is negligent under the common law as administered either in the State or Federal court, and that the defendant is liable under the Federal statute. *Ibid.*

MASTER AND SERVANT—*Continued.*

10. *Statutes—Federal Employers' Liability Act—Compensatory Damages—Evidence.*—In this action brought under the Federal Employers' Liability act to recover damages sustained by the father for the wrongful death of his son, an employee of the defendant railway company, there was evidence tending to show that the relationship between the plaintiff and the deceased was affectionate, and that the latter had contributed to the support of the former, and it is held sufficient to support a verdict awarding more than nominal damages. *Irvin v. R. R.*, 164 N. C., 5; *Dooley v. R. R.*, 163 N. C., 454, cited and approved. *Ibid.*

11. *Railroads—Master and Servant—Federal Act—Issues as to Damages—Negligence—Contributory Negligence—Diminution of Damages.*—It is not required in an action brought under the Federal Employers' Liability act that damages be assessed under separate issues, one as to the full amount sustained and the other as to the amount to be deducted therefrom by the answer to the issue of contributory negligence; and where the trial judge has correctly charged the jury in this respect, under the one issue of damages, it will not be held as erroneous. *Gray v. R. R.*, 433.

12. *Railroads—Federal Employers' Liability Act—Master and Servant—Negligence—Common Law—Last Clear Chance—Trials—Instructions—Appeal and Error.*—The Federal Employers' Liability act was passed for the benefit of railroad employees, to afford them a recovery of damages when under the common law their contributory negligence would have totally deprived them of the right; and where there is evidence that an employee of the defendant has placed himself in a position of danger on the track in front of an approaching train, but that the injury complained of would not have been sustained had the employees on defendant's train kept a proper lookout ahead and had performed the duties required of them under the circumstances in stopping the train, the common-law doctrine of the last clear chance is applicable; and a requested instruction to the effect that the defendant would not be liable if it did all it reasonably could to stop the train in time, after seeing the intestate's danger, is properly refused. *Ibid.*

13. *Negligence—Personal Injury—Warning of Danger—Proximate Cause.*—While engaged with other employees in the defendant's chemical plant in cutting a channel through phosphate in a bin, and sloping its sides, the usual method for removing the phosphate, the plaintiff received the injury complained of by a piece of phosphate falling upon him, with evidence on defendant's part that the plaintiff was warned of the danger by its foreman in time to have avoided the injury had he obeyed. *Held*, error for the trial judge to instruct the jury upon the theory of plaintiff's want of the exercise of ordinary care being the proximate cause of the injury, for the plaintiff cannot recover if his failure to obey the warning was the proximate cause, and the defendant's special prayer for instruction to this effect was erroneously refused. *Edwards v. Chemical Co.*, 671.

MATERIAL MEN. See Mechanics' Liens.

MEASURE OF DAMAGES. See Damages.

1. *Measure of Damages—Wrongful Death—Net Value of Life—Children—Trials—Evidence.*—In an action to recover damages for a wrongful death the present net value of the life wrongfully taken determines the measure of damages recoverable, and evidence tending to show the number and ages of the children of the deceased is incompetent; and where the judge in his charge has correctly stated in general terms that the jury should award a fair and just compensation for the pecuniary injury, and then specifically instruct them to find from the evidence what the earnings of the deceased would have been during the balance of his life, the instruction is held for reversible error. *Lynch v. Mfg. Co.*, 98.

2. *Measure of Damages—Personal Injury—Evidence—Wages—Prospective.*—The plaintiff in his action to recover damages for a personal injury against a railroad company testified to the amount of wages he had received as brakeman, as flagman, and at the time he was injured, and that then he "had been in line for extra baggage for two or three months." *Held*, competent upon the measure of damages. *Ferebee v. R. R.*, 290.

3. *Evidence—Measure of Damages—Nervous Conditions.*—It is competent for witnesses who have qualified as medical experts and who had attended the plaintiff, to testify, when relevant to the measure of damages in an action for a personal injury, as to the effect on plaintiff's nervous system in amputating his arm; that they found the plaintiff "rundown and weak, with rather a troubled expression, indicating sorrow and suffering." *Ibid.*

MECHANICS' LIENS.

1. *Liens—Contracts—Material Men—Trials—Materials Used in Buildings—Evidence—Specific Notice—Waiver—Statutes.*—Where a material man brings suit against the owner of a dwelling for the price of material furnished during its construction to the contractor, and has given notice to the owner by letter of the amount claimed to be due him by the contractor, an acknowledgment by the owner, in reply, that he will reserve the bill for settlement, affords evidence in an action to collect the amount claimed to be due under the provisions of the Revisal, sec. 2020, that the materials had entered into the construction of the defendant's house; and also of a waiver in the nature of an admission of the defendant's right, if it existed, to demand greater particularity in the statement of the plaintiff's claim. *Bain v. Lamb*, 304.

2. *Liens—Contracts—Material Men—Trials—Amount Due—Instructions—Appeal and Error—Harmless Error.*—In an action by the material man against the owner of a dwelling to recover the amount due him by the contractor for materials furnished and used in the construction of the building under Revisal, sec. 2020, and there is conflicting evidence as to the amount due by the owner to the contractor on his contract at the time of receiving the statutory notice, it is erroneous for the trial judge to charge the jury upon the question of plaintiff's recovery, without laying down any rule for ascertaining the amount due on the contract, or furnishing a guide for them in reaching their conclusion upon the alternative propositions contained in the instruction; but when, taking the charge as a whole, it may be seen that

MECHANICS' LIENS—*Continued.*

instructions on this point were correctly given, and the jury understood them, an incorrect instruction appearing in a part of the charge will not be held for reversible error. *Ibid.*

3. *Liens—Contracts—Material Men—Amount Due Contractor—Trials—Instructions—Measure of Damages.*—In an action by the material man against the owner of a dwelling to recover the price of material furnished by him to the contractor and used in the building (Revisal, sec. 2020), and the evidence discloses that the contractor has abandoned his contract and it is conflicting as to the amount the owner is due the contractor under the contract, the rule for the ascertainment of what amount, if any, is due to the contractor is the contract price, less the amount paid to him, and the reasonable cost of completing the building; and if the amount thus due exceeds the claim of the plaintiff, and the materials furnished were used in the house, he should recover the amount of his claim; and if less, he can only recover the amount due the contractor. *Ibid.*

4. *Liens—Material Men—Mortgages—Priorities.*—The lien upon a building given the contractor for its erection, and to those furnishing material used in its construction, relates back to the time of the commencement of the work; and where the parties have entered into a contract for the erection of the building before, and the contractor commences work thereunder subsequent to the execution and registration of a mortgage on the lands given by the owner to pay off encumbrances thereon and to acquire additional land to widen the lot, together with commissions and expenses in securing the loan, it is held that his lien is taken subject to the mortgage, of which registration has fixed him with notice before commencing to work under his contract. *Chadbourn v. Williams*, 71 N. C., 444, cited and distinguished. *McAdams v. Trust Co.*, 494.

5. *Liens for Labor—Interpretation of Statutes.*—The lien on personal property given by Revisal, 2017, applies when possession is retained by the mechanic, etc., of the property upon which he claims his lien; and for a lien upon buildings, etc., to obtain under Revisal, sec. 2016, it is necessary for the work, etc., of the one claiming it to have been a betterment to the property. *Glazener v. Lumber Co.*, 676.

6. *Same—Sawing Lumber.*—One claiming a lien for "doing the work of cutting or sawing logs into lumber" under sec. 6, ch. 150, Laws 1913, can only obtain it upon the lumber which his services have helped to convert from the logs; and it is held that the provisions of this section apply when the lienor worked in a band sawmill of a lumber plant, received the plank as it fell from the saw and placed it upon a mechanical device used in its further manipulation. *Ibid.*

7. *Liens for Labor—Buildings—Betterments—Interpretation of Statutes.*—Under contract, one of the defendants agreed to operate a large lumber plant, including a railroad equipment for handling the logs, owned by the other defendant, and assumed the payment of all employees, several of whom filed liens against logs and lumber sawed, in a justice's court, for the nonpayment of wages. *Held*, work done in repairing the track, equipment, etc., was not in contemplation of chapter 150, Laws 1913 (amending Revisal, secs. 2021 and 2033a), so as to give those performing these services a lien on the logs and lumber used or manufactured by the plant; nor could a lien upon the

MECHANICS' LIENS—*Continued.*

plant hold, for the material had not been used in its construction as betterments. *Ibid.*

8. *Liens for Labor—Sawing Lumber—Priorities—Interpretation of Statutes.*—The lien given to the person "doing the work of cutting or sawing logs into lumber," etc., by chapter 150, Laws 1913, is superior to the lien given to the contractor therefor, or any other person. *Ibid.*

MENTAL ANGUISH. See Telegraphs.

MINERS. See Process.

MORTGAGES. See Deeds and Conveyances, 7; Equity, 14, 15, 16.

1. *Mortgages—Foreclosure—Provisions as to Notice—Strict Compliance.*—In foreclosure proceedings under a power of sale contained in a mortgage, the requirements of the statute and the contract stipulations of the instrument not inconsistent with the statute in respect to notice and other terms on which the power may be exercised shall be strictly complied with; and when such has not been done, no title can pass under the sale in respect to the immediate parties thereto. *Ferebee v. Sawyer*, 199.
2. *Same—Postponements.*—The strict compliance with the terms of the mortgage and statutory provisions required to make a valid sale upon foreclosure does not apply when a postponement is had by reason of the sale being enjoined or for other reasonable purposes, for in the absence of statutory or contract provisions to the contrary, as in this State, a notice of postponement made in good faith, and reasonably calculated to give proper publicity of the time and place, is held sufficient. *Ibid.*
3. *Same—Insufficiency of Notice.*—Under the facts of this case a sale under a power contained in a mortgage was adjourned not less than four times, the only published notice of the postponement being memoranda at the bottom of one of the original notices, without satisfactory evidence that a proclamation was made at more than two of the dates, or testimony informing the court of the number of persons within hearing when the same was made, except the first time, and then only a half-dozen were present. *Held*, the notice of postponement was insufficient. *Ibid.*
4. *Mortgages—Sales—Postponement—Sheriffs—Sales by Order of Court—Interpretation of Statutes.*—Revisal, sec. 645, authorizing the postponement of sale from day to day for not more than six days is held to apply to sales by the sheriff or persons acting under court decrees, and not to apply to sales under power contained in a mortgage. *Ibid.*
5. *Judgments—Mortgages—Sales — Notice — Estoppel.*—The mortgagor of lands brought suit to restrain the mortgagee from making conveyance thereof under a sale of foreclosure under the power contained in the mortgage, and issue was joined, among others, upon the question of the sufficiency of notice of the postponement of the sale, and judgment was rendered establishing, among other things, the sufficiency thereof. In the present action the purchaser at the sale sues the mortgagor for possession of the lands, and it is *Held*, the present defendant is estopped by the judgment in the former proceedings to deny the sufficiency of the notice of postponement. *Ibid.*
6. *Landlord and Tenant—Mortgage—Fraud—Equities.*—The mortgagor and mortgagee having agreed after the latter had acquired the lands at a

MORTGAGES—*Continued.*

foreclosure sale, under a paper-writing whereby the mortgagor was given another opportunity to purchase upon his payment of rent and the performance of certain other conditions, the mortgagee brings his action before a justice of the peace in summary ejectment, wherein a controversy arose, under conflicting evidence, as to whether the defendant had relinquished his rights under the paper-writing, or had executed another writing wherein he became merely a tenant, concerning which the defendant contended, upon competent evidence, that he had not signed, or had signed it in ignorance of its terms, or through fear or by coercion. *Held*, the controversy involved the disputed title to real property, out of which certain equities arose, and not being within the jurisdiction of the justice of the peace, was properly dismissed by him; and, further, the Superior Court acquired no jurisdiction on appeal to determine the controversy *de novo*. *McLaurin v. McIntyre*, 350.

7. *Liens—Material Men—Mortgages—Priorities.*—The lien upon a building given the contractor for its erection, and to those furnishing material used in its construction, relates back to the time of the commencement of the work; and where the parties have entered into a contract for the erection of the building before, and the contractor commences work thereunder subsequent to the execution and registration of a mortgage on the lands given by the owner to pay off encumbrances thereon and to acquire additional land to widen the lot, together with commissions and expenses in securing the loan, it is held that his lien is taken subject to the mortgage, of which registration has fixed him with notice before commencing to work under his contract. *Chadbourn v. Williams*, 71 N. C. 444, cited and distinguished. *McAdams v. Trust Co.*, 494.

MOTIONS. See Judicial Sales, 2; Trials, 37; Process; Evidence, 27; Judgments; Courts, 39.

MUNICIPAL CORPORATIONS. See Railroads; Cities and Towns.

MUTUAL MISTAKE. See Equity.

NEGLIGENCE. See Water and Water-courses; Trials, 26; Telegraphs, 9; Evidence, 29, 32, 33; Hospitals.

1. *Railroads—Rights of Way—Pedestrians—Look and Listen—Contributory Negligence — Proximate Cause — Trials — Nonsuit.*—Whether a trespasser or a licensee by custom, a person walking along a railroad track is required, by his having thus chosen a dangerous place to walk, to use diligence in protecting himself from being run over or injured by a train passing there, by the use of both his faculties of looking and listening; and the employees of the railroad, having a superior right to the usage of the track for the running of the company's trains, may assume to the last moment that the pedestrian, apparently having a proper use of his faculties, will leave the track in time to avoid an injury; and when he has failed to do so, and the track is unobstructed, and by the use of his faculties he could have perceived his danger in time to avoid the injury complained of, his omission to perform this duty required of him is the proximate cause of his injury, and a recovery of damages will be denied. *Talley v. R. R.*, 163 N. C., 567, cited and distinguished. *Ward v. R. R.*, 148.

NEGLIGENCE—*Continued.*

2. *Same—Signals—Lookout.*—Where a recovery of damages for a personal injury is denied by reason of the failure of a pedestrian walking on the railroad track to exercise the proper degree of care required of him to leave the track in time to avoid the injury complained of, it is his own negligence which bars his recovery, irrespective of the duty of the employees of the railroad company to keep a lookout in front of the moving train, or give warnings of its approach. *Ibid.*
3. *Same—Side-tracks—Noises.*—The doctrine that a pedestrian on a railroad track is required to exercise his faculties to look and listen to protect himself from the consequences of his having used this dangerous place for walking, applies to side-tracks which are customarily used; and where the pedestrian in full use of himself and his faculties has attempted to walk upon the right of way, not far from a station, where there are a main and two side-tracks, one of the side-tracks being then used by a train, and to avoid another train passing on the main line has stepped over to the other side-track, and while walking there is killed by the engine and car from the main-line train backing down upon him, in broad daylight, and when by looking or listening, or in the proper exercise of his faculties he should have seen the engine and car approaching in time to have left the track for a place of safety, his death is solely attributed to his own negligence, without reference to whether the train on the other side-track was making too much noise for the engine and car to have been heard, or whether there was a proper lookout placed or signals given to him. *Ibid.*
4. *Master and Servant—Federal Employers' Liability Act—Contributory Negligence—Damages.*—Under the Federal Employers' Liability act an instruction that the jury should "deduct," in proper instances, a reasonable amount for contributory negligence, instead of saying the damages should be "diminished on account of the contributory negligence of the plaintiff," is not held for error. *Tilghman v. R. R.*, 163.
5. *Master and Servant—Federal Employers' Liability Act—Contributory Negligence—Measure of Damages.—Semble*, that an instruction under the Federal Employers' Liability act is erroneous, that if the negligence of the plaintiff was equal to the negligence of the defendant, he could not recover, for in such cases the plaintiff would be entitled to the full amount of the damages, less an allowance of one-half to be deducted on account of his contributory negligence. *Ibid.*
6. *Master and Servant—Cotton Mills—Employment of Children—Negligence—Causal Connection—Interpretation of Statutes.*—Revisal, sec. 1981 (*a*), makes it unlawful for any factory or manufacturing plant to work or employ a child therein under 12 years of age, and a willful violation of this section on the part of a mill owner, superintendent, or other person acting in behalf of the establishment, is made a misdemeanor by Revisal, sec. 3362; and it is held that a violation of this statute by reason of which an injury was caused to such child, unlawfully employed, constitutes an actionable wrong, and whenever the injury has arisen from placing the child at work in the mill and subjecting it to the risks naturally incident to such work or environment, it is actionable negligence for which a recovery may be had without the necessity of showing that the child received the injury when engaged in the very work he was employed to do or by reason of it. *McGowan v. Mfg. Co.*, 192.

NEGLIGENCE—*Continued.*

7. *Same—Knowledge Implied.*—Where with the knowledge of the owners of a cotton mill, or its superintendent or other agents representing the owner or management of the plant, a child under 12 years of age is permitted to work around the mill, though not on its regular pay roll, or has so continuously worked there that the management or its representatives should have observed that he was so engaged, it is in violation of our statute, Revisal, sec. 1981 (*a*), prohibiting the working or employment of children at such places under 12 years of age. *Ibid.*

8. *Same — Trials — Evidence — Acts of Vice Principal—Scope of Employment.*—In this case a child under 12 years of age was injured in the lapper room of the defendant cotton mill. There was evidence tending to show that the plaintiff was not on the pay roll of the mill, but had for a length of time been continuously at work around the mill, with the knowledge and approval of the superintendent and foreman; that the foreman of the lapper room, when plaintiff was passing through, ordered and forced him "to throw cotton from the lapper while the machine was in motion," which resulted in the injury complained of. *Held*, evidence sufficient to show that the act of the foreman in causing the said injury was within the scope of his employment, and one for which the defendant is responsible, whether at common law or under the provisions of our statute. Revisal, sec. 1981 (*a*). *Ibid.*

9. *Cities and Towns—Streets and Sidewalks—Negligence—Trials—Evidence—Nonsuit.*—In an action against a city for damages alleged to have been negligently inflicted on the plaintiff by reason of the defendant allowing a ditch or excavation to remain unlighted and unguarded on its street, at night, it was shown that the city issued a permit to plumbers to make sewer connections there, which were completed and the ditch properly filled and the bricks of the sidewalk replaced nine days before the occurrence; that less than an hour before the plaintiff's injury occurred a sunken place, alleged to be the cause thereof, came into the sidewalk, where the street was well lighted, evidently resulting from a cave-in from an excavation in a private lot: *Held*, this evidence was insufficient, unsupported by other evidence, to be submitted to the jury on the question of defendant's actionable negligence. *Seagroves v. Winston*, 206.

10. *Railroads—Negligence—Persons on Track—Helpless Condition—Outlook Ahead—Insufficient Headlight—Trials—Evidence.* — The plaintiff's intestate was killed at dusk on the defendant's railroad track. There was evidence tending to show that he had been seen drinking and staggering some fifteen minutes before the occurrence, and that while on his way home he came upon the defendant's roadway and sat upon the end of a cross-tie, and while sitting there with his head and body leaning forward upon his knees, the defendant's train came upon him, using a poor quality of oil for its headlight, striking his body in the region of the ribs, and causing his death; that the track was straight and unobstructed for a mile at this place, which was up-grade, that a person sitting upon the track could have been seen for 300 yards, and that by applying the brakes the train could have been stopped in 50 yards. Upon a motion to nonsuit it is *Held*, that contributory negligence being admitted, the evidence was sufficient to be submitted to the jury upon the issue of the last

NEGLIGENCE—*Continued.*

clear chance as to whether the engineer could have seen the intestate sitting upon the cross-tie, if the headlight had been a propr one, or by a diligent outlook ahead he could have done so in time to have avoided killing him. *Holder v. R. R.*, 160 N. C., 7; *Stout v. R. R.*, 164 N. C., cited and distinguished. *Tyson v. R. R.*, 215.

12. *Interpretation of Statutes — Motor Cars — Negligence — Intersecting Streets.*—Public Laws 1913, ch. 107, providing, among other things, that a person operating a motor vehicle, when approaching an intersecting highway or traversing it, shall have the car under control and operate it at a speed not exceeding 7 miles an hour, having regard to the traffic then on the highway and the safety of the public, is construed with reference to its subject-matter and the purpose and intent of the act gathered from the language employed, and it is held that the words "intersecting highways" includes all space made by the junction of frequented streets of a town, though one of the streets enters the other without crossing or going beyond it. *Manly v. Abernathy*, 220.

13. *Same—Trials—Instructions.*—It appearing in this case that the defendant knocked the plaintiff down and injured him, while the former was running his motor vehicle at an excessive speed upon a public and frequented street that ran into but did not cross another, which he was approaching, without slowing down or giving the signal required by section 1, chapter 107, Public Laws 1913, it was error for the trial judge to charge the jury that the second section of said chapter did not apply to the facts of the case, upon the ground that to come within the meaning of the statute the defendant must have been running his car on a street which crossed beyond the other street he was approaching in order for the streets to have been intersecting each other. *Ibid.*

14. *Trials — Contributory Negligence — Evidence — Nonsuit.*—A motion to nonsuit upon the evidence is properly allowed when the plaintiff's own evidence discloses such contributory negligence as bars his recovery. *Dunnevant v. R. R.*, 232.

15. *Carriers of Passengers—Stations—Safe Egress—Contributory Negligence—Trials—Questions for Court.*—Where a person *sui juris* is lawfully on the platform of a railroad company, at night, with a lighted lantern near him, which he had used in going there, and knew the existing conditions, that the platform was elevated some distance from the ground and was without guard or railing at a certain place used for the handling of freight, which was a dark and dangerous place at the time; and the light from his lantern was shining upon some steps near him from the platform to the ground, a shorter distance, where the railroad had provided a railing or guard, his attempting to leave the platform, without his lantern, by the dangerous way, instead of by the safe way opened to him, is such contributory negligence, as a matter of law, as will bar his recovery in his action for damages against the railroad company for its alleged negligence in failing to provide a safe place for the use of its passengers. *Ibid.*

16. *Telegraphs — Negligence—Mental Anguish—Issues—Causal Connection —Trials—Instruction.*—Where damages are sought for mental anguish and the negligent delay of a message by a telegraph company, and the first issue relates solely to the question of defendant's negli-

NEGLIGENCE—*Continued.*

gence, and the second as to whether the damages were caused by the negligence of the defendant, and where the jury has affirmatively answered the second issue under proper instructions, it includes the question of proximate cause. Hence, an instruction on the first issue, that the jury could answer it without finding that the negligence of the defendant was the cause of the injury, is not erroneous. In this case, it appearing that the name of the sendee of the message was changed in transmission, without explanation, and otherwise it would have been promptly delivered, there was no real controversy presented as to proximate cause arising under the second issue, and the judge would have been justified in instructing the jury that the defendant was negligent upon the admitted facts, upon the first one. *Hedrick v. Telegraph Co.*, 234.

17. *Telegraphs—Mental Anguish—Presumptions—Relationship—Uncle and Nephew.*—Where a telegram to an uncle announces the death and time of burial of his 4-year-old nephew, there is a presumption arising from the relationship that the sendee of the message will suffer mental anguish in consequence of not being able to attend the burial of the deceased, caused by the negligence of the telegraph company in failing in its duty to transmit and deliver the message with reasonable promptness. *Sherrill v. Telegraph Co.*, 155 N. C., 250, cited and approved. *Ibid.*

18. *Railroads—Inspection of Trains—Unusual Conditions—Projections from Trains—Injury to Pedestrians—Trials—Questions for Jury.*—A railroad company is fixed with knowledge of whatever a careful inspection of its trains will disclose, and the burden is upon it to show that a proper inspection had been made, which failed to discover an unusual condition causing an injury, the subject of an action; and the evidence in this case tending to show that while the plaintiff was standing alongside the defendant's track at a crossing, and where he had a right to be, waiting the passage of its train, some unusual projection 4 or 5 feet from the side of the train struck his knee and hurled him beneath the train, to his injury, the question of defendant's actionable negligence is one for the jury under a proper instruction from the court. The charge in this case is approved. *Pruitt v. R. R.*, 247.

19. *Telegraphs—Mental Anguish—Funeral Postponed—Addressee's Duty—Negligence — Trials — Evidence.*—In an action to recover damages against a telegraph company for the negligent delay in delivering a telegram from A. S. Adams to Annie E. Smith, reading, "Baby died this evening. Come," delivered to the husband of the plaintiff, the addressee, the evidence tended to show that the husband wired back to the sender to ascertain the name of the deceased baby, and was informed in reply that it was the 1-year-old baby of the sender, the plaintiff's brother. The plaintiff acknowledged receiving the two messages, and there was evidence tending to show that other telegraphic correspondence had passed between the parties, wherein the sender stated that the funeral of the child would be postponed on plaintiff's request, of which the plaintiff denied knowledge; and with further evidence that the plaintiff had ample time after receiving the messages to have had the funeral postponed and attended the burial. *Held*, it was the duty of the plaintiff to have had the funeral postponed and attended it, had she received the message to that effect and could rea-

NEGLIGENCE—*Continued.*

sonably have done so, which presented an issue of fact for the jury under the conflicting evidence; and upon an affirmative finding thereon, the plaintiff's recovery of damages occasioned by not attending the funeral will be denied. *Smith v. Telegraph Co.*, 248.

20. *Same—Measure of Damages—Nominal Damages—Trials—Instructions.* Where damages for mental anguish are sought in an action against a telegraph company for negligent delay in the delivery of a death message, in an action brought by the addressee, and there is evidence tending to show negligence on the defendant's part in failing to deliver the message with reasonable promptness, and that the addressee could have had the funeral of the deceased postponed and attended it, it is *Held*, that the negligence of the defendant, if established, would be a tort arising from its failure to perform a public duty, and that nominal damages, at least, would be recoverable, and such additional damages as the plaintiff may have suffered up to the time she first had the opportunity to attend the funeral; and a charge is held erroneous that fails to instruct the jury upon the plaintiff's duty to have had the funeral postponed and attend it, under the circumstances of this case. *Ibid.*

21. *Same—Proximate Cause—Special Instructions — Appeal and Error.*— Where in an action against a telegraph company to recover damages for its failure to promptly deliver a death message, there is evidence tending to show that at the time it was received for transmission the sender was asked for a better address, which he could not give, and a service message was delivered to him thereafter stating that the party addressed could not be found and asking for a better address, which the sender promised to obtain; and that he obtained and gave the correct address several hours thereafter, but too late for the addressee to come, and which was promptly forwarded by the defendant, resulting in the prompt delivery of the first message; and there is further evidence that the messenger boy of the defendant at the terminal point was negligent in not promptly finding the addressee and delivering the first message, it is held to be erroneous for the trial judge to refuse to give a prayer for special instructions on this phase of the case, presenting the question of proximate cause, which was not cured by the general charge given in the case. *Ibid.*

22. *Railroads—Injury to Live Stock—Negligence—Opinion Evidence—Trials —Questions for Jury.*—Where the evidence is conflicting as to whether or not the engineer on defendant's train could have stopped his train in time to have prevented an injury to plaintiff's horse, which had become frightened and had run some distance down and near the defendant's track in the same direction the train was going, before attempting to cross the track, where the engine struck him, it is competent for an engineer who had been long in the defendant's service and knew the condition existing as to grade, etc., at the place of the injury, to testify that from his knowledge of the locality, experience and observation, the train could have been stopped in time to have avoided it; and the evidence presenting questions of fact, a judgment of nonsuit was properly denied. *Hanford v. R. R.*, 277.

23. *Railroads—Injury to Live Stock—Statutory Presumptions.*—The statutory presumption of negligence of a railroad company in killing live stock, when the action is brought within six months, applies whether

NEGLIGENCE—*Continued.*

a horse, the subject of the action, was hitched to a buggy at the time or running at large. Revisal, sec. 2645. *Ibid.*.

24. *Railroads—Injury to Live Stock—Ordinary Noises—Frightening Horses—Trials—Negligence.*—The principle that railroad companies are not liable in damages occurring to travelers along the road in consequence of their teams taking fright at the noises ordinarily made by the operating of its trains does not apply to cases wherein the company, by the exercise of reasonable diligence, could have prevented the injury after the horse had become frightend and, running along the track for some distance, had attempted to cross in front of the train. *Barnes v. Public-service Corporation*, 163 N. C., 365, cited and distinguished. *Ibid.*

25. *Railroads—Injury to Live Stock—Issues—Last Clear Chance.*—The evidence in this case being conflicting as to whether or not by the exercise of reasonable care the engineer on the defendant's train could have avoided killing the plaintiff's horse which attempted to cross the track in front of the train, it was proper to submit a third issue, as to whether the defendant could have avoided the injury by the exercise of ordinary care, in addition to the issues of negligence and contributory negligence. *Ibid.*

26. *Street Railways—Trials—Negligence—Evidence—Questions for Jury.*—When a judgment of nonsuit is granted upon the evidence, the evidence is viewed on appeal in the light most favorable to the plaintiff; and in this action to recover damages for the death of plaintiff's horse, wherein there was evidence in plaintiff's behalf that he was sitting on his horse in a narrow street of a town, when the horse, becoming frightened on the approach of the defendant's car, ran backward in the direction the car was going, which the motorman must have seen, but failed to stop the car or slacken the speed, which he could have done in time, resulting in the injury, while the plaintiff was doing all he could to control the horse and avoid it. *Held*, it was sufficient to be submitted to the jury upon the question of defendant's actionable negligence. *Barnes v. Public-service Corporation*, 163 N. C., 363; *Doster v. Street Ry.*, 117 N. C., 661, cited and distinguished. *Hall v. Electric Co.*, 284.

27. *Telegraphs — Principal and Agent — Writing Messages at Sender's Request — Duty to Deliver — Service Messages — Better Address—Negligence.*—As to whether the local agent of a telegraph company becomes the agent of the sender of the message, for certain purposes, by assuming to write the message for him, *quere*. But it is *Held*, that when the company seeks to defend itself from the consequence of the act of its agent, under the circumstances, in making a mistake in the address of the sendee, whereby it claims the message was not delivered with reasonable promptness, it may not rely upon the mistake and absolve itself from the duty of making reasonable inquiry in its effort to deliver it, as addressed, and it is further held that, in any event, the agent would remain the agent of the telegraph company to send a better address when requested by a service message to do so, and the information is available to him, and his negligence therein would be imputed to the company. *Miller v. Telegraph Co.*, 315.

28. *Negligence — Contributory Negligence—Trials—Evidence—Nonsuit.*—It appearing from the evidence in this case that an alderman of the

NEGLIGENCE—*Continued.*

city of Charlotte and an employee of an oil company there, in his endeavor to relieve the city from a "water famine" by the use of trains of the defendant railroad company tendered by the defendant to the city for the purpose, and the use of the oil company's tanks, hired hands and organized a force to pump the water into the tanks for transportation over the defendant's road; and the plaintiff, so employed, but when off duty, went up the road a short distance, and to get out of the rain then falling went under an empty box car placed on a siding frequently in use, and while sitting there was injured by a freight train backing into the car he was under, without signal or warning. Apart from the question of the breach of any duty owed by the defendant to the plaintiff, it is held that the latter's contributory negligence, continuing to the time of impact, barred his recovery as a matter of law, and defendant's motion for nonsuit was properly granted. *Watts v. R. R.*, 345.

29. *Master and Servant — Employers' Liability Act — Contributory Negligence—Issues—Damages.*—In an action by an administrator of an employee of a railroad company to recover damages of the company for his wrongful death, coming within the meaning of the Federal employers' liability act, an affirmative answer by the jury to the issue of contributory negligence does not preclude an answer to the issue of damages, when the issue as to the defendant's negligence has been correctly answered in the affirmative. *Saunders v. R. R.*, 376.

30. *Courts—Federal Employers' Liability Act—Common Law—Negligence—Pedestrians—Warnings—Train Signals.*—There is no difference in the administration of the common law of negligence between the State and Federal courts where the jurisdiction is concurrent, the seeming difference arising in the application of this law to the varying combinations of facts, or confusing negligence, which may or may not cause the injury complained of, with actionable negligence, which unites cause and effect; and where suit is brought in the State court, under the Federal employers' liability act, against a railroad company for the wrongful death of the plaintiff's intestate, and it is shown that while the intestate, an employee of the defendant, in its interstate business, was walking upon or across the defendant's railroad track, in a populous town and where the conditions were dangerous, owing to a double main line and several spur or side tracks, and the customary use of the right of way by pedestrians, the defendant's freight train approached at a speed of from 20 to 25 miles an hour, without signals or other warnings, required by the dangerous condition of the locality and the company's rules, and running over plaintiff's intestate, caused the death complained of, it is *Held*, that the defendant is negligent under the common law as administered either in the State or Federal court, and that the defendant is liable under the Federal statute. *Ibid.*

31. *Railroads — Headlights — Negligence — Proximate Cause — Burden of Proof.*—In this action to recover damages of a railroad company for the negligent killing of the plaintiff's intestate while the defendant was running its train on a dark night without a headlight, there was evidence tending to show that the deceased, who had been drinking, was found dead at a place on the defendant's right of way customarily used by pedestrians, lying on the ground with his head on a cross-tie, with a large hole in his left side which afterwards caused

NEGLIGENCE—*Continued.*

his death, after the train of defendant had passed the place, and also after another of defendant's trains with the required headlight, had passed, going in the opposite direction. There was allegation in the complaint that the deceased was killed while walking near the track, or attempting to cross the track of the defendant company. *Held*, upon the issue as to the defendant's negligence, the burden was on the plaintiff, not only to show that the defendant was negligent in the running of the train without the headlight or giving warnings of its approach, but that the negligence proximately caused the injury complained of, it being for the jury to determine, under the circumstances of this case, whether the deceased was killed by the train running without the headlight; and if so, whether the intestate, being drunk at the time, ran into the train after the engine had passed, or got upon the track immediately in front of the moving train, so that, notwithstanding the absence of the headlight, he would have nevertheless met his death. *McNeill v. R. R.*, 390.

32. *Trials — Instructions — Construed—Railroads—Headlights—Negligence —Expression of Opinion—Appeal and Error.*—Where there is evidence tending to show that the plaintiff's intestate was killed at night by the defendant railroad company's train running without a headlight, under circumstances requiring the plaintiff to prove that the defendant's negligent act was the proximate cause of the death of the deceased, a charge that it made no difference, upon the issue of defendant's negligence, that the train was running without a headlight though erroneous, when standing alone, is not held for reversible error in this case as an expression of opinion by the court forbidden by statute, it appearing, construing the charge as a whole, that the jury could not have been misled thereby, and the charge being otherwise correct. *Ibid.*

33. *Sanitariums for Profit—Negligence of Employees.*—The owner of a private sanitarium receiving sick persons for treatment with the expectation and hope of gain and profit is held to the duty of ordinary care and protection of those intrusted to him, the rule not obtaining in such instances which applies to charitable institutions, for the latter are held responsible only for the exercise of due care in the selection of employees, and not for injuries resulting from their negligence. *Green v. Biggs*, 417.

34. *Railroads—Master and Servant—Federal Act—Issues as to Damages— Negligence—Contributory Negligence—Diminution of Damages.*—It is not required in an action brought under the Federal Employers' Liability act that damages be assessed under separate issues, one as to the full amount sustained and the other as to the amount to be deducted therefrom by the answer to the issue of contributory negligence; and where the trial judge has correctly charged the jury in this respect, under the one issue of damages, it will not be held as erroneous. *Gray v. R. R.*, 433.

35. *Railroads—Negligence—Evidence—Curve—Unobstructed View.*—Where the plaintiff's intestate has been killed by the defendant railroad's train, it is competent for a witness to testify that a curve near the place of the injury did not interfere with the engineer's view from his engine at a certain point north of the place, when such is relevant to the inquiry as to whether the engineer saw, or by keeping a proper lookout could have seen, the danger of the intestate in time to have avoided killing him. *Ibid.*

NEGLIGENCE—*Continued.*

36. *Railroads—Federal Employers' Liability Act—Master and Servant—Negligence—Common Law—Last Clear Chance—Trials—Instructions—Appeal and Error.*—The Federal Employers' Liability act was passed for the benefit of railroad employees, to afford them a recovery of damages when under the common law their contributory negligence would have totally deprived them of the right; and where there is evidence that an employee of the defendant has placed himself in a position of danger on the track in front of an approaching train, but that the injury complained of would not have been sustained had the employees on defendant's train kept a proper lookout ahead and had performed the duties required of them under the circumstances in stopping the train, the common-law doctrine of the last clear chance is applicable; and a requested instruction to the effect that the defendant would not be liable if it did all it reasonably could to stop the train in time, after seeing the intestate's danger, is properly refused. *Ibid.*

37. *Contracts—Independent Contractor—Acts of Owner—Negligence—Proximate Cause.*—Where the defendant has contracted with another for the erection of a dry-kiln with a concrete foundation, and, under his orders, the employer has changed the foundation to brick, which change has caused the wall thereof to fall and injure plaintiff, while engaged in laying brick in its erection, the defense of independent contractor is not available, for the negligent act of the owner, in causing the change to be made, was the proximate cause of the injury, for which he is directly liable. *Embler v. Lumber Co.*, 458.

38. *Negligence—Concurrent Causes—Proximate Cause.*—Where two causes coöperate to produce an injury, one of which is attributable to the defendant's negligence, the latter becomes liable, if together they are the proximate cause of the injury, or if the defendant's negligence is the proximate cause. *Ridge v. R. R.*, 510.

39. *Street Railways—Cities and Towns—Ordinances—Speed Limits—Excessive Speed—Negligence—Last Clear Chance—Trials—Evidence—Questions for Jury.*—Where there is evidence that one running an automobile had negligently placed himself upon a street car track on the street of a city, in front of an approaching car, and that the street car was exceeding the speed limit of the city at the time it ran into the plaintiff, causing the injury complained of in the action, a motion to nonsuit upon the evidence is properly denied, the excessive speed of the car being evidence of the defendant's actionable negligence, upon the issue of the last clear chance, it being for the jury to determine whether by the excessive speed of the car the defendant's motorman had deprived himself of the ability to avoid the injury after discovering the plaintiff's danger. *Norman v. R. R.*, 534.

40. *Street Railways—Negligence—Last Clear Chance—Proximate Cause.*—Where the motorman on a moving street car sees in front of him, on the track, an automobile run there by the negligence of its driver, who was unconscious of his danger, it is his duty to lessen the speed of his car and take reasonable measures to avoid injuring him, under the doctrine of the last clear chance, if ordinary prudence so required; and his failure to so act, if he could do so, is the proximate cause of an injury consequently inflicted. *Ibid.*

41. *Negligence—Proximate Cause—Definition—Trials—Instructions—Appeal and Error.*—Proximate cause of an injury arising from the negli-

NEGLIGENCE—*Continued.*

gence of a party is that which, in natural and continuous sequence, unbroken by any new and independent cause, produces the result, without which it would not have occurred, and from which a man of ordinary prudence could have foreseen that the result was probable under all the circumstances as they existed and were known or should by the exercise of due care have been known to him; and a charge of the court, in this case, that proximity in point of time and space is not part of the definition, was not erroneous. *Ibid.*

42. *Negligence — Explosives — Children — Trials—Evidence—Questions for Jury.*—In an action to recover damages for injury caused to an 11-year old boy in exploding a dynamite cap alleged to have been negligently left on the ground near a well which the defendant corporation had dug on its premises, there was evidence in plaintiff's behalf tending to show that the defendant had used dynamite in digging the well, and the boy found the dynamite cap on the ground or in an uncovered box near by, in an open or uninclosed place, and the injury occurred when he exploded the cap with a hammer; that this place was 8 or 10 steps from a much used path, 76 yards from the main entrance of defendant's mill where 600 or 700 people worked, and within a short distance of the defendant's store and of the post-office, and where children frequently went, the plaintiff on this occasion having gone upon seeing other children there. *Held*, evidence of defendant's actionable negligence sufficient to be submitted to the jury, and to sustain the charge of the court upon the question of whether the dynamite caps were left on the ground by the defendant's employees, whether the place was a public one, and whether the place or caps were likely to attract children. *Barnett v. Mills*, 567.

43. *Negligence — Explosives—Commensurate Care—Children—Invitation—Trials—Instruction.*—Those who use high explosives in the conduct of their business are held to a degree of care in their use commensurate with the danger of such instrumentalities, and where there is evidence, in an action to recover damages sustained by an 11-year-old boy, that he was injured by bursting a dynamite cap he had found on the defendant's premises, publicly situated and frequented by children, etc., near a well the defendant had been blasting, it is not error for the judge to charge the jury that one who maintains dangerous instrumentalities on inclosed premises, of a nature likely to attract children at play, or permit dangerous conditions to exist while not liable to an adult under those circumstances, he is liable to children so injured, though a trespasser at the time the injuries were received. *Ibid.*

44. *Railroads — Excessive Speed—Public Crossings—Negligence—Automobiles—Guests—Last Clear Chance—Trials—Issues—Complex Instructions—Appeal and Error.*—In an action to recover damages of a railway company caused by its train in running upon an automobile in which the plaintiff was riding as a guest, at a public crossing, where the driver of the machine was attempting to cross at the time, there was evidence submitted to the jury upon the question of whether the defendant's train was being run at an unlawful speed, but the case was tried upon the theory, (1) that the defendant had failed to give notice of its approach, and (2) that the engineer thereon, by the exercise of proper care, could have stopped the train in time to have avoided the injury after he had seen or should have seen the plain-

NEGLIGENCE—*Continued.*

tiff's danger. The evidence as to the excessive speed of the defendant's train was not relied on as a distinct ground of action, but in support of the other issues; and construing the charge as a whole it is *Held*, in this case, that the principles of law were correctly charged by the court as applicable to the evidence in their relation to the issues of negligence and last clear chance, and not objectionable as making the plaintiff responsible for any negligent act of the driver of the car; and it is *Further held*, that a new trial will not be awarded on a theory that a charge was more complex than necessary and that the jury did not understand it. *Bagwell v. R. R.*, 611.

45. *Railroads — Negligence—Warnings—Last Clear Chance—Automobiles—Driver — Concurrent Negligence — Imputed Negligence.*—Where the guest in an automobile driven by another is injured while attempting to cross a railroad track at a public crossing by a collision with the defendant's train, and there is conflicting evidence as to whether the injury was caused by the driver of the machine in attempting to cross at the time, or that of defendant's employees on the train in failing to give proper signals or warnings of its approach, or reasonably endeavoring to stop the train after seeing, or after they should have seen by keeping a proper lookout, the plaintiff's danger, the liability of the defendant in damages for the consequent injury is properly made to depend upon whether the injury was the proximate cause of its own negligent acts, if established, or concurred with the negligent acts of the driver of the machine, if any, in producing the result, eliminating the question of plaintiff's contributory negligence upon the ground that the negligence of the driver of the machine cannot be imputed to the plaintiff. *Crampton v. Ivie*, 126 N. C., 894, cited and applied. *Ibid.*

46. *Municipal Corporations — Cities and Towns — Discretionary Powers — Streets and Sidewalks — Negligent Construction—Damages—Constitutional Law—Taking of Private Property.*—A city is not liable to owners of lands abutting upon the street for any detriment to their property resulting from the grading of the street, done in the discretionary power of the city in making needed improvements, unless the damage done thereto resulted from a negligent grading of the street, or the State has given its consent by statute. The principles upon which this doctrine rests discussed by WALKER, J., and differentiated from those applying to the taking of private property for public use without just compensation. *Hoyle v. Hickory*, 619.

47. *Municipal Corporations — Cities and Towns — Streets and Sidewalks—Negligence—Witness, Nonexpert—Evidence—Maps—Measure of Damages.*—Where damages are sought by the owner of lands adjoining a street of a city or town, alleged to have been caused by the negligent construction of the street by the city authorities, evidence of its negligent construction is not confined to the testimony of experts, for such construction may be shown by other witnesses in plaintiff's behalf, using photographs of the locality in explanation and illustration of the testimony, so as to give the jury a better idea as to whether or not damages had been caused, or as to their extent. *Ibid.*

48. *Municipal Corporations — Cities and Towns — Streets and Sidewalks—Negligent Construction—Measure of Damages.*—Upon an issue as to the amount of damages sustained by the plaintiff to his lands abutting a city street, alleged to have been caused by the negligent construction

NEGLIGENCE—*Continued.*

of the street by the city authorities, it is competent for the plaintiff to show the cost of restoring his lot to its former condition and value, the jury to give the evidence such weight as they think proper. *Ibid.*

49. *Carriers of Goods—Live Stock—Improper Cars—Approved and General Use—Weather Conditions—Rule of Prudent Man—Negligence.*—The defendant railroad company used for the transportation of the plaintiff's horse an open slat car, the slats being 4 or 5 inches apart, and the evidence was conflicting as to whether the weather was bitter cold and penetrating, or mild and balmy. There was evidence that the shipment was delayed for several hours, and that the horse contracted pneumonia and shortly afterwards died of the disease; and also that the car was one approved and generally used for the purpose of such shipments. *Held*, the carrier is required to exercise due care, under the rule of the prudent man, according to the existing circumstances, in the selection of a proper car for the shipment, and will not be exempted from liability solely for the reason that the car was such as is generally used under ordinary conditions for such shipment, as this may not be the equivalent of the proper care required. *Hornthal v. R. R.*, 627.

50. *Electricity—Negligence—High Degree of Care—Trials—Instructions—Ordinary Care—Appeal and Error.*—While corporations engaged in the business of furnishing electric power and light to their patrons are not regarded as insurers against injury, they owe the duty to the public and to their patrons to exercise a high skill and the most consummate diligence and foresight in the construction, maintenance, and inspection of their plants, wires, and appliances consistent with the practical operation of their business; and when in an action for damages there is evidence tending to show that the plaintiff was injured on the streets of a city by coming in contact with the defendant's live wire, heavily charged with electricity, lying down upon the sidewalk, it is reversible error for the trial judge to charge the jury, in effect, upon the issue of defendant's negligence, that the care required of the defendant in such instances was that of the ordinarily prudent man. *Turner v. Power Co.*, 630.

51. *Railroads—Employer and Employee—Contributory Negligence—Measure of Damages—Interpretation of Statutes—Federal Act.*—The verdict of the jury in this action against a railroad company to recover for the wrongful death of its employee, under the instruction of the court, awarded damages by considering the contributory negligence of the plaintiff's intestate and diminishing the amount of recovery according to Laws 1913, ch. 6, secs. 2, 3, and 4; and it appearing that by admissions, pleadings, and the evidence that the intestate was engaged upon an intrastate train, the State statute and not the Federal statute is applicable; and it is *Further held*, that the testimony of a witness that he thought, without accurate means of knowledge, that some of the cars of the train were loaded with coal from Tennessee or Virginia, is not sufficient to constitute legal evidence of interstate commerce. *Ingle v. R. R.*, 636.

53. *Railroads—Negligence—Employees—Willful and Reckless Acts—Trials—Evidence—Nonsuit.*—The plaintiff, at the request of an employee of the defendant railroad company, was on the ground assisting him in lifting a 500-pound keg down from the car, while another employee in

NEGLIGENCE—*Continued.*

the car was helping from that place. A hoop of the keg in some way caught in the side of the car door, and owing to the efforts of the employee in the car in helping to free it, the keg came loose and fell upon the plaintiff, causing the injury complained of. The question of the defendant's negligence being eliminated, it is *Held*, that the evidence was insufficient to sustain a judgment for exemplary damages for the willful or reckless acts of the defendant's employee; and if it were otherwise, the judgment rendered could not be sustained, there being no finding that the defendant was responsible for the willful or reckless acts of its agent, if any were committed by him. *Brittain v. R. R.*, 642.

54. *Automobiles—Negligence—Trials—Issues—Proximate Cause — Instructions—Appeal and Error.*—In an action to recover damages for injuries alleged to have been sustained by the negligence of the defendant, while driving an automobile, in running over the plaintiff, it is error for the trial judge to instruct the jury to answer the issue as to defendant's negligence in the affirmative if the evidence satisfied them, by its greater weight, that the machine was being run in a negligent manner; for this eliminated the question of proximate cause; and when it appears that the error was not cured by construing the charge as a whole, it is reversible error. *Clark v. Wright*, 646.

55. *Independent Contractor—Dangerous Character of Work—Negligence of Contractor—Contributory Negligence.*—A railroad company which in the construction of its roadbed makes a cut 30 feet deep across the main street of a town cannot escape liability for an injury to a pedestrian who has fallen into the cut, while passing along the street a dark, drizzly night, caused by the negligence of its contractor in not properly safeguarding a temporary narrow footbridge across it, with rails or guards or providing lights to give warning of the danger, on the ground that the work was being done by an independent contractor, for work of this character is necessarily and inherently dangerous; and it is further held that the case was properly submitted to the jury upon the issues of negligence and contributory negligence. *Watson v. R. R.*, 164 N. C., 176, and that line of cases, cited and applied. *Dunlap v. R. R.*, 669.

56. *Independent Contractor — Supervision of Work—Negligence of Contractor.*—A railroad company may not successfully defend an action to recover for an injury received by the plaintiff proximately caused by its negligence in falling into a deep cut across the main street of a town where the plaintiff was walking, on the ground that the work was being done by an independent contractor, when it appears that the work was being done under the direction of the railroad company. *Ibid.*

57. *Negligence—Personal Injury—Warning of Danger—Proximate Cause.*—While engaged with other employees in the defendant's chemical plant in cutting a channel through phosphate in a bin, and sloping its sides, the usual method for removing the phosphate, the plaintiff received the injury complained of by a piece of phosphate falling upon him, with evidence on defendant's part that the plaintiff was warned of the danger by its foreman in time to have avoided the injury had he obeyed. *Held*, error for the trial judge to instruct the jury upon the theory of plaintiff's want of the exercise of ordinary

NEGLIGENCE—*Continued.*

care being the proximate cause of the injury, for the plaintiff cannot recover if his failure to obey the warning was the proximate cause, and the defendant's special prayer for instruction to this effect was erroneously refused. *Edwards v. Chemical Co.*, 671.

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 1, 4.

NEGRO BLOOD. See Schools, 3, 4.

NEW TRIALS.

1. *Courts—Substitute Judgment—Compromise—Time Given for Consent—Intent—Interpretation—Practice—New Trial.*—Upon motion made in the Superior Court by a party defendant to set aside a verdict of the jury as being against the weight of the evidence, the judge said he would grant the motion as a matter in his discretion, but thought the plaintiff should recover something, stating if the defendant would pay a certain less amount and the plaintiff would take it, he would sign a judgment in that sum. Whereupon the attorneys for both parties requested time in which to communicate with their clients, and until Tuesday of the following week, a criminal term, was given for that purpose. The judge signed an order setting aside the verdict, which was to stand if the parties did not agree, and also a judgment in the amount stated to be substituted for the order, if the parties should agree thereto; and this without objection. The defendant agreed to pay this sum, and on the Tuesday fixed for the purpose the plaintiff's attorney stated he had not yet heard from his client, but on the following day stated that his client had refused to accept the compromise judgment. *Held*, (1) the plaintiff having waived his legal right that the judge should exercise his discretion to set aside the verdict at the term it was rendered, cannot avail himself of the fact that this was not done; (2) the order setting aside the verdict was the judgment of the court at that term, and the compromise judgment was only to become effective as a substitute if thereafter agreed to by both of the parties, and upon their failure to agree the order for a new trial remained in effect; (3) the reason for the delay being to give the parties time to hear from their clients, and Tuesday being supposed to be sufficient for the purpose, but not the last day, the action of the court on Wednesday, the day following, was valid, especially as plaintiff's conduct implied consent that the court might act on that day; (4) the misunderstanding having arisen from the failure of the court and the parties to effect a compromise, an order granting a new trial would otherwise be proper. *Decker v. R. R.*, 26.
2. *New Trial—Newly Discovered Evidence—Motions.*—A motion for a new trial for newly discovered evidence is denied. *Johnson v. R. R.*, 163 N. C., 453. *Padgett v. McKay*, 504.

NEWLY DISCOVERED EVIDENCE. See New Trials.

NONSUIT. See Trials; Pleadings, 15.

NOTICES. See Evidence, 2.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 7.

OFFICERS. See Corporations, 3, 17.

1. *Public Officers—Appointment—Constitutional Law—Legislative Powers—Hospitals for the Insane—Directors.*—By amendment to Article III, sec. 10, of our Constitution by the Convention of 1875, the express inhibition of the General Assembly to appoint officers to offices created by statute was taken away, and the inherent right of the Governor to appoint is now restricted to constitutional offices and where the Constitution itself so provides; and all offices created by statute, including directorates in State institutions—in this case, the State Hospital at Raleigh—the power of appointment, either original or to fill vacancies, is subject to legislative provision as expressed in a valid enactment. *Salisbury v. Croom*, 223.
2. *Public Officers—Hospitals for the Insane—Directors—Appointments—Interpretation of Statutes—Concurrence of Senate.*—Revisal, sec. 4547, providing directorates for hospitals for the insane, enacts among other things, that each corporation shall be under the management of each class expiring at different times, "nominated by the Governor and, by and with the advice and consent of a majority of the Senators-elect, appointed by him," and after making provisions as to quorums, etc., concludes that "after the expiration of their said respective terms of office, all appointments shall be for a term of six years, except such as are made to fill unexpired terms." *Held*, it was the design and purpose of the Legislature that the consent and approval of the Senate, as stated, be required for a valid appointment by the Governor to fill unexpired terms as well as full terms, and that the sole power of appointment of the Governor is derived under Revisal, sec. 5328, subsec. 3, to fill vacancies when the Senate was not in session, and until it met and concurred in his appointment. *Boynton v. Heartt*, 158 N. C., 488, cited and distinguished; *State's Prison v. Day*, 124 N. C., 362, overruled. *Ibid.*
3. *Public Officers—Appointments—Ouster—Process—Concurrence of Senate—Color of Right—Interpretation of Statutes.*—Revisal, sec. 2368, providing in effect that a person "admitted and sworn into any office shall be held, deemed, and taken, by force of such admission, to be rightfully in such office, until by judicial sentence, upon a proper proceeding, he shall be ousted therefrom," etc., applies to such persons who, having duly qualified, are performing the duties of the office under color of right, and not to the facts of this case, where the appointee of the Governor, requiring the concurrence of the Senate in order to hold his office for the full unexpired term of his predecessor, is holding over after the Senate has met and concurred in the appointment of another. *Ibid.*
4. *Public Officers—Quo Warranto — Ouster — Process — Interpretation of Statutes.*—A realtor in *quo warranto* proceedings to try title to office accepts the position that he has been displaced in the office by the form of action in which he seeks to assert his rights, and may not therein avail himself of the position that under our statute, Revisal, sec. 2368, he should have been ousted therefrom by a judicial sentence, under a proper proceeding, etc. *Ibid.*

OPINION. See Evidence, 5; Trials, 18, 45.

ORDINANCES. See Cities and Towns; Street Railways.

OSTEOPATH. See Evidence, 19.

OUSTER. See Officers.

PARENT AND CHILD. See Schools, 3, 4; Divorce.

1. *Parent and Child—Support of Child—Willful Abandonment—Trials—Evidence—Burden of Proof.*—In an action against a father to recover for the support, tuition, etc., of his minor children furnished by their grandmother, the plaintiff, there was evidence in behalf of the defendant tending to show that the plaintiff took possession of his children against his will and prevented him from having access to them or performing his parental duty as to their support and maintenance, and had then voluntarily surrendered them to him; as well as evidence to the contrary. *Held*, the burden of proof was on the plaintiff to show that she supported and maintained the children, and on the defendant that he was prevented by plaintiff from performing the duty himself, and when the verdict of the jury has been rendered, under proper instructions from the court, in defendant's favor, the case does not fall within the meaning of Revisal, sec. 180, providing that the parent shall be deemed to have forfeited all rights and privileges with respect to the care, custody, and services of his children whom he has willfully abandoned. *Howell v. Solomon*, 588.
2. *Same — Contract Implied — Torts — Damages.*—Where a grandmother seeks to recover in an action against the father for the tuition, board, etc., of his minor children, and the jury by their verdict, under proper instructions, have found that the plaintiff had deprived the defendant of their care and custody against his will during the time in question and should recover nothing, though ordinarily a recovery may be had as upon a *quasi contract* for services rendered, etc., the verdict will not be disturbed, for the plaintiff will not be permitted to take advantage of her own wrong. *Ibid.*

PAROL EVIDENCE. See Bills and Notes, 1; Contracts.

PAROL TRUSTS. See Trusts.

PARTIES. See Process; Married Women.

1. *Dead Bodies — Mutilation — Damages—Parties—Next of kin.*—In the order of their priority of inheritance of the personal property of the deceased, the next of kin may maintain an action to recover damages for the negligent mutilataion of his dead body after death. *Floyd v. R. R.*, 55.
2. *Same—Father and Mother—Interpretation of Statutes.*—The father in his lifetime is now, by statute, entitled to all the personal property of his deceased child, in preference to its mother, upon the intestacy of the child without wife or children (chapter 172, Public Laws 1911, now Pell's Revisal, Supplement, sec. 132); and hence the mother of a deceased minor child, in the lifetime of the father, may not recover for the mutilation of its body after death. *Semble*, the same result would follow from the interpretation of Revisal, sec. 132, subsec. 6, before the amendment of 1911, chapter 172. *Ibid.*
3. *Same—Joinder of Parties.*—The mother may not recover damages for the mutilation of the dead body of her minor child, when the father is alive, is made a formal party plaintiff, and disavows all personal

PARTIES—*Continued.*

interest in the recovery; for the suit is then, in effect, one for the recovery by the mother alone. *Ibid.*

4. *Executors and Administrators—Lands—Rules of Descent—Heirs at Law—Parties—Actions.*—The undevised land of a testator immediately descends, at his death, to his heirs at law, and his executors cannot maintain an action to set aside a deed for it, in the absence of some power in the will authorizing him to do so, or when there are no debts for the payment of which the lands may be sold. An executor may sell land conveyed by his testator when the deed is fraudulent or otherwise void, as against creditors, under the statute. Revisal, sec. 72. *Speed v. Perry*, 122.

5. *Contracts—Covenants—Parties—Misjoinder—Torts—Election—Separate Actions.*—While a plaintiff, who has brought his action against two defendants, alleging as to one a breach of an implied covenant of quiet enjoyment of leased premises in respect to sewer connections, and as to the other, a tort in wrongfully stopping up the sewers running underground across his adjoining lands, must elect as to which cause of action he will prosecute, he may nevertheless take a nonsuit in that action and bring separate actions at the same time against each of the defendants for the same damages: against one for the breach of the implied covenant and against the other for the tort; but a recovery in one of these actions will preclude a recovery in the other. *Huggins v. Waters*, 197.

PARTITION. See Dower, 2, 3.

*Dower Proceedings—Actions—Collateral Attack—Partition.*—An allotment to the widow in dower proceedings cannot be attacked collaterally in proceedings for partition of the lands of the deceased ancestor by his heirs at law. *Dudley v. Tyson*, 68.

PARTNERSHIPS.

*Partnership—Service on One Partner—Judgment — Property Subject to Execution—Service After Judgment—Interpretation of Statutes.*—Where a judgment has been obtained in an action against a partnership (here a husband and wife) and summons therein has been issued and served only on one of the partners, and the other has not made himself a party or taken proper steps by independent action to prevent it, execution may issue on the partnership property and on the property of the individual member who has been served with process (Revisal, sec. 413); and as to the partner not served with summons, he may be made a party after judgment rendered, and then execution may issue against his separate property. Revisal, secs. 413, 414. *Daniel v. Bethell*, 218.

PEDESTRIANS. See Railroads, 7.

PENALTY. See Commerce.

PENALTY STATUTES. See Register of Deeds; Statutes.

PER CURIAM OPINION. See Courts, 6.

PLEADINGS. See Courts, 7, 11; Trials, 86; Corporations, 11; Removal of Causes; Judgments, 7; Courts, 44.

1. *Courts—Pleadings—Amendments—Answer—Waiver.* — When a defendant answers an amended complaint which has been permitted by the court, his doing so is a waiver of any objection thereto he might otherwise have had. *Rice v. R. R.*, 1.

2. *Pleadings—Amendments—Court's Discretion.*—The refusal of the trial court to permit a party to amend his pleadings is a matter within its discretion, and not reviewable on appeal. *Cauley v. Dunn*, 32.

3. *Pleadings—Answers—Counterclaim—Title to Lands—Slander of Title—Equity—Injunction—Trials—Nonsuit.*—The right of a plaintiff to abandon his action and submit to a judgment of nonsuit at any time before verdict rendered, or what is tantamount to it, does not apply where the defendant has pleaded as a counterclaim a cause of action arising out of a contract or transaction set forth in the complaint as a ground for the plaintiff's cause; and where in an action for the possession of land the defendant set forth his title and, asking for injunctive relief, alleges the insolvency of the plaintiff, his frequent acts of trespass, and that his claim of title constitutes slander upon the defendant's title, depriving him of the opportunity to sell his land, etc., the plaintiff may not take a voluntary nonsuit and deprive the defendant of his right to try out the action to obtain the relief he has demanded. *Yellowday v. Perkinson*, 144.

4. *Railroads—Collisions—Meeting Points—Pleadings—Amendments—Negligence—Issues.*—The damages claimed in this action are sought for the alleged failure of a train order to properly name the meeting point of two of its trains going in opposite directions, whereby an injury was caused to the plaintiff, an employee on one of them. *Held*, the issues of negligence, contributory negligence, and damages were the proper ones, the question of assumption of risk having been excluded from the case by a permitted amendment of the pleadings. *Tilghman v. R. R.*, 163.

5. *Pleadings—Fraud—Allegations—Issues.*—Allegations of the complaint, in substance, that a deed sought to be set aside for fraud was obtained when the relationship of mortgagor and mortgagee existed between the parties, and that the plaintiff was induced to sign the deed by the false representations that it was a mortgage, is held sufficient to raise the issue; and upon a new trial awarded in this case the Court suggests that the question of actual and constructive fraud be determined upon separate issues. *McPhaul v. Walters*, 182.

6. *Courts—Jurisdiction—Pleadings—Judgment—Estoppel.*—When a court having jurisdiction of the case and the parties renders judgment therein, it estops the parties and their privies as to all issuable matters contained in the pleadings; and though not issuable in a technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined in the hearing. *Ferebee v. Sawyer*, 199.

7. *Pleadings — Deeds and Conveyances — Insufficient Description—Appeal and Error.*—In an action upon a note given for the purchase price of lands and to foreclose a mortgage given thereon to secure it, the position is not open to the defendant that the description in the mortgage

PLEADINGS—*Continued.*

was insufficient, when it is not denied in the answer that the mortgage covered the *locus in quo*. *Crowell v. Jones*, 386.

8. *Actions—Pleadings — Counterclaim—Uncollected Accounts.*—A counterclaim alleged by reason of accounts of defendant in the plaintiff's hands, remaining uncollected, cannot be sustained, when it does not appear that the plaintiff had in any manner guaranteed their collection. *Ibid.*

9. *Appeal and Error—Answers to Issues—Immaterial Exceptions.*—It becomes unnecessary on plaintiff's appeal to consider his exception to the refusal of the trial court to submit an issue upon the last clear chance, in a personal injury case against a railroad company, where the jury have answered the issue as to defendant's negligence in its favor upon the evidence and under correct instructions of the law. *McNeill v. R. R.*, 390.

10. *Pleadings—Trials—Instructions — Appeal and Error.*—In an action to recover damages of a railroad company for the negligent killing of plaintiff's intestate by its train, a requested instruction as to the defendant's duty to keep a lookout was properly refused, there being no allegation in the complaint to that effect. *Ibid.*

11. *Pleadings—Interpretation—Cause Stated.*—A complaint will be liberally construed in plaintiff's favor to ascertain if the facts presented are sufficient to state a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, however inartificially it may have been drawn; and in this action to recover damages for the wrongful death of plaintiff's intestate, who had been received for treatment in defendant's sanitarium, allegations of the complaint are held sufficient, that the intestate was so received by the defendant for hire, when he was in a helpless condition; that he was placed in the upper room of a wooden building, heated by furnace from the basement; that the windows of the room were closed and the health of the intestate was such as to render his exit from the room impossible; that the employee of defendant, whose duty it was to watch the furnace, had been permitted by the defendant to leave the premises without putting another in his place, and in his absence a fire started near the furnace which destroyed the building and burnt the intestate to death. *Green v. Biggs*, 417.

12. *Pleadings—Variance—Appeal and Error—Objections and Exceptions—Trials—Instructions.*—The objection by the defendant that there has been a variance between the allegations of the complaint and the proof of the plaintiff, in his action, and that recovery has been permitted him upon evidence of an entirely distinct and independent theory than that alleged, must be taken to the evidence when it is offered, and when no objection is then made, an exception to the charge of the trial judge because he stated that phase of the plaintiff's contention is untenable on appeal. *Ibid.*

13. *Pleadings—Variance—Impeachment—Appeal and Error.*—Where the defendant has not excepted to plaintiff's evidence claimed to be at variance with the allegations of the complaint upon the measure of damages, but has introduced the paragraph of the complaint relating thereto as substantive evidence for the purpose of impeachment, he will not be permitted on appeal to rely upon the variance between the

PLEADINGS—*Continued.*

allegation and proof for the purpose of obtaining another trial. *Ibid.*

14. *Pleadings—Waiver—Insurance—Supreme Court—Amendments.*—While it is usually necessary to plead a waiver in order to make it available on the trial, the Supreme Court may allow an amendment there, within its sound discretion, and not disturb a verdict and judgment the party may have obtained in the Superior Court; and it appearing in this case that the plaintiff has failed to plead that the defendant had waived a condition contained in its policy of life insurance, requiring proof of death of the insured, and that the action had been commenced in a justice's court, where the pleadings are ordinarily informal, and that full opportunity had been given the defendant to produce and introduce testimony upon the question, the verdict below is left undisturbed. *Shuford v. Insurance Co.*, 547.

15. *Pleadings—Counterclaim—Demurrer—Voluntary Nonsuit.*—It appearing in this case that the plaintiff's demurrer to the defendant's alleged counterclaim should have been sustained, thus depriving the defendant of any right to affirmative relief, it is held that the plaintiff's motion for a voluntary nonsuit should have been granted without leave to the defendant hereafter to amend his answer in respect thereto. *Carpenter v. Hanes*, 551.

16. *Pleas in Bar—Former Action—Nonsuit.*—The plea of the pendency of the same action in another county will be overruled when it appears that in the former action a judgment of nonsuit has been entered. *Barnett v. Mills*, 576.

17. *Pleadings—Interpretation—Cause of Action.*—Under our Code system of pleading, actions should be tried upon their merits, construing every intendment in favor of the pleader; and a complaint may not be overthrown by demurrer if in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, however inartificially it may have been drawn, or uncertain, defective, or redundant may be its statements. *Hoke v. Glenn*, 594.

18. *Same—Charitable Hospitals—Selection of Employees—Ordinary Care—Demurrer.*—A hospital maintained for charitable purposes is liable in damages caused by its failure to use ordinary care in the selection of its employees, and where one who has been received as a patient therein alleges in his complaint, in an action to recover damages, that he has been injured by reason of the failure of the defendant to exercise the care required in this respect, a demurrer thereto on the ground that the complaint does not state facts sufficient to constitute a cause of action is bad. *Ibid.*

19. *Pleadings—Amendments—Effect—Demurrer.*—Where the complaint in an action sought to restrain the use of the plaintiff's name in a given business is insufficient, and an amended complaint is allowed and filed which makes allegation sufficient to sustain the suit, the amended complaint has the effect of superseding the first, and a demurrer to the complaint should not be sustained. *Zagier v. Zagier*, 616.

20. *Pleadings — Trade Names — Injunction — Sufficient Allegations.*—In an action to restrain the use of a name in a given business, a complaint is held sufficient which alleges, in substance, that the defendant had

PLEADINGS—*Continued.*

expressly contracted with the plaintiff for a valuable consideration not to do business of a given kind in a certain city under the name of Z.; and that he had wrongfully begun and conducted the business therein under the name of Z., and that the plaintiff, also engaged there in that business under the designated name, had been greatly wronged and damaged in a stated sum. *Ibid.*

21. *Pleadings — Allegations — Information and Belief — Denial — Issues—Deeds and Conveyances—Delivery.*—Allegations of the complaint, made upon information and belief, and denied by the answer, that a deed sought to be set aside had never in fact or in law been executed by the grantor, is sufficient to raise the issues as to whether the grantor signed and delivered the deed to the grantee. *Linker v. Linker*, 651.

PLEAS IN BAR. See Pleadings, 16.

PREMATURE APPEAL. See Appeal and Error.

PRINCIPAL AND AGENT. See Railroads, 6; Insurance; Negligence, 8; Corporations, 2, 7; Contracts; Insurance.

1. *Telegraphs—Principal and Agent—Writing Messages at Sender's Request—Duty to Deliver—Service Messages—Better Address—Negligence.*—As to whether the local agent of a telegraph company becomes the agent of the sender of the message, for certain purposes, by assuming to write the message for him, *quere.* But it is *Held*, that when the company seeks to defend itself from the consequences of the act of its agent, under the circumstances, in making a mistake in the address of the sendee, whereby it claims the message was not delivered with reasonable promptness, it may not rely upon the mistake and absolve itself from the duty of making reasonable inquiry in its effort to deliver it, as addressed, and it is further held that, in any event, the agent would remain the agent of the telegraph company to send a better address when requested by a service message to do so, and the information is available to him, and his negligence therein would be imputed to the company. *Miller v. Telegraph Co.*, 315.

2. *Principal and Agent—Commissions—Pleadings—Trials—Proof.*—In an action to recover commissions for sale of lands it is unnecessary for the plaintiff to allege in his complaint the various stages leading up to the consummation of the transaction; and in this case it is held that it was not necessary for the plaintiff to have alleged that the defendant procured a loan, for the purchaser through the agent of the former as a condition for the sale, and that the same agent therein acted for both, in order to show the fact by his evidence. The charge of the court is according to the decision on a former appeal. 164 N. C., 19. *Trust Co. v. Goode*, 338.

3. *Contracts—Statute of Frauds—Principal and Agent—Parol Authority.* The requirement to make a binding and valid writing to convey lands, that the instrument shall be signed by the party or his agent thereunto lawfully authorized, does not extend to a written authority from the principal to the agent, for such authority is sufficient if given by parol. *Flowe v. Hartwick*, 448.

PRINCIPAL AND AGENT—*Continued.*

4. *Contracts to Convey—Deeds and Conveyances—Principal and Agent—Ratification.*—When an unauthorized contract has been made for an alleged principal, who is sought to be bound thereby, it is necessary that the agent must have contracted or professed to have contracted for the principal, and the latter must have signified his assent or intent to ratify, either by word or conduct. Hence, where the tenant for life in lands has executed a written contract to convey the lands upon condition, resting in parol, that all the remaindermen should convey their interest therein, and a deed was signed by the parties, but was left undelivered in the hands of a party in interest, a minor and remainderman, who destroyed the deed after coming of age, it is *Held*, that the contract is not enforcible, there being no evidence that the life tenant assumed to act as the agent of the remaindermen or that they had ratified his acts. *Ibid.*

5. *Insurance — Policies — Proof of Death—Impossible Requirements—Waiver—Principal and Agent—Proof of Agency—Evidence Sufficient.* Where a policy of life insurance provides that payment thereof to the wife of the insured will discharge the insurer from all liability thereunder, and relying upon the statutory seven years absence, and other evidence sufficient upon the inquiry of the whereabouts of the insured, etc., the wife has made demand for payment on the agent of the insurer, who refuses on behalf of the company to pay the amount of the policy without proof of death of the insured by three witnesses, or certificate to that effect by the physician attending him during his last illness, the conditions imposed by the company are impossible of performance, and will be regarded as a waiver by the company of its right to demand the proof of death. The evidence in this case that the agent was authorized by the company to waive the proof of death in its behalf is held sufficient. *Shuford v. Insurance Co.*, 547.

PRINCIPAL AND SURETY. See Insurance, 5.

*Principal and Surety—Contracts—Indemnity—Notice—Date of Completion Weather Conditions.*—Where a surety bond indemnifying the owner against loss under a contract for the building of a house provides that the owner shall notify the guaranty company of the failure of the contractor to complete the house by a certain date, and that no liability shall attach to the company unless the owner shall promptly, and in any event not later than thirty days after knowledge of such default, deliver to the surety at its office in a certain city written notice thereof, and it is expressly provided in the contract, to which the bond refers, that delays caused by excessive bad weather should not be counted against the contractor, it is *Held*, that delays from the cause stated extends the time wherein the house was contracted to have been completed, and that notification under the terms of the contract given after the date named, but within the extension thereof, on account of the weather conditions, is sufficient. *Harris v. Guaranty Co.*, 623.

PRIORITIES. See Mechanics' Liens, 8.

PROCESS. See Judgments, 6.

1. *Process—Parties—Minors—Guardian ad Litem—Irregularities—Process Cured.*—The appointment of a guardian *ad litem* before service of summons upon the infants is an irregularity which may be cured by the service of summons upon the infants thereafter, and the filing of the answer of the guardian, etc. *Dudley v. Tyson*, 67.
2. *Partnership—Service on One Partner—Judgment—Property Subject to Execution—Service After Judgment—Interpretation of Statutes.*—Where a judgment has been obtained in an action against a partnership (here a husband and wife) and summons therein has been issued and served only on one of the partners, and the other has not made himself a party or taken proper steps by independent action to prevent it, execution may issue on the partnership property and on the property of the individual member who has been served with process (Revisal, sec. 413); and as to the partner not served with summons, he may be made a party after judgment rendered, and then execution may issue against his separate property. Revisal, secs. 413, 414. *Daniel v. Bethell*, 218.
3. *Public Officers—Appointments—Ouster—Process—Concurrence of Senate—Color of Right—Interpretation of Statutes.*—Revisal, sec. 2368, providing in effect that a person "admitted and sworn into any office shall be held, deemed, and taken, by force of such admission, to be rightfully in such office, until by judicial sentence, upon a proper proceeding, he shall be ousted therefrom," etc., applies to such persons who, having duly qualified, are performing the duties of the office under color of right, and not to the facts of this case, where the appointee of the Governor, requiring the concurrence of the Senate in order to hold his office for the full unexpired term of his predecessor, is holding over after the Senate has met and concurred in the appointment of another. *Salisbury v. Croom*, 223.
4. *Public Officers — Quo Warranto—Ouster—Process—Interpretation of Statutes.*—A relator in *quo warranto* proceedings to try title to office accepts the position that he has been displaced in the office by the form of action in which he seeks to assert his rights, and may not therein avail himself of the position that under our statute, Revisal, sec. 2368, he should have been ousted therefrom by a judicial sentence, under a proper proceeding, etc. *Ibid.*
5. *Process—Return Term—Interpretation of Statutes—Courts—Motion to Dismiss.*—When, contrary to the provisions of our statute, Revisal, sec. 434, a summons has been issued in an action returnable within less than ten days from the term in which the defendant is to appear and answer, etc., the action will be dismissed on defendant's motion. As to the power of the court to permit amendment to the summons upon request of plaintiff, *Quere. Scott v. Jarrell*, 364.
6. *Summons—Irregular Process—Appearance—Waiver.*—A summons is irregular when made returnable at a term of court less than ten days from its date of issue; but a defendant against whom a judgment has been obtained in the action cannot avail himself thereof when he has moved for a restraining order. *McDowell v. Justice*, 493.

PROCEEDINGS. See Trials, 15.

1. *Processioning Lands—Issues—Title—Estoppel—Judgment.*—While prior to the act of 1903, now Revisal, 717, title to lands were not affected

PROCEEDINGS—*Continued.*

by proceedings to procession lands, now the dividing line may be established without putting the title in issue, or the parties may also join issue upon the title; and where the first course is pursued a judgment in the proceeding is an estoppel as to where the line is located, and in the second event the case is transferred to the Superior Court in term upon issues joined as to the title, and a judgment of the court therein estops the parties both as to the title and the location of the line. *Whitaker v. Garren*, 658.

2. *Same—Controverted Matters—Evidence—Interpretation of Statutes.*—As to whether the party in an action involving title to lands is estopped by a judgment formerly rendered in processioning proceedings to determine the true dividing line between himself and another, parol evidence is admissible to show whether or not the title as well as the boundary of the land was properly embraced in and determined by the judgment in former proceedings, or whether the issue as to the true location of the line was raised and determined by merely showing occupancy of the parties without involving the issue as to title, Revisal, sec. 326; and in this case it is held for error under the defendant's exceptions that the trial judge withdrew from the consideration of the jury the processioning proceedings, which had been introduced, and instructed them not to consider them in any view, it therein appearing that the parties were claiming under mesne conveyances under separate grants from the State, and that the court "settled and adjudged the true line between the said grants, and between the parties, in accordance with the defendant's contention." *Ibid.*

PROFITS. See Deeds and Conveyances, 27.

PROXIMATE CAUSE. See Negligence, 1, 21, 31, 37.

PUBLICATION. See Libel and Slander.

PUBLIC POLICY. See Courts, 35; Gaming, 2.

QUESTIONS FOR COURT. See Trials, 35.

QUESTIONS FOR JURY. See Trials, 9, 13.

QUO WARRANTO. See Officers.

RAILROADS. See Cities and Towns; Street Railways.

1. *Railroads—Construction—Negligence—Drain Pipes—Ponding Water—Limitations of Actions.*—Where a plaintiff sues a railroad company for damages arising from sickness in his family alleged to have been caused by the negligence of the defendant in failing to properly keep open a culvert under its track to carry off accumulating or running waters, resulting in ponding the waters upon plaintiff's lands under his dwelling-house, the negligence complained of is not barred by the five-year statute of limitation, running from the time the culvert was constructed, the damages sought having arisen from an alleged subsequent negligent act in connection with the drain. *Rice v. R. R.*, 1.

2. *Railroads—Ponding Water—Malaria—Mosquitoes — Evidence.*—In an action to recover damages of a railroad company for malarial sickness alleged to have been caused in the plaintiff's family from the negligence of the defendant in not keeping a drain under its track properly

RAILROADS—*Continued.*

cleaned out and open, thus ponding water under the plaintiff's dwelling, his physician testified that the ponded water bred mosquitoes whose bite caused the malaria, and it is held competent for plaintiff to testify as to the sickness of certain of his children thus caused. *Ibid.*

3. *Same—Children—Value of Services—Obstruction of Jury—Witnesses—Evidence.*—Where damages are allowable to the parent by reason of the sickness of his children, caused by the act of defendant in ponding water under his dwelling, and the children are exhibited to the jury, it is competent for the jury to take into their consideration in assessing the damages their own observation and knowledge of the value of such children to their parents in their own homes. *Ibid.*

4. *Railroads—Drain Pipes—Ponding Water—Malaria—Negligence—Trials—Evidence—Burden of Proof—Instructions.*—Where a railroad company is sued for not keeping its drain pipe under its roadbed properly cleaned out, thus ponding water under the plaintiff's house, and causing sickness in his family, and there is evidence tending to show this resulted in the sickness complained of, it is competent to ask a witness whether the water would have been thus ponded had the drain been cleaned; and in this case it is held that the instruction of the judge as to the burden of proof was not objectionable to the defendant. *Ibid.*

5. *Railroads—Federal Employers' Liability Act—"Next of Kin"—"Dependent"—State Laws—Interpretation of Statutes.*—Within the intent of the Federal Employers' Liability act, the meaning of the words "next of kin" depending upon the employee, who are given a right of action against a railroad company for his wrongful death, when he has no surviving widow or husband or children, is dependent upon the State law regulating inheritances; and in this State our statute, Revisal, sec. 137, controls, and thereunder the half-brothers of the deceased employee, an illegitimate child, may maintain the action when born in lawful wedlock of the same mother; and it is further held, in this case, that evidence of the tender age of such next of kin, being without estate, is sufficient to be submitted to the jury as being "dependent" upon the deceased employee. *Kenney v. R. R.*, 14.

6. *Railroads—Principal and Agent—Contracts—Special Authority—Trials—Evidence—Questions for Jury.*—Upon the question whether a railroad company through its proper officers authorized its local agent to make a contract for furnishing the plaintiff a baggage car at certain other of its stations at stated times, or ratified the act of the agent in making such contract, evidence is held sufficient which tends to show the plaintiff requested the car from the local agent, who asked time before replying, and subsequently entered into the contract, and the car was thereafter furnished at two of the stations. The charge of the court is approved in this case. *Newberry v. R. R.*, 50.

7. *Railroads—Rights of Way—Pedestrians—Look and Listen—Contributory Negligence—Proximate Cause—Trials—Nonsuit.*—Whether a trespasser or a licensee by custom, a person walking along a railroad track is required, by his having thus chosen a dangerous place to walk, to use diligence in protecting himself from being run over or injured by a train passing there, by the use of both his faculties of looking and listening; and the employees of the railroad, having a superior right

RAILROADS—*Continued.*

to the usage of the track for the running of the company's trains, may assume to the last moment that the pedestrian, apparently having a proper use of his faculties, will leave the track in time to avoid an injury; and when he has failed to do so, and the track is unobstructed, and by the use of his faculties he could have perceived his danger in time to avoid the injury complained of, his omission to perform this duty required of him is the proximate cause of his injury, and a recovery of damages will be denied. *Talley v. R. R.*, 163 N. C., 567, cited and distinguished. *Ward v. R. R.*, 148.

8. *Same—Signals—Lookout.*—Where a recovery of damages for a personal injury is denied by reason of the failure of a pedestrian walking on the railroad track to exercise the proper degree of care required of him to leave the track in time to avoid the injury complained of, it is his own negligence which bars his recovery, irrespective of the duty of the employees of the railroad company to keep a lookout in front of the moving train, or give warnings of its approach. *Ibid.*

9. *Same—Side-tracks—Noises.*—The doctrine that a pedestrian on a railroad track is required to exercise his faculties to look and listen to protect himself from the consequences of his having used this dangerous place for walking, applies to side-tracks which are customarily used; and where the pedestrian in full use of himself and his faculties has attempted to walk upon the right of way, not far from a station, where there are a main and two side-tracks, one of the side-tracks being then used by a train, and to avoid another train passing on the main line has stepped over to the other side-track, and while walking there is killed by the engine and car from the main-line train backing down upon him, in broad daylight, and when by looking or listening, or in the proper exercise of his faculties he should have seen the engine and car approaching in time to have left the track for a place of safety, his death is solely attributed to his own negligence, without reference to whether the train on the other side-track was making too much noise for the engine and car to have been heard, or whether there was a proper lookout placed or signals given to him. *Ibid.*

10. *Railroads—Train Orders — Copies — Identification—Witnesses—Nonexpert Evidence.*—Where damages are sought in an action against a railroad company for a wrongful death alleged to have been inflicted on the deceased by reason of an erroneous train order, made out in original and carbon, causing a collision of two trains, wherein the deceased met his death, it is competent for a witness who has not qualified as an expert to testify that he had inspected the original order, and that the copy exhibited was not genuine. *Tilghman v. R. R.*, 164.

11. *Same—Meeting Points—Similarity of Names.*—A railroad company having two stations on its road with similar names, "Grandy" and "Granite," wired from its proper department for two trains going in opposite directions to meet at one of these points, which they failed to do, resulting in a collision and the injury to the plaintiff, and the controversy turned upon the question which point was named in the order, the plaintiff contending that the order he received instructed "Grandy" as the meeting point. The plaintiff having been fully examined and testified he had no doubt that the order read "Grandy" instead of "Granite," was permitted to say that a paper-writing exhibited to him looked nearer like the one he had received than that

RAILROADS—*Continued.*

introduced by the defendant, and that it read that the trains should pass at "Grandy," the name of the station as appearing upon the order being indistinct; and this is held no error. *Ibid.*

12. *Railroads—Collisions—Meeting Points—Pleadings—Amendments—Negligence—Issues.*—The damages claimed in this action are sought for the alleged failure of a train order to properly name the meeting point of two of its trains going in opposite directions, whereby an injury was caused to the plaintiff, an employee on one of them. *Held*, the issues of negligence, contributory negligence, and damages were the proper ones, the question of assumption of his having been excluded from the case by a permitted amendment of the pleadings. *Ibid.*

13. *Same—Trials—Evidence—Questions for Jury.*—Where damages are sought in an action against a railroad company for its alleged negligence in giving the proper order for the meeting of trains at a certain station, resulting in an injury to an employee on one of the trains, upon which the evidence is conflicting, the controversy presents issues of fact for the determination of the jury. *Ibid.*

14. *Railroads—Relief Departments—Advisory Boards—Final Arbitration—Fraud—Notice of Meetings—Trials—Evidence—Nonsuit.*—It having been held on a former appeal in this case that the plaintiff was concluded by the action of the advisory committee of the defendant railroad company's relief department, when such is not fraudulent or oppressive (157 N. C., 194), by amendment the plaintiff, upon another trial, seeks to invalidate the adverse conclusion of the committee upon the grounds stated, and his evidence tends to show that the committee acted in his absence after failing to notify him, as it had promised to do, of the meeting at which it would consider his claim, and the evidence of the defendant, which was not denied, that its superintendent caused a letter of notification to be mailed him, and it appears that several days thereafter the committee received a letter from plaintiff's attorneys inclosing affidavits upon which he based his claim, without intimating his desire or intention to be present, and there is no evidence that the board did not consider the matter fairly and impartially, or that, under the rules, the plaintiff would have been admitted to its consideration of the question had he been present: *Held*, there was not sufficient evidence of fraud on the part of the committee, and a motion to nonsuit is allowed. *Nelson v. R. R.*, 185.

15. *Railroads—Negligence—Persons on Track—Helpless Condition—Outlook Ahead—Insufficient Headlight—Trials—Evidence.*—The plaintiff's intestate was killed at dusk on the defendant's railroad track. There was evidence tending to show that he had been seen drinking and staggering some fifteen minutes before the occurrence, and that while on his way home he came upon the defendant's roadway and sat upon the end of a cross-tie, and while sitting there with his head and body leaning forward upon his knees, the defendant's train came upon him, using a poor quality of oil for its headlight, striking his body in the region of the ribs, and causing his death; that the track was straight and unobstructed for a mile at this place, which was upgrade, that a person sitting upon the track could have been seen for 300 yards, and that by applying the brakes the train could have been stopped in 50 yards. Upon a motion to nonsuit, it is *Held*, that con-

RAILROADS—*Continued.*

tributory negligence being admitted, the evidence was sufficient to be submitted to the jury upon the issue of the last clear chance as to whether the engineer could have seen the intestate sitting upon the cross-tie, if the headlight had been a proper one, or by a diligent outlook ahead he could have done so in time to have avoided killing him. *Holder v. R. R.*, 160 N. C., 7; *Stout v. R. R.*, 164 N. C., cited and distinguished. *Tyson v. R. R.*, 215.

16. *Railroads—Inspection of Trains—Unusual Conditions—Projections from Trains—Injury to Pedestrians—Trials—Questions for Jury.*—A railroad company is fixed with knowledge of whatever a careful inspection of its trains will disclose, and the burden is upon it to show that a proper inspection had been made, which failed to discover an unusual condition causing an injury, the subject of an action; and the evidence in this case tending to show that while the plaintiff was standing alongside the defendant's track at a crossing, and where he had a right to be, waiting the passage of its train, some unusual projection 4 or 5 feet from the side of the train struck his knee and hurled him beneath the train, to his injury, the question of defendant's actionable negligence is one for the jury under a proper instruction from the court. The charge in this case is approved. *Pruitt v. R. R.*, 247.

17. *Railroads—Injury to Live Stock—Negligence—Opinion Evidence—Trials—Questions for Jury.*—Where the evidence is conflicting as to whether or not the engineer on defendant's train could have stopped his train in time to have prevented an injury to plaintiff's horse, which had become frightened and had run some distance down and near the defendant's track in the same direction the train was going, before attempting to cross the track, where the engine struck him, it is competent for an engineer who had been long in the defendant's service and knew the condition existing as to grade, etc., at the place of the injury, to testify that from his knowledge of the locality, experience and observation, the train could have been stopped in time to have avoided it; and the evidence presented questions of fact, a judgment of nonsuit was properly denied. *Hanford v. R. R.*, 277.

18. *Railroads—Injury to Live Stock—Statutory Presumptions.*—The statutory presumption of negligence of a railroad company, in killing live stock, when the action is brought within six months, applies whether a horse, the subject of the action, was hitched to a buggy at the time or running at large. Revisal, sec. 2645. *Ibid.*

19. *Railroads—Injury to Live Stock—Ordinary Noises—Frightening Horses—Trials—Negligence.*—The principle that railroad companies are not liable in damages occurring to travelers along the road in consequence of their teams taking fright at the noises ordinarily made by the operating of its trains does not apply to cases wherein the company, by the exercise of reasonable diligence, could have prevented the injury after the horse had become frightened and, running along the track for some distance, had attempted to cross in front of the train. *Barnes v. Public-service Corporation*, 163 N. C., 365, cited and distinguished. *Ibid.*

20. *Railroads—Injury to Live Stock—Issues—Last Clear Chance.*—The evidence in this case being conflicting as to whether or not by the exercise of reasonable care the engineer on the defendant's train could have avoided killing the plaintiff's horse which attempted to cross the

RAILROADS—*Continued.*

track in front of the train, it was proper to submit a third issue, as to whether the defendant could have avoided the injury by the exercise of ordinary care, in addition to the issues of negligence and contributory negligence. *Ibid.*

21. *Railroads — Easements — Equity — Restraining Order — Injunction.*— *Semble*, an owner of a lot on a city street, after having been refused a restraining order in the Superior Court against a railroad company from continuing the construction of the roadway in front of his property on the street, and from which order he has not appealed, is not entitled to consideration in equity upon his application thereafter for a permanent injunction against the continued use of the road by the common carrier, which had been put into full operation. *Griffin v. R. R.*, 150 N. C., 315, cited and applied. *Waste Co. v. R. R.*, 340.

22. *Same—Municipal Authority—Damages.*—The defendant railroad company in this case petitioned the city to change the location of one of the streets by using for street purposes a strip of land the defendant owned, and to permit it to use the street running in front of plaintiff's property for its roadway and railroad purposes, which was granted, and the road constructed in accordance with a blue-print, etc., filed with the petition and under the direction and supervision of the city engineer and with the approval of the city authorities. *Held*, the location of the road through the city was a matter to be determined by the city authorities, and the plaintiff is not entitled to injunctive relief, the remedy being in an action for damages. *Ibid.*

23. *Railroad—Easements—Abutting Lands—Ingress to Lands—Damages—Evidence.*—Damages are recoverable of a railroad company which has constructed its railroad along and upon a city street upon which the plaintiff's lands abut, whether the plaintiff has shown any title to the street, or not, which arise from the inconvenience the plaintiff has sustained by reason of the interruption of access to his property, by rendering it less convenient for the purposes to which he had put it; and it is held competent, in this case, for the plaintiff to show that by the construction of the railroad at this place the plaintiff's ingress and egress had been impaired to and from leased property used in connection with its business conducted there. *Ibid.*

24. *Railroads—Easements—Abutting Lands—Depreciation—Damages—Evidence.*—When compensatory damages are recoverable from a railroad company by an owner of lands abutting on the street by reason of its construction of its roadway upon the street, it is competent for the plaintiff to show the diminution in value to his property by reason of the construction complained of, and while a witness testifying in behalf of the plaintiff may not be able to express in dollars and cents the amount of the damages caused, they may, in proper instances, give their opinion that the property has been damaged a certain per cent of its value. *Ibid.*

25. *Railroads—Easements—Abutting Lands—Measure of Damages.*—The plaintiff sues a railroad company for damages to his property arising from its constructing and operating its railway upon the street in front of his lot abutting thereon, and it is held that the defendant's prayer for instruction asking that the jury should not take into consideration any effect upon the mere appearance of the plaintiff's property caused by the construction of the road was substantially in-

RAILROADS—*Continued.*

corporated in the charge given, of which the defendant cannot complain. *Ibid.*

26. *Railroads — Headlights — Negligence — Proximate Cause — Burden of Proof.*—In this action to recover damages of a railroad company for the negligent killing of the plaintiff's intestate while the defendant was running its train on a dark night, without a headlight, there was evidence tending to show that the deceased, who had been drinking, was found dead at a place on the defendant's right of way customarily used by pedestrians, lying on the ground with his head on a cross-tie, with a large hole in his left side which afterwards caused his death, after the train of defendant had passed the place, and also after another of defendant's trains with the required headlight had passed, going in the opposite direction. There was allegation in the complaint that the deceased was killed while walking near the track, or attempting to cross the track of the defendant company. *Held*, upon the issue as to the defendant's negligence, the burden was on the plaintiff, not only to show that the defendant was negligent in the running of the train without the headlight or giving warnings of its approach, but that the negligence proximately caused the injury complained of, it being for the jury to determine, under the circumstances of this case, whether the deceased was killed by the train running without the headlight; and if so, whether the intestate, being drunk at the time, ran into the train after the engine had passed, or got upon the track immediately in front of the moving train, so that, notwithstanding the absence of the headlight, he would have nevertheless met his death. *McNeill v. R. R.*, 390.

27. *Railroads—Master and Servant—Federal Act—Issues as to Damages—Negligence—Contributory Negligence—Diminution of Damages.*—It is not required in an action brought under the Federal Employers' Liability act that damages be assessed under separate issues, one as to the full amount sustained and the other as to the amount to be deducted therefrom by the answer to the issue of contributory negligence; and where the trial judge has correctly charged the jury in this respect, under the one issue of damages, it will not be held as erroneous. *Gray v. R. R.*, 433.

28. *Railroads—Negligence—Evidence—Curve—Unobstructed View.*—Where the plaintiff's intestate has been killed by the defendant railroad's train, it is competent for a witness to testify that a curve near the place of the injury did not interfere with the engineer's view from his engine at a certain point north of the place, when such is relevant to the inquiry as to whether the engineer saw, or by keeping a proper lookout could have seen, the danger of the intestate in time to have avoided killing him. *Ibid.*

29. *Railroads—Federal Employers' Liability Act—Master and Servant—Negligence—Common Law—Last Clear Chance—Trials—Instructions Appeal and Error.*—The Federal Employers' Liability act was passed for the benefit of railroad employees, to afford them a recovery of damages when under the common law their contributory negligence would have totally deprived them of the right; and where there is evidence that an employee of the defendant has placed himself in a position of danger on the track in front of an approaching train, but that the injury complained of would not have been sustained had the

RAILROADS—*Continued.*

employees on defendant's train kept a proper lookout ahead and had performed the duties required of them under the circumstances in stopping the train, the common-law doctrine of the last clear chance is applicable; and a requested instruction to the effect that the defendant would not be liable if it did all it reasonably could to stop the train in time, after seeing the intestate's danger, is properly refused. *Ibid.*

30. *Railroads—Easements—Measure of Damages.*—In awarding compensation to the owner of lands for an easement acquired by a railroad company thereon, recovery may be had for the impaired value, including, as a rule, the market value of the land actually taken or covered by the right of way, with damages to the remainder of the tract or portions of the land used by the owner as one tract, deducting from the estimate the pecuniary benefits or advantages which are special or peculiar to the tract in question, but not those which are shared by the owner in common with other owners in the same vicinity. *R. R. v. Armfield*, 464.

31. *Same—Incidental Depreciation—Smoke, Etc.—Sentimental and Speculative Damages.*—In awarding damages to the owner of land in condemnation proceedings brought by a railroad company to acquire a right of way through them, it is proper, in ascertaining the amount, to consider, among other things, the inconvenience and annoyance likely to arise in the orderly exercise of the easement which interfere with the use and proper enjoyment of the property by the owner and which sensibly impair its value, including the injury and annoyance from jarring, noise, smoke, cinders, etc., from the operating of trains, to the extent it exists from close proximity of the property and not attributable to the defendant's negligence; excluding, however, considerations of sentiment or personal annoyance detached from any effect on the pecuniary value of the property or allowance of damages of a purely speculative character. *R. R. v. Mfg. Co.*, 166 N. C., 168, cited and distinguished. *Ibid.*

32. *Master and Servant—Negligence—Safe Place to Work—Ordinary Care—Definition.*—The measure of care against accidents which a master must take to avoid responsibility for injuries to his servant in the performance of his duties is that which a person of ordinary prudence and caution would use if his own safety were to be affected and the whole risk were his own. *Ridge v. R. R.*, 510.

33. *Master and Servant—Negligence—Cooperating Cause—Apportionment of Liability.*—Where the master's negligence contributes to the result of the servant's injury, although there may be a cooperating cause, not due to the servant's act, the law will not undertake to apportion the liability, but will hold him responsible to the servant in the same degree and with the same consequence as if his negligence had been the sole cause of the injury. *Ibid.*

34. *Master and Servant—Railroads—Inspection of Cars—Trials—Absence of Witnesses—Evidence.*—Where there is evidence that a personal injury was inflicted upon an employee of a railroad by reason of the failure of the company to inspect a defective box car, the absence of the railroad's inspector as a witness justifies the jury in drawing inferences unfavorable to the defendant, in an action for damages, upon the issue of its negligence in this respect. *Ibid.*

RAILROADS—*Continued.*

35. *Railroads—Master and Servant—Safe Place to Work—Inspection—Foreign Car—Negligence—Evidence.*—In an action to recover damages against a railroad company for an injury to the plaintiff received while in the course of his employment by the top of a box car being blown off by the wind, striking him and carrying him to the ground, there was evidence tending to show that the planks of the roof of the car, an old one, were seen by the plaintiff, just prior to the injury, "jumping up and down"; that the car belonged to another railroad company, but it could readily have been inspected by the defendant, under the circumstances, considering its location and the defendant's usual methods of inspection. *Held*, it was sufficient evidence that the planks on top of the car were not properly nailed or fastened, and of the defendant's actionable negligence in failing to discover the defects of the car by reasonable inspection and remedy it. *Ibid.*

36. *Same—Vis Major—Concurrent Negligence.*—It is the duty of the master to furnish the servant with a reasonably safe place to do his work, under the rule of the ordinarily prudent man with reference to his own safety, and when the master fails in this respect and his negligence concurs with conditions over which he has no control, in producing an injury to an employee, it will be held as the proximate cause of the consequent injury; and where an injury to its train hand is caused by the negligence of a railroad company to provide a box car reasonably safe for the purpose of his going along its top in the performance of his duties, and in consequence, during a windstorm, the roof of the car is blown off and hurls the plaintiff to the ground to his injury, without other or intervening cause, the doctrine of *vis major* will not apply, and the negligence of the defendant will be held the proximate cause of the resulting injury. *Ibid.*

37. *Railroads—Excessive Speed—Public Crossings—Negligence—Automobiles—Guests—Last Clear Chance—Trials—Issues—Complex Instructions—Appeal and Error.*—In an action to recover damages of a railway company caused by its train in running upon an automobile in which the plaintiff was riding as a guest, at a public crossing, where the driver of the machine was attempting to cross at the time, there was evidence submitted to the jury upon the question of whether the defendant's train was being run at an unlawful speed, but the case was tried upon the theory, (1) that the defendant had failed to give notice of its approach, and (2) that the engineer thereon, by the exercise of proper care, could have stopped the train in time to have avoided the injury after he had seen or should have seen the plaintiff's danger. The evidence as to the excessive speed of the defendant's train was not relied on as a distinct ground of action, but in support of the other issues; and construing the charge as a whole it is *Held*, in this case, that the principles of law were correctly charged by the court as applicable to the evidence in their relation to the issues of negligence and last clear chance, and not objectionable as making the plaintiff responsible for any negligent act of the driver of the car; and it is *Further held*, that a new trial will not be awarded on a theory that a charge was more complex than necessary and that the jury did not understand it. *Bagwell v. R. R.*, 611.

38. *Railroads—Negligence—Warnings—Last Clear Chance—Automobiles—Driver—Concurrent Negligence—Imputed Negligence.*—Where the

RAILROADS—*Continued.*

guest in an automobile driven by another is injured while attempting to cross a railroad track at a public crossing by a collision with the defendant's train, and there is conflicting evidence as to whether the injury was caused by the driver of the machine in attempting to cross at the time, or that of defendant's employees on the train in failing to give proper signals or warnings of its approach, or reasonably endeavoring to stop the train after seeing, or after they should have seen, by keeping a proper outlook, the plaintiff's danger, the liability of the defendant in damages for the consequent injury is properly made to depend upon whether the injury was the proximate cause of its own negligent acts, if established, or concurred with the negligent acts of the driver of the machine, if any, in producing the result, eliminating the question of plaintiff's contributory negligence upon the ground that the negligence of the driver of the machine cannot be imputed to the plaintiff. *Crampton v. Ivie*, 126 N. C., 894, cited and applied. *Ibid.*

39. *Railroads—Employer and Employee—Contributory Negligence—Measure of Damages—Interpretation of Statutes—Federal Act.*—The verdict of the jury in this action against a railroad company to recover for the wrongful death of its employee, under the instruction of the court, awarded damages by considering the contributory negligence of the plaintiff's intestate and diminishing the amount of recovery according to Laws 1913, ch. 6, secs. 2, 3, and 4; and it appearing that by admissions, pleadings, and the evidence that the intestate was engaged upon an intrastate train, the State statute and not the Federal statute is applicable; and it is *Further held*, that the testimony of a witness that he thought, without accurate means of knowledge, that some of the cars of the train were loaded with coal from Tennessee or Virginia, is not sufficient to constitute legal evidence of interstate commerce. *Ingle v. R. R.*, 636.

40. *Railroads—Negligence—Employees—Willful and Reckless Acts—Trials—Evidence—Nonsuit.*—The plaintiff, at the request of an employee of the defendant railroad company, was on the ground assisting him in lifting a 500-pound keg down from the car, while another employee in the car was helping from that place. A hoop of the keg in some way caught in the side of the car door, and owing to the efforts of the employee in the car in helping to free it, the keg came loose and fell upon the plaintiff, causing the injury complained of. The question of the defendant's negligence being eliminated, it is *Held*, that the evidence was insufficient to sustain a judgment for exemplary damages for the willful or reckless acts of the defendant's employee; and if it were otherwise, the judgment rendered could not be sustained, there being no finding that the defendant was responsible for the willful or reckless acts of its agent, if any were committed by him. *Brittain v. R. R.*, 642.

RECORDARI. See Courts, 32.

REFERENCE.

1. *Reference—Report—Omission of Findings—Approval of Trial Judge—Conclusions of Law—Appeal and Error.*—Where the report of a referee fails to find a material fact necessary to the determination of the controversy, and his report has been approved by the court without further finding, and the judgment appealed from, the affirmation of the

REFERENCE.—*Continued.*

report by the lower court will have no conclusive effect, and this Court will remand the case, to the end that the necessary fact be found; and while the conclusions of law found by the referee in this case seem to regard the fact as found, the Court will not supply the omission or pass upon the matter. *French v. Richardson*, 41.

2. *Limitations of Actions—Reference—Debtor and Creditor—Application of Payment—Intent—Trials—Evidence.*—In an action by the mortgagor against the mortgagee for an account, etc., it appeared that the parties had various and sundry dealings, the defendant mortgagee keeping the accounts, and there was evidence tending to show that certain credits were made by him on the mortgage note in time to prevent the running of the statute of limitation in plaintiff's favor, with conflicting evidence as to whether the plaintiff had authorized these credits to be made upon the note, some of it tending to show that the plaintiff had contended that the credits should be in a larger amount. *Held*, the direction of the creditor as to the application of his payment may be express or deduced from circumstances tending to show his intention; and in this case the question was one of fact as to the authority of the defendant creditor to enter the credit upon the note, which should have been passed upon and determined by the referee. *Ibid.*

3. *Reference—Evidence—Approval of Trial Judge—Appeal and Error.*—Exceptions to a report of a referee, supported by competent evidence and approved by the trial judge, are not reviewable on appeal. *Montcastle v. Wheeler*, 258.

4. *Reference—Findings of Fact—Evidence—Confirmation of Court—Appeal and Error.*—The findings of fact by the referee made upon adequate and responsive evidence, and concurred in by the trial judge, are not open to review on appeal. *Simmons v. Groom*, 271.

5. *Reference, Compulsory—Waiver.*—A motion for a compulsory reference should be made in an action before the jury has been impaneled, or the rights of a party thereto will be considered as waived. Whether or not it was within the discretion of the trial judge to order a compulsory reference in this case is not presented, as it does not fall within the class of cases wherein such a reference is allowed. Revisal, sec. 519. *Peyton v. Shoe Co.*, 280.

REFORMATION. See Equity.

REGISTER OF DEEDS.

*Penalty Statutes—Register of Deeds—Age of Woman—Inquiry—Trials—Instructions.*—In this action brought by the father of the woman against the register of deeds, for issuing a license for the marriage of his daughter under 18 years of age, the judge charged the jury, among other things, that it was the duty of the register of deeds to make the inquiry as to the age of the woman, not as a mere matter of form, but for the purpose, conscientiously, of ascertaining the fact; such inquiry as a business man, acting in the important affairs of life, would make. *Held*, the charge is correct, and approved under *Joyner v. Harris*, 157 N. C., 298; *Furr v. Johnson*, 140 N. C., 159; *Trollinger v. Burroughs*, 133 N. C., 312. *Savage v. Moore*, 383.

RELEASE. See Contracts, 16.

RELIEF DEPARTMENTS. See Railroads, 14.

REMAINDERMEN. See Estates.

REMOVAL OF CAUSES.

1. *Removal of Causes—Extension of Time to Plead — Petition — Time to File—Interpretation of Statutes.*—An order of the trial judge extending time within which to file pleadings, under our statute, has the same force and effect as if the extended period had originally been allowed by the statute; and where a nonresident defendant is sued by a resident plaintiff in our courts for an amount cognizable in the Federal court, and the plaintiff fails to file his complaint within the time allowed, and obtains an extension of time to file pleadings duly excepted to by the defendant, which upon notice given files its petition and bond for removal to the Federal court and moves thereon at the first available term of the Superior Court wherein the action was commenced, it is held that the defendant's motion was in time, and should be allowed, if the cause is otherwise removable. *Hyder v. R. R.*, 584.
2. *Removal of Causes—Foreign Corporations—Lessee Railroads.*—The leasing and operation of a domestic railroad by a foreign railroad company cannot have the effect of making the lessee road a domestic corporation, or prohibit it from removing a cause to the Federal court under the Federal act permitting it. *Herrick v. R. R.*, 158 N. C., 310; *Hurst v. R. R.*, 162 N. C., 368, cited and distinguished. *Ibid.*
3. *Removal of Causes—Citizenship—Issue of Fact—Jurisdiction—Federal Courts.*—An issue of fact raised by the complaint and petition as to whether a corporation, seeking to remove a cause brought against it by a resident plaintiff, to the Federal court, is a foreign corporation and entitled to have its motion granted for diversity of citizenship, is one for the determination of the Federal court where the petition upon its face is regular and sets forth facts sufficient for the removal of the case, and the bond accompanying it is a proper one. *Ibid.*
4. *Trial Courts—New Trial—Interpretation of Statutes.*—Where the defendant has filed a sufficient petition and bond for the removal of a cause from the State to the Federal court on the ground of diversity of citizenship, and appeals from an order of the trial court refusing to remove the cause, the appeal involves the right of the State court to try the action, including in its scope all the issues presented in the record; and pending the appeal it is error for the trial court to proceed with the trial and determine these issues, over the objection of the defendant; and when this is done, and the appeal has regularly been prosecuted in accordance with the rules of law and practice regulating appeals, a new trial will be ordered, though the Supreme Court may have affirmed the order of the trial court, appealed from, retaining the cause. Revisal, sec. 602. *Pruett v. Power Co.*, 598.

RES IPSA LOQUITUR. See Evidence, 29, 31, 32.

RESTRAINT ON ALIENATION. See Deeds and Conveyances, 2.

RESTRAINT OF TRADE. See Contracts, 15.

RETRIAL. See Trials, 85, 86.

REVISAL. (For greater accuracy, refer to the various subjects in this index.)

SEC.

72. There must be some authority in the will for executor to sell land, when there are no debts. *Speed v. Perry*, 122.

132. Father inherits personalty of deceased child in preference to mother upon intestacy of child without wife or children, and mother may not recover for mutilation of its dead body. *Floyd v. R. R.*, 55.

137. Half-brothers of deceased born in wedlock of same mother may recover when deceased is illegitimate. *Kenney v. R. R.*, 14.

156. This section does not change common-law rule that action for personal injuries, not causing death, do not survive. *Watts v. Vanderbilt*, 567.

157. This section does not change common law that action for personal injury does not survive unless it causes the death. *Ibid.*

180. Where the father is prevented from supporting his minor children, he is not deemed to have forfeited his right to them by abandonment. *Howell v. Solomon*, 588.

307. Court has discretion to allow amendment of pleadings during progress of trial. *Tilghman v. R. R.*, 164.

326. Parol evidence is competent to show occupancy of parties without involving title to lands. *Whitaker v. Garren*, 658.

363. Since 1899, coverture is no bar to running of statute of limitations in favor of married woman. *Carter v. Reaves*, 131.

386. Occupation of land is presumed to be in subordination to true title. *Land Co. v. Floyd*, 686.

403. Motion in the cause is the remedy to collect purchase price of land under judicial sale. *Davis v. Pierce*, 135.

413. Service on one partner only binds him personally and the firm's assets, and not those of the other partner. *Daniel v. Bethell*, 218.

414. Partner not served with process may be made party after judgment to bind his separate property. *Ibid.*

415. This section applies alone to actions which survive, and not to personal injuries which have not caused the death. *Watts v. Vanderbilt*, 567.

434. Action dismissed if summons is issued less than ten days from appearance term. *Scott v. Jarrell*, 364.

513. This does not apply to judgments rendered contrary to course and practice of the courts. *Cox v. Boyden*, 320.

513. Where an order refusing to set aside a judgment for excusable neglect has been set aside, the original motion is left pending, and movant is not estopped by the former judgment. *Pierce v. Eller*, 672.

519. Motion for compulsory reference must be made before jury impaneled, or it will be considered as waived. *Peyton v. Shoe Co.*, 280.

602. Where there is an appeal to the Supreme Court on jurisdictional grounds, and the Superior Court has proceeded to try the cause pending it, a new trial will be ordered, though appeal is affirmed as to jurisdiction. *Pruett v. Power Co.*, 598.

645. Section applies to judicial sales, and not those under mortgage. *Ferebee v. Sawyer*, 199.

REVISAL—*Continued.*

SEC.

648. Held under the facts of the case, the purchaser of a piano was not an innocent one, for value. *Phillips v. Hyatt*, 570.

652. Improvements made in good faith under a defective probate of wife are allowed as betterments. *Gann v. Spencer*, 429.

717. The dividing line as well as title to lands may be determined in processioning. *Whitaker v. Garren*, 658.

946. Attempt of restraint of alienation void in conveyance of lands without the word "heirs," but the words used may be construed to ascertain the intent of grantor to convey less than fee. *Holloway v. Green*, 91.

948. When descriptions are made definite by reference to former conveyances, parol evidence of identification is admissible. *Patton v. Sluder*, 500.

1005. When descriptions are made definite by reference to former conveyances, parol evidence of identification is admissible. *Ibid.*

1424. A purchaser entering into possession of land without paying the purchase price may not avail himself of the bar of ten-year statute of limitations. *Davis v. Pierce*, 135.

1425. The ten-year statute of limitations will not avail a purchaser entering into possession of land without paying the purchase price. *Ibid.*

1491. Superior Court judge refusing *recordari* upon laches found, etc., the facts not reviewable on appeal. *Tedder v. Deaton*, 479.

1492. Court on appeal will not review facts found by trial judge in refusing a *recordari* for laches, etc. *Ibid.*

1556. A collateral relation must be of the blood of the ancestor. *Noble v. Williams*, 112.

1562 (4). Evidence of husband's misconduct more than ten years previous, coming to within six months of the time of commencing the action, is competent. *Page v. Page*, 346.

1570. Court may make orders respecting custody of children before and after final judgment for divorce. *Sanders v. Sanders*, 317.

1589. A suit to remove cloud upon title to lands placed there by plaintiff is regarded as a proceeding to determine title. *Guilford v. Porter*, 366.

1589. This section liberally construed, and suit to cancel tax deed as a cloud upon title maintained. *Christman v. Hilliard*, 4.

1625. Verified account *prima facie* case when goods sold, etc. *Lipinsky v. Revell*, 508.

1631. The wife of deceased person may testify in action brought by another against him to recover value of services. *Helsabeck v. Doub*, 205.

1631. As corroborative evidence of general reputation of marriage, a witness may testify to declaration made by the mother, since deceased. *Carter v. Reaves*, 131.

1631. A son of a deceased person may not testify as to the consideration of his father's deed, or his intention to make it, when interested in result of trial. *Linker v. Linker*, 651.

1656. Paper, etc., asked to be inspected must be shown to relate to the merits of the action. *Evans v. R. R.*, 415.

REVISAL—*Continued.*

SEC.

1981. The placing of a child at work at a mill, prohibited by statute, is actionable negligence. *McGowan v. Mfg. Co.*, 192.

1990. Where rent is payable in a certain fixed sum of money, the remainderman is only entitled to his proportionate part of the sum. *Hayes v. Wrenn*, 229.

2016. The lien for material furnished attaches when the material becomes betterments. *Glazener v. Lumber Co.*, 676.

2017. Lien attaches when personal property is in possession of mechanic, and for material men the material must become betterments. *Ibid.*

2020. It is error for trial judge to charge the jury, without stating rule, to ascertain amount recoverable by material man against owner. The rule given. *Bain v. Lamb*, 304.

2020. Owner acknowledging receipt of notice by material man, and saying he will reserve bill in settlement with contractor, is evidence that materials were used in building. *Ibid.*

2021, as amended, ch. 150, Laws 1913, gives laborers a lien on the logs and lumber on which work is done. *Glazener v. Lumber Co.*, 676.

2033a, as amended ch. 150 Laws 1913, gives laborers a lien on logs and lumber on which work is done. *Ibid.*

2107. Except in dealing with her husband, a married woman may as freely contract as a *feme sole*. *Lipinsky v. Revell*, 508.

2109. Section does not apply to estates by entireties. *McKinnon v. Caulk*, 411.

2110. Section does not apply to estates by entireties. *Ibid.*

2201. Holder of negotiable instrument in due course defined. *Lumber Co. v. Childerhose*, 34.

2205. Knowledge required to charge holder of negotiable instrument with knowledge of its infirmity. *Smathers v. Hotel Co.*, 469.

2208. Burden of proof is on intervenor claiming in due course an instrument procured by fraud. *Ibid.*

2368. This section applies to officers holding office under color of right. *Salisbury v. Croom*, 223.

2485. Clerk may not allow motion to nonsuit in partition upon issue joined. *Haddock v. Stocks*, 70.

2517. Widow, with some of the heirs at law, may bring action for partition against other heirs at law. *Dudley v. Tyson*, 67.

2634. The validity of section depends upon whether Interstate Commerce Commission has assumed authorized control of subject. *Morphis v. Express Co.*, 139.

2645. The killing of a horse by a railroad company, whether hitched to a buggy or running at large, comes within the statutory presumption of negligence. *Hanford v. R. R.*, 277.

2930. A municipality is not responsible in damages caused to property owners by keeping up its streets, in the absence of negligent construction. *Munday v. Newton*, 656.

3362. The placing of a child at work prohibited by statute, is actionable negligence. *McGowan v. Mfg. Co.*, 192.

REVISAL—*Continued.*

SEC.

4086. Colored children or with any admixture of negro blood are excluded from public schools for the white race. *Medlin v. Board of Education*, 239.

4110. Treasurer of county board of education and treasurer of county are separate offices. *Board of Education v. Commissioners*, 114.

4111. Cost for making tax list paid out of general county funds. *Ibid.*

4154. Treasurer of county board of education and treasurer of county are separate offices. *Ibid.*

4547. The Governor appoints to fill unexpired terms of directors of hospitals for insane, with concurrence of Senate. *Salisbury v. Croom*, 223.

4763. This section will not invalidate a policy as to the interest of a holder who has paid the premium. *Hay v. Insurance Co.*, 82.

5328, subsec. 3. The sole power of Governor to fill terms of directors of hospitals for insane, without approval of the Senate, is not given in this section. *Salisbury v. Croom*, 223.

RULE OF COURT. See Appeal and Error, 8, 10, 14, 58; Courts, 36.

RULE IN SHELLEY'S CASE. See Estates, 1.

SAFE PLACE TO WORK. See Master and Servant, 3.

SALES. See Mortgages; Judicial Sales, 6, 7.

SANITARIUMS. See Hospitals.

SCHOOLS.

1. *Counties—Taxation—Schools—Tax List—County Expenses—Interpretation of Statutes.*—In an action involving the question of whether the school funds of Wake County should be charged with its proportionate expense of preparing and computing the tax lists of the county, it is held that Revisal, sec. 4111, providing, among other things, that the sheriff shall annually pay to the treasurer of the county school fund the whole amount for school purposes, less his lawful commissions, should be construed with section 83, Machinery Act of 1913, providing the compensation for making out the tax lists, and that it shall be paid by the county treasurer out of the county funds; and with Revisal, sec. 4110, that the school tax should be kept in separate columns; and with Revisal, sec. 4154, that, except in certain instances, the money coming into the hands of the treasurer of the school board shall not be paid out by him except upon the order of the county board of education; the various statutes relating to the same subject and being *in pari materia;* and when so construed, the treasurer of the board of education and of the county of Wake are held to be distinctive offices, though held by the same person, and the taxes set apart for the school fund are not chargeable with the expense of making out the tax lists. *Board of Education v. Commissioners*, 114.

2. *Counties—Taxation—School Funds—Mandamus — Alternate Writ.*—In this action of mandamus to compel the county and its commissioners to pay over to the treasurer of the school fund money they had unlawfully retained for preparing and computing the tax list of the county, the judgment appealed from by the commissioners is affirmed,

SCHOOLS—*Continued.*

with the modification that an alternate writ issue before a peremptory writ be applied for. *Ibid.*

3. *Schools, Separate—White and Colored Races—Statutes—Parent—Party in Interest—Evidence—Negro Blood—General Reputation—Hearsay.*—Children having any admixture of colored blood are by statute (Revisal, sec. 4086) forbidden entrance into the public schools for white children; and where a witness has testified as to the general reputation of the grandmother of the child, whose parent is seeking to enter him into a school for white children, that she was of mixed blood, but on cross-examination that she had heard such reputation had sprung up through jealousy of two or three white men in the neighborhood in the last few years, the latter is admissible as to the general reputation. Where the parentage of an ancestor of the child is relevant, testimony of general reputation of such parentage should be elicited, and a question, "Who was said to be her mother?" is held incompetent, in this case, as hearsay. *Medlin v. Board of Education*, 239.

4. *Schools, Separate—White and Colored Races—Negro Blood—Statutes—Parent and Child—Party in Interest—Declarations of Parent—Impeaching Evidence.*—Where the entrance of a child into a white public school is denied on the ground that it had an admixture of colored blood in its veins (Revisal, sec. 4086), and the father of the child brings suit against the county board of education to compel its admission to such school, the father is but a nominal party, the party in interest being the child, and testimony of other witnesses of his declarations to them that he had married a negress can only be received as hearsay evidence in impeachment of his contradictory testimony, given by him as a witness, and not as substantive evidence. In this case, if it were erroneous on the trial for the judge to confine the admissibility of the evidence of this character to the purposes of impeachment, the distinction is too slight to be the ground for a new trial. Supreme Court Rule 27, 164 N. C., 548. The tendency of the court and of the times not to afford the appellant a new trial unless prejudicial error has been committed by the trial court, discussed by CLARK, C. J. *Ibid.*

5. *Schools—Contracts—Board and Lodging—Presumptions—Reasonably Clean and Wholesome—Trials—Evidence—Questions for Jury—Courts—Verdict, Directing.*—Where the plaintiff sues upon a contract for the price agreed to be paid by the defendant for the tuition, board and lodging of his sons, the law implies that the board and lodging to be furnished by plaintiff must be clean, decent, and reasonably wholesome, and when the evidence is conflicting as to whether the plaintiff has performed these requirements, the question should be submitted to the jury, and it is reversible error for the judge to direct a verdict in the plaintiff's favor because the terms of the contract are admitted or established. *Military School v. Rogers*, 270.

SERVICE. See Process.

SHADE TREES. See Cities and Towns.

SLANDER. See Libel and Slander; Pleadings, 3.

SPECIFIC PERFORMANCE. See Contracts, 26, 28.

STATUTES. See Limitation of Actions, 3; Commerce; Master and Servant.

1. *Equity—Cloud on Title—Tax Deeds*—Interpretation of Statutes. Revisal, sec. 1589, is highly remedial in its nature and should be construed liberally, and thereunder a suit may be maintained to cancel a tax deed as a cloud upon the title to lands, without requiring that the plaintiff must have possession under his paper title as a condition precedent to his right of action. *Christman v. Hilliard*, 4.

2. *Railroads—Federal Employers' Liability Act—"Next of Kin"—"Defendant"—State Laws—Interpretation of Statutes.*—Within the intent of the Federal Employers' Liability act, the meaning of the words "next of kin" depending upon the employee, who are given a right of action against a railroad company for his wrongful death, when he has no surviving widow of husband or children, is dependent upon the State law regulating inheritances; and in this State our statute, Revisal sec. 137, controls, and thereunder the half-brother of the deceased employee, an illegitimate child, may maintain the action when born in lawful wedlock of the same mother; and it is further held, in this case, that evidence of the tender age of such next of kin, being without estate, is sufficient to be submitted to the jury as being "dependent" upon the deceased employee. *Kenney v. R. R.*, 14.

3. *Dead Bodies—Mutilation—Damages—Father and Mother—Interpretation of Statutes.*—The father in his lifetime is now, by statute, entitled to all the personal property of his deceased child, in preference to its mother, upon the intestacy of the child without wife or children (chapter 172, Public Laws 1911, now Pell's Revisal, Supplement, sec. 132); and hence the mother of a deceased minor child, in the lifetime of the father, may not recover for the mutilation of its body after death. *Semble*, the same result would follow from the interpretation of Revisal, sec. 132, subsec. 6, before the amendment of 1911, chapter 172. *Floyd v. R. R.*, 55.

4. *Torrens Law—Remedial Statutes—Interpretation.*—Chapter 90, Laws 1913, known as the "Torrens Law," is not in derogation of common right, but is of a remedial character, and should be liberally construed according to its intent. *Cape Lookout Co. v. Gold*, 63.

5. *Same—Summons—Notice—Publication.*—Where the summons in proceedings to register lands under chapter 90, Laws 1913, known as the "Torrens Law," has been issued and served under the provisions of section 6 of the act, it is not requisite to the validity of the proceedings that the publication of notice of filing should have been made on exactly the day the summons was issued, if the publication has been made in the designated paper once a week for four successive weeks, as directed by section 7 thereof. It appears in this case that the publication in a weekly paper was made in its first issue after the clerk of the court received the summons, and that all other requirements of the statute had been complied with. *Ibid.*

6. *Torrens Law—Notice—Publication—Waiver.*—In proceedings under the "Torrens Law" (ch. 90, Laws 1913, secs. 6 and 7) to register a title to lands, a party claiming an interest in the lands waives his rights to object on the ground of the irregularity in the publication of notice by appearing and answering the petition. *Ibid.*

7. *Dower—Partition—Actions—Interpretation of Statutes.*—The widow of a deceased owner of an undivided one-half interest in lands held in

STATUTES—*Continued.*

common with his sister had her dower interest of one-sixth of the lands laid off to her; and the heirs at law of the deceased having purchased the interest of the other tenant in common, the widow and some of the heirs at law bring suit against the other parties in interest, for partition of the lands subject to the widow's right of dower to be now allotted therein: *Held*, the action in this form can be maintained. Revisal, sec. 2517. *Dudley v. Tyson*, 67.

8. *Insurance, Fire—License—Voidable Policy—Right of Action—Insured—Interpretation of Statutes.*—While Revisal, sec. 4763, provides that no action shall be maintained in the courts of this State upon a policy of fire insurance issued by a company not authorized to do business in this State by the Insurance Commissioner, etc., the company issuing the policy in violation of this section may not receive the premiums and rely upon the statute to invalidate the policy, for such would permit it to take advantage of its own wrong. *Hay v. Insurance Co.*, 82.

9. *Deeds and Conveyances—Interpretation—Presumptions—Fee Simple—Interpretation of Statutes—Restraint on Alienation.*—Our statute, Revisal, sec. 946, provides that conveyances of land, without the use of the words "heirs," etc., are to be construed in fee, unless it clearly appears from the wording of the conveyance that an estate of less dignity was intended; and where a conveyance is thus construed to be in fee, any attempt of restraint upon alienation is void, but where relevant, the words therein used may be construed to ascertain whether the intent of the grantor was to convey a fee or an estate of less dignity. *Holloway v. Green*, 91.

10. *Same—Acquired by Adjoining Owner—Identity of Lands—Interpretation of Statutes.*—When P., the owner of a tract of land, has acquired by deed lands adjoining his own sufficiently described by metes and bounds, and thereafter conveys them with the same description and designated lines and boundaries, which description is used in the subsequent conveyances, with reference to the original deed for further description, and the possession of the land has been held successively by those under whom a party claims, and he tenders a deed thereto under his contract to convey, with the same description set out in his claim of title, and the other party refuses to accept it, it is *Held*, that the *locus in quo* did not lose its identity because P. owned the adjoining tract at the time of acquiring the title thereto, and that parol evidence of identification of the lands to fit the description in the deed is competent both under the later decisions of our Court and our statutes. Revisal, secs. 948, 1005; and it is *Further held* that this principle is not affected by the fact that the original deeds call for a less number of acres than the later ones, the description of the lands and boundaries given being identical. *Patton v. Sluder*, 500.

11. *Trials—Evidence—Nonsuit—Court—Expression of Opinion—Interpretation of Statutes.*—In an action by executors of the grantor to set aside a deed made by him to a former hireling, whose services have been of value to him, and in which said services were recited as the consideration, the grounds for the attack upon the conveyance being that it was obtained by fraud, deceit, and undue influence, and that the grantor did not have sufficient mental capacity to execute it, and also the insufficiency of the description to admit of parol evidence of identifi-

STATUTES—*Continued.*

cation, the judge said, in the presence of the jury, that he would not permit a landlord to acknowledge in his deed that he had received services from a negro tenant, as its consideration, and avoid the deed for vagueness of description, without permitting the tenant to show that he had rendered the services, etc., for which he has not been paid. *Held*, such remarks are, in their tendency and probable effect, an expression of opinion by the judge forbidden by the statute. Revisal, sec. 535, which is explained and discussed by WALKER, J. *Speed v. Perry*, 122.

12. *Courts—Judicial Sales—Sales of Lands—Failure to Pay Purchase Price—Motion in Cause—Interlocutory Orders—Interpretation of Statutes.* The remedy to enforce a decree under a judicial sale of land for the collection of the purchase price of the land is by motion in the cause (Revisal, sec. 403), the matter remaining under the control of the court (Revisal, sec. 1524), and in proper instances the court may decree a resale of them if the purchaser does not pay the price within a specified time—in this case, within sixty days. *Davis v. Pierce*, 135.

13. *Master and Servant—Cotton Mills—Employment of Children—Negligence—Causal Connection—Interpretation of Statutes.*—Revisal, sec. 1981 (*a*), makes it unlawful for any factory or manufacturing plant to work or employ a child therein under 12 years of age, and a willful violation of this section on the part of a mill owner, superintendent, or other person acting in behalf of the establishment, is made a misdemeanor by Revisal, sec. 3362; and it is held that a violation of this statute by reason of which an injury was caused to such child, unlawfully employed, constitutes an actionable wrong, and whenever the injury has arisen from placing the child at work in the mill and subjecting it to the risks naturally incident to such work or environment, it is actionable negligence for which a recovery may be had without the necessity of showing that the child received the injury when engaged in the very work he was employed to do or by reason of it. *McGowan v. Mfg. Co.*, 192.

14. *Same—Knowledge Implied.*—Where with the knowledge of the owners of a cotton mill, or its superintendent or other agents representing the owner or management of the plant, a child under 12 years of age is permitted to work around the mill, though not on its regular pay roll, or has so continuously worked there that the management or its representatives should have observed that he was so engaged, it is in violation of our statute, Revisal, sec. 1981 (*a*), prohibiting the working or employment of children at such places under 12 years of age. *Ibid.*

15. *Same—Trials—Evidence—Acts of Vice Principal—Scope of Employment.*—In this case a child under 12 years of age was injured in the lapper room of the defendant cotton mill. There was evidence tending to show that the plaintiff was not on the pay-roll of the mill, but had for a length of time been continuously at work around the mill, with the knowledge and approval of the superintendent and foreman; that the foreman of the lapper room, when plaintiff was passing through, ordered and forced him "to throw cotton from the lapper while the machine was in motion," which resulted in the injury complained of. *Held*, evidence sufficient to show that the act of the foreman in causing

STATUTES—*Continued.*

the said injury was within the scope of his employment, and one for which the defendant is responsible, whether at common law or under the provisions of our statute. Revisal, sec. 1981 (*a*). *Ibid.*

16. *Mortgages—Sales—Postponement—Sheriffs—Sales by Order of Court—Interpretation of Statutes.*—Revisal, sec. 645, authorizing the postponement of sale from day to day for not more than six days is held to apply to sales by the sheriff or persons acting under court decrees, and not to apply to sales under power contained in a mortgage. *Ferebee v. Sawyer*, 199.

17. *Evidence—Deceased—Transactions and Communications—Husband and Wife—Interpretation of Statutes.*—In an action against an administrator to recover the value of services the plaintiff alleges he has rendered the deceased, the wife of the plaintiff has no "direct, legal, or pecuniary interest in the event" which would bar her testimony as to a transaction with the deceased, under Revisal, sec. 1631, and it is competent for her to testify to the contract relied upon by her husband, the plaintiff. *Linebarger v. Linebarger*, 143 N. C., 231, cited and distinguished. *Helsabeck v. Doub*, 205.

18. *Partnership—Service on One Partner—Judgment—Property Subject to Execution—Service After Judgment—Interpretation of Statutes.*—Where a judgment has been obtained in an action against a partnership (here a husband and wife) and summons therein has been issued and served only on one of the partners, and the other has not made himself a party or taken proper steps by independent action to prevent it, execution may issue on the partnership property and on the property of the individual member who has been served with process (Revisal, sec. 413); and as to the partner not served with summons, he may be made a party after judgment rendered, and then execution may issue against his separate property. Revisal, secs. 413, 414. *Daniel v. Bethell*, 218.

19. *Interpretation of Statutes — Motor Cars — Negligence — Intersecting Streets.*—Public Laws 1913, ch. 107, providing, among other things, that a person operating a motor vehicle, when approaching an intersecting highway or traversing it, shall have the car under control and operate it at a speed not exceeding 7 miles an hour, having regard to the traffic then on the highway and the safety of the public, is construed with reference to its subject-matter and the purpose and intent of the act gathered from the language employed, and it is held that the words "intersecting highways" includes all space made by the junction of frequented streets of a town, though one of the streets enters the other without crossing or going beyond it. *Manley v. Abernathy*, 220.

20. *Same—Trials—Instructions.*—It appearing in this case that the defendant knocked the plaintiff down and injured him, while the former was running his motor vehicle at an excessive speed upon a public and frequented street that ran into but did not cross another, which he was approaching, without slowing down or giving the signal required by section 1, chapter 107, Public Laws 1913, it was error for the trial judge to charge the jury that the second section of said chapter did not apply to the facts of the case, upon the ground that to come within the meaning of the statute the defendant must have been running his car on a street which crossed beyond the other street he was

STATUTES—*Continued.*

approaching in order for the streets to have been intersecting each other. *Ibid.*

21. *Public Officers—Appointment—Constitutional Law—Legislative Powers—Hospitals for the Insane—Directors.*—By amendment to Article III, sec. 10, of our Constitution by the Convention of 1875, the express inhibition of the General Assembly to appoint officers to offices created by statute was taken away, and the inherent right of the Governor to appoint is now restricted to constitutional offices and where the Constitution itself so provides; and all offices created by statute, including directorates in State institutions—in this case, the State Hospital at Raleigh—the power of appointment, either original or to fill vacancies, is subject to legislative provision as expressed in a valid enactment. *Salisbury v. Croom*, 223.

22. *Public Officers—Hospitals for the Insane—Directors—Appointments—Interpretation of Statutes — Concurrence of Senate.*—Revisal, sec. 4547, providing directorates for hospitals for the insane, enacts, among other things, that each corporation shall be under the management of a certain number of directors, divided into classes, the terms of each class expiring at different times, "nominated by the Governor and, by and with the advice and consent of a majority of the Senators-elect, appointed by him," and after making provisions as to quorums, etc., concludes that "after the expiration of their said respective terms of office, all appointments shall be for a term of six years, except such as are made to fill unexpired terms." *Held*, it was the design and purpose of the Legislature that the consent and approval of the Senate, as stated, be required for a valid appointment by the Governor to fill unexpired terms as well as full terms, and that the sole power of appointment of the Governor is derived under Revisal, sec. 5328, subsec. 3, to fill vacancies when the Senate was not in session, and until it met and concurred in his appointment. *Boynton v. Heartt*, 158 N. C., 488, cited and distinguished; *State's Prison v. Day*, 124 N. C., 362, overruled. *Ibid.*

23. *Public Officers—Appointments—Ouster—Process—Concurrence of Senate—Color of Right—Interpretation of Statutes.*—Revisal, sec. 2368, providing in effect that a person "admitted and sworn into any office shall be held, deemed, and taken, by force of such admission, to be rightfully in such office, until by judicial sentence, upon a proper proceeding, he shall be ousted therefrom," etc., applies to such persons who, having duly qualified, are performing the duties of the office under color of right, and not to the facts of this case, where the appointee of the Governor, requiring the concurrence of the Senate in order to hold his office for the full unexpired term of his predecessor, is holding over after the Senate has met and concurred in the appointment of another. *Ibid.*

24. *Public Officers — Quo Warranto — Ouster—Process—Interpretation of Statutes.*—A relator in *quo warranto* proceedings to try title to office accepts the position that he has been displaced in the office by the form of action in which he seeks to assert his rights, and may not therein avail himself of the position that under our statute, Revisal, sec. 2368, he should have been ousted therefrom by a judicial sentence, under a proper proceeding, etc. *Ibid.*

STATUTES—*Continued.*

25. *Estates — Leases—Tenants—Remaindermen—Rents—Interpretation of Statutes.*—The common law relating to the crops of a tenant growing upon lands, at the termination of the life estate of his lessor, withholding from the remainderman his part of the rent for the land during the current crop year, and accruing after the life estate has fallen in, has been changed by statute, Revisal, sec. 1990, the effect of which is to extend the lease for the current crop year, upon the consideration of the payment of rent; and where the rent under the contract of lease is for a certain fixed sum of money, the remainderman is entitled only to his proportionate part of that sum, according to the period of payment elapsing after the termination of the life estate of the lessor. *Hayes v. Wrenn*, 229.

26. *Schools, Separate — White and Colored Races — Statutes — Parent—Party in Interest — Evidence — Negro Blood—General Reputation—Hearsay.*—Children having any admixture of colored blood are by statute (Revisal, sec. 4086), forbidden entrance into the public schools for white children; and where a witness has testified as to the general reputation of the grandmother of the child, whose parent is seeking to enter him in a school for white children, that she was of mixed blood, but on cross-examination that she had heard such reputation had sprung up through jealousy of two or three white men in the neighborhood in the last few years, the latter is admissible as to the general reputation. Where the parentage of an ancestor of the child is relevant, testimony of general reputation of such parentage should be elicited, and a question, "Who was said to be her mother?" is held incompetent, in this case, as hearsay. *Medlin v. Board of Education*, 239.

27. *Schools, Separate—White and Colored Races—Negro Blood—Statutes—Parent and Child—Party in Interest—Declarations of Parent—Impeaching Evidence.*—Where the entrance of a child into a white public school is denied on the ground that it had an admixture of colored blood in its veins (Revisal, sec. 4086), and the father of the child brings suit against the county board of education to compel its admission to such school, the father is but a nominal party, the party in interest being the child, and testimony of other witnesses of his declarations to them that he had married a negress can only be received as hearsay evidence in impeachment of his contradictory testimony, given by him as a witness, and not as substantive evidence. In this case, if it were erroneous on the trial for the judge to confine the admissibility of the evidence of this character to the purposes of impeachment, the distinction is too slight to be the ground for a new trial. Supreme Court Rule 27, 164 N. C., 548. The tendency of the court and of the times not to afford the appellant a new trial unless prejudicial error has been committed by the court, discussed by CLARK, C. J. *Ibid.*

28. *Railroads—Injury to Live Stock—Statutory Presumptions.*—The statutory presumption of negligence of a railroad company in killing live stock, when the action is brought within six months, applies whether a horse, the subject of the action, was hitched to a buggy at the time or running at large. Revisal, sec. 2645. *Hanford v. R. R.*, 277.

29. *Liens—Contracts—Material Men—Trials—Materials Used in Buildings—Evidence—Specific Notice—Waiver—Statutes.*—Where a material

STATUTES—*Continued.*

man brings suit against the owner of a dwelling for the price of material furnished, during its construction, to the contractor, and has given notice to the owner by letter of the amount claimed to be due him by the contractor, an acknowledgment by the owner, in reply, that he will reserve the bill for settlement, affords evidence in an action to collect the amount claimed to be due under the provisions of the Revisal, sec. 2020, that the materials had entered into the construction of the defendant's house; and also of a waiver in the nature of an admission of the defendant's right, if it existed, to demand greater particularity in the statement of the plaintiff's claim. *Bain v. Lamb*, 304.

30. *Liens—Contracts—Material Men—Trials—Amount Due—Instructions—Appeal and Error—Harmless Error.*—In an action by the material man against the owner of a dwelling to recover the amount due him by the contractor for materials furnished and used in the construction of the building under Revisal, sec. 2020, and there is conflicting evidence as to the amount due by the owner to the contractor on his contract at the time of receiving the statutory notice, it is erroneous for the trial judge to charge the jury upon the question of plaintiff's recovery, without laying down any rule for ascertaining the amount due on the contract, or furnishing a guide for them in reaching their conclusion upon the alternative propositions contained in the instruction; but when, taking the charge as a whole, it may be seen that instructions on this point were correctly given, and the jury understood them, an incorrect instruction appearing in a part of the charge will not be held for reversible error. *Ibid.*

31. *Liens—Contracts—Material Men—Amount Due Contractor—Trials—Instructions—Measure of Damages.*—In an action by the material man against the owner of a dwelling to recover the price of material furnished by him to the contractor and used in the building (Revisal, sec. 2020), and the evidence discloses that the contractor has abandoned his contract and it is conflicting as to the amount the owner is due the contractor under the contract, the rule for the ascertainment of what amount, if any, is due to the contractor is the contract price, less the amount paid to him, and the reasonable cost of completing the building; and if the amount thus due exceeds the claim of the plaintiff, and the materials furnished were used in the house, he should recover the amount of his claim; and if less, he can only recover the amount due the contractor. *Ibid.*

32. *Divorce—Consent Decree—Support of Minor Children—Motion in Cause—Power of Court—Statutes.*—The trial court is authorized by statute (Revisal, 1570), both before and after final judgment in an action for divorce, either *a vinculo* or *a mensa et thoro*, "to make such orders respecting the care, custody, tuition, and maintenance of the minor children of the marriage as may be proper, and from time to time modify," etc., such orders, and where consent judgment in a suit *a mensa et thoro* has been entered in the action, without providing for such children, upon motion in the original cause the court has power to make such further orders as it deems proper requiring the father to provide for the support of his children, whether born before or after the rendition of the consent judgment. *Sanders v. Sanders*, 317.

STATUTES—*Continued.*

33. *Same—Charge Upon Husband's Lands—Appeal and Error—Presumptions—Evidence—Custody of Children.*—The trial judge, on motion in the original cause wherein a judgment for divorce has been rendered, may direct the father to pay a sum certain at regular intervals for the support and maintenance of his minor children and decree that it shall constitute a lien upon his lands; and where the order of the court does not provide for the custody or tuition of the children, the appellate court will not reverse the order solely on that account, the matters being within the discretion of the trial court, and where the record is silent, the presumption is that the court below acted upon sufficient evidence to warrant the omission. *Ibid.*

34. *Limitation of Actions—Judgments—Course and Practice—Interpretation of Statutes.*—Revisal, sec. 513, requiring that application to relieve against a judgment for mistake, surprise, or excusable neglect be made within one year, does not apply to a judgment rendered contrary to the course and practice of the courts, as where the judgment was signed in a different county from the one in which the action was pending, without the consent of the complaining party. *Cox v. Boyden*, 320.

35. *Divorce a Mensa — Husband's Misconduct — Provocation — Statutes—Trials — Questions for Jury — Former Appeal—Appeal and Error—Weight of Evidence—Courts.*—In this action for divorce *a mensa et thoro*, brought by the wife, it is *Held*, that the separate issues as to the husband's conduct and the wife's provocation are sufficiently raised by the pleadings, Revisal, sec. 1562 (4), and the verdict of the jury thereon in the plaintiff's favor, rendered upon competent evidence and correct rulings of law, will not be disturbed; the question of the sufficiency of the evidence to sustain the verdict is one that should have been addressed to the discretion of the trial judge; and it is *Further held*, that the former appeal in this case, deciding that the wife was not entitled to alimony *pendente lite*, did not affect the right of the plaintiff to introduce further evidence in her favor upon the issues raised. *Page v. Page*, 346.

35. *Penalty Statutes—Register of Deeds—Age of Woman—Inquiry—Trials—Instructions.*—In this action brought by the father of the woman against the register of deeds, for issuing a license for the marriage of his daughter under 18 years of age, the judge charged the jury, among other things, that it was the duty of the register of deeds to make the inquiry as to the age of the woman, not as a mere matter of form, but for the purpose, conscientiously, of ascertaining the fact; such inquiry as a business man, acting in the important affairs of life, would make. *Held*, the charge is correct, and approved under *Joyner v. Harris*, 157 N. C., 298; *Furr v. Johnson*, 140 N. C., 159; *Trollinger v. Burroughs*, 133 N. C., 312. *Savage v. Moore*, 383.

36. *Process—Return Term—Interpretation of Statutes—Courts—Motion to Dismiss.*—When, contrary to the provisions of our statute, Revisal, sec. 434, a summons has been issued in an action returnable within less than ten days from the term in which the defendant is to appear and answer, etc., the action will be dismissed on defendant's motion. As to the power of the court to permit amendment to the summons upon request of plaintiff, *Quere*. *Scott v. Jarrell*, 364.

STATUTES—*Continued.*

37. *Interpretation of Statutes—Counties—Deeds and Conveyances—Conditions—Open Squares.*—Where a county owning a site upon which to build its courthouse is authorized by statute to buy, sell, and exchange real estate surrounding it upon such terms and conditions as it may deem just and proper, and for the best interest of the county, "for the purpose of preventing the erection of any building near the courthouse and thereby lessen the danger of fire" and "to enlarge the public square," and in pursuance of this authority have acquired conveyance of lands from adjoining owners upon condition that they shall be used as a public square and kept open for that purpose, etc., it is *Held*, that whether the conditions be called conditions subsequent or otherwise, they were within the purview of the authority conferred upon the county by the statute; and, coming within the intent of the parties as expressed in the conveyance, and forming a material part of the consideration for the lands, they are valid and binding upon the county. *Guilford v. Porter*, 366.

38. *Same — Specific Performance—Equity—Injunction—Alleyways—Power of Courts.*—A county, under the purview of a statute authorizing it, having acquired lands from adjacent owners to its courthouse square upon a valid condition, expressed in the conveyance, that the property should be kept clear as a part of the open square around the courthouse, may be restrained, by proceedings of an equitable nature, from an intended breach of the covenants of the deeds by conveying the square to another corporation for the purpose of erecting a large building thereon to take up nearly the entire square; nor will the courts assume to pass upon the sufficiency of an 18½-foot alley for the defendants' needs, to be left between the proposed building and those of defendants; for the defendants are entitled to the continued performance of the conditions upon which the deeds were made. *Ibid.*

39. *Actions at Law — Titles—Equity—Interpretation of Statutes—Appeal and Error—Cause Remanded—Costs.*—Though this action is denominated a suit to remove a cloud upon plaintiff's title to land, it appears that the cloud complained of was put thereon by the plaintiff itself, and the case on appeal is therefore treated by the Court as a proceeding, under Revisal, sec. 1589, to determine the title to the property; and it appearing that the court below erroneously granted defendant's motion to nonsuit, where, under the facts shown, a decree in defendant's favor should have been entered, the case is remanded to set aside the nonsuit, and the court below is directed to enter the decree in accordance with the opinion and to tax plaintiff with costs of both courts. *Ibid.*

40. *Husband and Wife—Estates by Entireties—Divorce—Tenants in Common—Statutes.*—Under our Constitution and the later statutes, as formerly, husband and wife hold lands conveyed to them in entireties with the right of survivorship, this estate in its essential features and attributes being made dependent upon their oneness of person in legal contemplation. Therefore, when this unity of person is entirely severed by divorce absolute, the peculiar features of the estate arising out of such unity, and made dependent upon it, should also disappear, and the owners, having acquired the estate subject to this principle, thereafter hold as tenants in common, subject to partition

STATUTES—*Continued.*

in proceedings regularly brought for that purpose by them or the grantees of their interests. Revisal, secs. 2109, 2110, deals with the rights of husband and wife growing out of the marriage relation, such as dower, curtesy, and the like, and has no application to estate by entireties. *McKinnon v. Caulk*, 411.

41. *Evidence—Motions—Inspection and Copy of Papers—Interpretation of Statutes—Court's Discretion.*—Upon motion to allow inspection or copy of books, papers, etc., before trial (Revisal, 1656), it must be made to appear that the instrument in question relates to the merits of the action or is pertinent to the issue; or the motion should be denied; and when it is of the character authorized by the statute to be copied or inspected, etc., it is expressly left within the discretion of the trial judge whether or not he will make the order sought; and should he refuse to do so, it still rests within his discretion to compel the production of the writing later, or upon trial, when its competency and pertinency as evidence bearing on the issue may be better determined. *Evans v. R. R.*, 415.

42. *Married Women—Contracts to Convey—Privy Examination—Color of Title—Betterments—Interpretation of Statutes.*—A paper-writing not under seal and signed by a *feme covert* without her privy examination, reading, "Received of W. T. S. $10, to be applied on the purchase of Z. G. land," adjoining certain other tracts of land, is construed as a contract to convey the land, and constitutes color of title thereto; and while the defendant, who was put into possession under the plaintiff's title, may not enforce specific performance because of the defective execution and probate, he is entitled to recover for the betterments he has made upon the lands, in the plaintiff's action for the possession, when he has made them in good faith, believing his title to be good, etc. Revisal, sec. 652 *et seq.* *Gann v. Spencer*, 429.

43. *Contracts—Equity—Specific Performance—Subscribed by Party—Interpretation of Statutes—Statute of Frauds.*—The courts of our State will enforce specific performance of a binding and definite contract to convey lands in the absence of fraud, mistake, undue influence, or oppression, and under our statute, Revisal, sec. 976, requiring that such contracts or some memorandum or note thereof shall be put in writing and signed by the party to be charged therewith, etc., it is unnecessary that the writing be subscribed, if the writing in express terms or by reasonable intendment contains a promise to convey on the part of the owner, and his signature, evincing a purpose to come under such obligation, appears anywhere in the instrument. *Flowe v. Hartwick*, 448.

44. *Bills and Notes—Defects—Notice—Bad Faith—Interpretation of Statutes.*—To invalidate a negotiable instrument for a defect or infirmity therein in the hands of a transferee thereof, it is required that he should have had actual knowledge of the infirmity or defect or knowledge of such facts or circumstances as amounted to bad faith in his acquiring the paper; and the charge in this case being sufficiently definite upon this phase of the case, no reversible error is found. Revisal, sec. 2205; *s. c.*, 162 N. C., 346. *Semble*, the evidence in this case was insufficient as a matter of law. *Smathers v. Hotel Co.*, 469.

45. *Justice's Courts — Appeal — Docketing Transcript — Interpretation of Statutes.*—An appeal from a justice's court not docketed in the Su-

STATUTES—*Continued.*

perior Court by the term thereof required by the statute is properly dismissed. *Tedder v. Deaton*, 479.

46. *Abatement and Revivor—Tort Feasor—Personal Injury—Death—Interpretation of Statutes.*—At common law a right of action sounding in tort for personal injuries inflicted does not survive the tort feasor, and the doctrine is not changed by statute, where the injury does not cause death, the exceptions in Revisal, sec. 157, to the provisions of section 156 being expressly to that effect; nor is this interpretation affected by section 415, providing that no action shall abate by death, etc., or that the court may allow the action to continue, etc.; these provisions relating to such actions as survive, and not to actions for personal injuries, which do not survive. *Watts v. Vanderbilt*, 567.

47. *Removal of Causes—Extension of Time to Plead—Petition—Time to File—Interpretation of Statutes.*—An order of the trial judge extending time within which to file pleadings, under our statute, has the same force and effect as if the extended period had originally been allowed by the statute; and where a nonresident defendant is sued by a resident plaintiff in our courts for an amount cognizable in the Federal court, and the plaintiff fails to file his complaint within the time allowed, and obtains an extension of time to file pleadings duly excepted to by the defendant, which upon notice given files its petition and bond for removal to the Federal court and moves thereon at the first available term of the Superior Court wherein the action was commenced, it is held that the defendant's motion was in time, and should be allowed, if the cause is otherwise removable. *Hyder v. R. R.*, 584.

48. *Removal of Causes—Trial Courts—New Trial—Interpretation of Statutes.*—Where the defendant has filed a sufficient petition and bond for the removal of a cause from the State to the Federal court on the ground of diversity of citizenship, and appeals from an order of the trial court refusing to remove the cause, the appeal involves the right of the State court to try the action, including in its scope all the issues presented in the record; and pending the appeal it is error for the trial court to proceed with the trial and determine these issues, over the objection of the defendant; and when this is done, and the appeal has regularly been prosecuted in accordance with the rules of law and practice regulating appeals, a new trial will be ordered, though the Supreme Court may have affirmed the order of the trial court, appealed from, retaining the cause. Revisal, sec. 602. *Pruett v. Power Co.*, 598.

49. *Appeal and Error—Trial Courts—Proceedings Stayed—Interpretation of Statutes.*—An appeal duly taken and regularly prosecuted operates as a stay of all proceedings in the trial court, relating to the issues included therein, until the matters are determined in the Supreme Court. Revisal, sec. 602. *Ibid.*

50. *Railroads—Employer and Employee—Contributory Negligence—Measure of Damages—Interpretation of Statutes—Federal Act.*—The verdict of the jury in this action against a railroad company to recover for the wrongful death of its employee, under the instruction of the court, awarded damages by considering the contributory negligence of the plaintiff's intestate and diminishing the amount of recovery according to Laws 1913, ch. 6, secs. 2, 3, and 4; and it appearing that by admissions, pleadings, and the evidence that the intestate was en-

STATUTES—*Continued.*

gaged upon an intrastate train, the State statute and not the Federal statute is applicable; and it is *Further held*, that the testimony of a witness that he thought, without accurate means of knowledge, that some of the cars of the train were loaded with coal from Tennessee or Virginia, is not sufficient to constitute legal evidence of interstate commerce. *Ingle v. R. R.*, 636.

51. *Common Carriers—Bills of Lading—Written Claim—Reasonable Stipulations—Damages—Penalty Statutes.*—Stipulations in the bill of lading of a common carrier that it would not be liable for loss or damage or delay in the shipment unless claim is made in writing, etc., within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed, are regarded as a reasonable protection to the carrier, and under the circumstances of this case it is *Held*, the failure of the plaintiff to comply with these stipulations as to the written claim bars his right to recover damages and the statutory penalty. *Forney v. R. R.*, 641.

52. *Evidence—Transactions with Deceased—Interpretation of Statutes.*—In a suit to set aside a deed made by the deceased father of a party defendant, it is incompetent for the son to testify as to the consideration of the deed or his father's intention to make it, being testimony relating to a transaction prohibited by Revisal, sec. 1631. *Linker v. Linker*, 651.

53. *Municipalities—Cities and Towns—Shade Trees—Streets and Sidewalks—Interpretation of Statutes—Discretionary Powers—Courts.* — The board of commissioners of a town or city are charged with the duty, among others, of keeping its streets, which includes its sidewalks, in proper repair (Revisal, sec. 2930), and in the exercise of this authority, unless done negligently or maliciously, the municipality is not responsible in damages to its citizen, owning property abutting upon the street, for cutting down shade trees on the sidewalk in front of his property; nor is this principle affected by the facts in this case, that the street was wider in front of the plaintiff's property than elsewhere, it appearing that the plaintiff had dedicated a strip of land to the public use as a sidewalk, the trees in question being over the outer edge of the sidewalk next to the street. *Munday v. Newton*, 656.

54. *Processioning — Controverted Matters — Evidence — Interpretation of Statutes—Estoppel.*—As to whether the party in an action involving title to lands is estopped by a judgment formerly rendered in processioning proceedings to determine the true dividing line between himself and another, parol evidence is admissible to show whether or not the title as well as the boundary of the land was properly embraced in and determined by the judgment in former proceedings, or whether the issue as to the true location of the line was raised and determined by merely showing occupancy of the parties, without involving the issue as to title, Revisal, sec. 326; and in this case it is held for error under the defendant's exceptions that the trial judge withdrew from the consideration of the jury the processioning proceedings, which had been introduced, and instructed them not to consider them in any view, it therein appearing that the parties were claiming under mesne conveyances under separate grants from the

STATUTES—*Continued.*

State, and that the court "settled and adjudged the true line between the said grants, and between the parties, in accordance with the defendant's contention." *Whitaker v. Garren*, 658.

55. *Liens for Labor—Interpretation of Statutes.*—The lien on personal property given by Revisal, 2017, applies when possession is retained by the mechanic, etc., of the property upon which he claims his lien; and for a lien upon buildings, etc., to obtain under Revisal, sec. 2016, it is necessary for the work, etc., of the one claiming it to have been a betterment to the property. *Glazener v. Lumber Co.*, 676.

56. *Same—Sawing Lumber.*—One claiming a lien for "doing the work of cutting or sawing logs into lumber" under sec. 6, ch. 150, Laws 1913, can only obtain it upon the lumber which his services have helped to convert from the logs; and it is held that the provisions of this section apply when the lienor worked in a band sawmill of a lumber plant, received the plank as it fell from the saw and placed it upon a mechanical device used in its further manipulation. *Ibid.*

57. *Liens for Labor — Buildings—Betterments—Interpretation of Statutes.* —Under contract, one of the defendants agreed to operate a large lumber plant, including a railroad equipment for handling the logs, owned by the other defendant, and assumed the payment of all employees, several of whom filed liens against logs and lumber sawed, in a justice's court, for the nonpayment of wages. *Held*, work done in repairing the track, equipment, etc., was not in contemplation of chapter 150, Laws 1913 (amending Revisal, secs. 2021 and 2033a), so as to give those performing these services a lien on the logs and lumber used or manufactured by the plant; nor could a lien upon the plant hold, for the material had not been used in its construction as betterments. *Ibid.*

58. *Liens for Labor—Sawing Lumber—Priorities—Interpretation of Statutes.*—The lien given to the person "doing the work of cutting or sawing logs into lumber," etc., by chapter 150, Laws 1913, is superior to the lien given to the contractor therefor, or any other person. *Ibid.*

59. *Deeds and Conveyances—True Title—Color of Title—Possession—Presumptions—Interpretation of Statutes—Limitations of Actions.*—The occupation of lands is presumed in law to be under and in subordination to the true title until the contrary is made to appear (Revisal, sec. 386); and where the plaintiff, in an action to recover lands, has shown his title by proper grant from the State and mesne conveyances to himself, the presumption is, unless it is made to appear to the contrary, that the occupation thereof by others is under his title. Hence, when the defendant relies on a deed made to his ancestor as color, and adverse possession of others thereunder to ripen his title, it is necessary to show that their occupancy was under or connected with the deed under which he claims, or the presumption will obtain that they were under the true title shown by the plaintiff. *Land Co. v. Floyd*, 686.

STATUTE OF FRAUDS. See Bills and Notes, 10; Contracts, 13, 17, 18, 20, 26, 27, 29.

STATUTE OF USES. See Trusts.

STREET RAILWAYS.

1. *Street Railways—Trials—Negligence—Evidence—Questions for Jury.*—When a judgment of nonsuit is granted upon the evidence, the evidence is viewed on appeal in the light most favorable to the plaintiff; and in this action to recover damages for the death of plaintiff's horse, wherein there was evidence in plaintiff's behalf that he was sitting on his horse in a narrow street of a town, when the horse, becoming frightened on the approach of the defendant's car, ran backward in the direction the car was going, which the motorman must have seen, but failed to stop the car or slacken the speed, which he could have done in time, resulting in the injury, while the plaintiff was doing all he could to control the horse and avoid it. *Held*, it was sufficient to be submitted to the jury upon the question of defendant's actionable negligence. *Barnes v. Public-service Corporation*, 163 N. C., 363; *Doster v. Street Ry.*, 117 N. C., 661, cited and distinguished. *Hall v. Electric Ry.*, 284.

2. *Street Railways—Negligence—City Streets—Vehicles — Trespassers.*—Vehicles and pedestrians on the street of a city or town are not trespassers when going upon street car tracks laid thereon, for the citizen ordinarily has the same privilege to use the street for travel as the street railway company has in the running of its cars thereon; but the latter is held to a degree of vigilance commensurate with the risks and hazards of accidents or injuries to others which the operation of its cars upon such thoroughfares have made more imminent. *Norman v. R. R.*, 533.

3. *Same—Mutual Rights.*—Owing to the benefit to the public arising from the operation of a street railway upon the streets of a city, the rights of wagons to use the part of the street upon which the railway track is situated is subordinate to that of the railway company in certain particulars, and the driver of the vehicle must yield the track promptly on sight or notice of the approaching street car, whether he is going in the same or opposite direction. *Ibid.*

4. *Same—Issues—Last Clear Chance.*—While it is negligence for one running an automobile on the streets of a city not to look up and down the track of a street railway before attempting to cross it, it is required of the motorman on the street car to keep a careful lookout to avoid injuring him; and when the motorman, in the exercise of proper care, should have seen that the one running the car had negligently run upon the track without looking for the approaching car, and had unconsciously put himself in a place of danger, it is incumbent upon him to take reasonable precaution to prevent an injury; and where he has the better opportunity of avoiding the injury, under the circumstances, and can see the danger, he is adjudged in law to have the last clear chance of doing so. *Ibid.*

5. *Same—Trials—Evidence—Nonsuit.*—The owner of an automobile, finding a street of the city blocked in front of him, in attempting to get out so as to pursue his course by another route, backed upon the car track of a street railway company, without looking up or down the track to see if a street car were approaching, but only looked through the rear window of the car in the direction he was backing it, to see if there were any obstructions. There was evidence tending to show that defendant's street car, running in excess of the speed limit permitted by the city, ran upon the plaintiff as he was about

STREET RAILWAYS—*Continued.*

to pursue his way forward, being then on the track, and injured him and his automobile, and that by the exercise of proper care the motorman on defendant's street car should have seen the plaintiff's danger in time to have slowed the car and prevented the injury, but that he gave no signal or warning of his approach and did not attempt to stop his car. *Held*, though the plaintiff was negligent in not looking to see if a street car were approaching, it did not relieve the defendant's motorman of his duty, within the rule of the prudent man, from attempting to avoid the injury, if he had the last clear chance of doing so, and this being a question for the jury, it was not error for the trial judge to submit the issue, as to the last clear chance, or to refuse defendant's special request for instruction directing a verdict in its favor. *Ibid.*

6. *Street Railways—Cities and Towns—Ordinances—Speed Limits—Excessive Speed—Negligence—Last Clear Chance—Trials—Evidence—Questions for Jury.*—Where there is evidence that one running an automobile had negligently placed himself upon a street car track on the street of a city, in front of an approaching car, and that the street car was exceeding the speed limit of the city at the time it ran into the plaintiff, causing the injury complained of in the action, a motion to nonsuit upon the evidence is properly denied, the excessive speed of the car being evidence of the defendant's actionable negligence, upon the issue of the last clear chance, it being for the jury to determine whether by the excessive speed of the car the defendant's motorman had deprived himself of the ability to avoid the injury after discovering the plaintiff's danger. *Ibid.*

7. *Street Railways—Negligence—Last Clear Chance—Proximate Cause.*—Where the motorman on a moving street car sees in front of him, on the track, an automobile run there by the negligence of its driver, who was unconscious of his danger, it is his duty to lessen the speed of his car and take reasonable measures to avoid injuring him, under the doctrine of the last clear chance, if ordinary prudence so required; and his failure to so act, if he could do so, is the proximate cause of an injury consequently inflicted. *Ibid.*

8. *Negligence — Proximate Cause — Definition—Trials—Instructions—Appeal and Error.*—Proximate cause of an injury arising from the negligence of a party is that which, in natural and continuous sequence, unbroken by any new and independent cause, produces the result, without which it would not have occurred, and from which a man of ordinary prudence could have foreseen that the result was probable under all the circumstances as they existed and were known or should by the exercise of due care have been known to him; and a charge of the court, in this case, that proximity in point of time and space is not part of the definition, was not erroneous. *Ibid.*

STREETS AND SIDEWALKS. See Cities and Towns, 3.

SUBROGATION. See Bills and Notes, 9.

SUMMONS. See Process, 6; Judgments, 6.

SUPREME COURT. See Courts.

SURFACE WATER. See Water and Water-courses.

TAXATION. See Schools.

TAXES. See Evidence, 1.

TELEGRAPHS.

1. *Telegraphs—Mental Anguish—Sendee—Consolation and Assistance.*—Where a person has telegraphed to his brother of the death of another brother, the time of burial, etc., and the sendee of the message is prevented from being at the funeral through the negligence of the telegraph company, the sender may recover for the mental anguish occasioned by the absence of the sendee at the funeral, and not hearing from him; and evidence is competent which tends to show that the sendee was an elder brother, whose advice and assistance were especially needed in making the necessary preparations for the burial of the deceased. *Betts v. Telegraph Co.*, 75.
2. *Same—Death Message—Notice of Importance.*—A telegram addressed to Ovey J. Betts, and reading, "Clifton died suddenly this morning; funeral tomorrow afternoon. Have written. Signed, Raymond," is sufficient upon its face to give notice that mental anguish will likely result if it is not delivered, and to sustain a recovery by both the sender and sendee of the message, brothers of the deceased. *Ibid.*
3. *Telegraphs—Death Message—Notice of Importance—"Have Written."*—A telegram announcing a death and time of burial, giving, upon its face, implied notice to a telegraph company that mental anguish will likely result if the sendee is unable, through its negligent failure to deliver the message, to arrive in time for the burial, the added words to the message, "have written," are to be regarded as merely incidental to the announcement of the death and burial, and not as indicating, necessarily, that the sendee is not expected to come, and afford the company, therefore, no complete defense that the message itself implied that the sendee would not come. *Ibid.*
4. *Telegraphs—Death Message—Failure to Deliver—Trials—Evidence—Prima Facie Case—Burden of Proof.*—The agent of a telegraph company at its receiving office accepted a telegram for transmission and delivery, requiring the use of telephone connection at the delivering end of the line, and there was evidence tending to show that the operator accepted the message with the promise to "put it through"; that like messages were customarily telephoned to sendees at the same address; and that no service message was sent informing the sender that an additional charge for delivery would be required. *Held*, the failure of the telegraph company to deliver the message raised a *prima facie* case of its negligence, and the burden rests upon it to prove it had not been neglectful of its duty; and the defense of the company that it was not required to transmit the message to the sendee over the lines of the telephone company is unavailing under the circumstances of this case. *Ibid.*
5. *Telegraphs—Death Message—Postponement of Funeral—Trials—Evidence—Damages—Questions for Jury.*—Where damages for mental anguish are sought in an action against a telegraph company for its negligent failure to deliver a message announcing a death and the time of the funeral, and the defense is set up that the message was filed with it too late for the sendee to arrive in time for the funeral; and there is evidence tending to show that had the message been delivered with reasonable promptness, the funeral would have been

TELEGRAPHS—*Continued.*

postponed and that the sendee would have arrived in time, the question of whether the failure of the company to perform its duty caused the damages alleged is for the determination of the jury. *Ibid.*

6. *Telegraphs—Negligence—Service of Other Company—Trials—Evidence.* Where a telegraph company is sued for damages alleged to have been caused by its negligent failure to deliver a telegram, it is competent for the plaintiff to show, upon the question of defendant's negligence, that another telegraph company, upon the same occasion, gave very prompt and efficient service to the same parties under substantially similar conditions. *Ibid.*

7. *Telegraphs—Negligence—Mental Anguish—Issues—Causal Connection—Trials—Instructions.*—Where damages are sought for mental anguish and the negligent delay of a message by a telegraph company, and the first issue relates solely to the question of defendant's negligence, and the second as to whether the damages were caused by the negligence of the defendant, and where the jury has affirmatively answered the second issue under proper instructions, it includes the question of proximate cause. Hence, an instruction on the first issue, that the jury could answer it without finding that the negligence of the defendant was the cause of the injury, is not erroneous. In this case, it appearing that the name of the sendee of the message was changed in transmission, without explanation, and otherwise it would have been promptly delivered, there was no real controversy presented as to proximate cause arising under the second issue, and the judge would have been justified in instructing the jury that the defendant was negligent upon the admitted facts, upon the first one. *Hedrick v. Telegraph Co.*, 235.

8. *Telegraphs—Mental Anguish—Presumptions—Relationship—Uncle and Nephew.*—Where a telegram to an uncle announces the death and time of burial of his 4-year-old nephew, there is a presumption arising from the relationship that the sendee of the message will suffer mental anguish in consequence of not being able to attend the burial of the deceased, caused by the negligence of the telegraph company in failing in its duty to transmit and deliver the message with reasonable promptness. *Sherrill v. Telegraph Co.*, 155 N. C., 250, cited and approved. *Ibid.*

9. *Telegraphs—Mental Anguish—Funeral Postponed—Addressee's Duty—Negligence—Trials—Evidence.*—In an action to recover damages against a telegraph company for the negligent delay in delivering a telegram from A. S. Adams to Annie E. Smith, reading, "Baby died this evening. Come," delivered to the husband of the plaintiff, the addressee, the evidence tended to show that the husband wired back to the sender to ascertain the name of the deceased baby, and was informed in reply that it was the 1-year-old baby of the sender, the plaintiff's brother. The plaintiff acknowledged receiving the two messages, and there was evidence tending to show that other telegraphic correspondence had passed between the parties, wherein the sender stated that the funeral of the child would be postponed on plaintiff's request, of which the plaintiff denied knowledge; and with further evidence that the plaintiff had ample time after receiving the messages to have had the funeral postponed and attended the burial. *Held*, it was the duty of the plaintiff to have had the funeral

TELEGRAPHS—*Continued.*

postponed and attended it, had she received the message to that effect and could reasonably have done so, which presented an issue of fact for the jury under the conflicting evidence; and upon an affirmative finding thereon, the plaintiff's recovery of damages occasioned by not attending the funeral will be denied. *Smith v. Telegraph Co.*, 248.

10. *Same—Measure of Damages—Nominal Damages—Trials—Instructions.* Where damages for mental anguish are sought in an action against a telegraph company for negligent delay in the delivery of a death message, in an action brought by the addressee, and there is evidence tending to show negligence on the defendant's part in failing to deliver the message with reasonable promptness, and that the addressee could have had the funeral of the deceased postponed and attended it, it is *Held*, that the negligence of the defendant, if established, would be a tort arising from its failure to perform a public duty, and that nominal damages, at least, would be recoverable, and such additional damages as the plaintiff may have suffered up to the time she first had the opportunity to attend the funeral; and a charge is held erroneous that fails to instruct the jury upon the plaintiff's duty to have had the funeral postponed and attended it, under the circumstances of this case. *Ibid.*

11. *Same—Proximate Cause—Special Instructions—Appeal and Error.*— Where in an action against a telegraph company to recover damages for its failure to promptly deliver a death message, there is evidence tending to show that at the time it was received for transmission the sender was asked for a better address, which he could not give, and a service message was delivered to him thereafter stating that the party addressed could not be found and asking for a better address, which the sender promised to obtain; and that he obtained and gave the correct address several hours thereafter, but too late for the addressee to come, and which was promptly forwarded by the defendant, resulting in the prompt delivery of the first message; and there is further evidence that the messenger boy of the defendant at the terminal point was negligent in not promptly finding the addressee and delivering the first message, it is held to be erroneous for the trial judge to refuse to give a prayer for special instructions on this phase of the case, presenting the question of proximate cause, which was not cured by the general charge given in the case. *Ibid.*

12. *Telegraphs—Principal and Agent—Writing Messages at Sender's Request—Duty to Deliver—Service Messages—Better Address—Negligence.*—As to whether the local agent of a telegraph company becomes the agent of the sender of the message, for certain purposes, by assuming to write the message for him, *quere*. But it is *Held*, that when the company seeks to defend itself from the consequence of the act of its agent, under the circumstances, in making a mistake in the address of the sendee, whereby it claims the message was not delivered with reasonable promptness, it may not rely upon the mistake and absolve itself from the duty of making reasonable inquiry in its effort to deliver it, as addressed, and it is further held that, in any event, the agent would remain the agent of the telegraph company to send a better address when requested by a service message to do so, and the information is available to him, and his negligence therein would be imputed to the company. *Miller v. Telegraph Co.*, 315.

TELEGRAPHS—*Continued.*

13. *Telegraphs—Nominal Damages—Issues—Special Instructions—Appeal and Error—Harmless Error—Punitive Damages—Trials—Evidence—Questions of Law.*—Where a telegraph company is sued for its negligent delay in the delivery of a message, and issues of negligence, amount of compensatory and punitive damages are separately submitted, exceptions to the second issue, upon which the jury has found only nominal damages in accordance with the defendant's special request for instructions, became immaterial, so far as the defendant is concerned, it appearing that the company has negligently delayed its delivery; and while punitive damages are recoverable when the amount of compensatory damages are only nominal, the evidence, to sustain such recovery, must not only tend to show an unexplained delay of the message which, being a failure of the defendant to perform a public duty, will sound in tort, but some acts on the part of the defendant or circumstances of aggravation which will amount to willful, wanton, or malicious conduct, in regard to the message sued on. The grounds upon which punitive damages may be awarded, and whether it is necessary that the corporation, as principal, must in some way have recognized or participated in the wrongful conduct of its local agent, and whether the recovery is not necessarily dependent upon the company's profits or loss at the particular locality, discussed by WALKER, J. *Webb v. Telegraph Co.*, 484.

14. *Telegraphs—Tort—Nominal Damages — Notice of Importance — Parol Evidence—Compensatory Damages.*—The breach of duty of a telegraph company to promptly transmit or deliver a message it has accepted for that purpose, though it does not give notice of its importance on its face, makes it liable for nominal damages, at least, and verbal communications made to the local agent receiving it, with respect to its importance, are admissible upon the issue of compensatory damages. *Ibid.*

15. *Telegraphs—Issues—Appeal and Error—Punitive Damages—Courts—Trials—Instructions.*—An action to recover damages for mental anguish, physical suffering, etc., of a telegraph company, for its negligent failure to transmit or deliver a telegram relating to sickness or death, ordinarily may be submitted to the jury under two issues, though the question of punitive damages arises therein; and where a third issue, as to punitive damages, has been erroneously submitted, or there is no evidence as to it, the court should withdraw it or instruct the jury to answer it in the negative. *Ibid.*

TENANTS IN COMMON. See Husband and Wife, 1, 3; Divorce, 10.

*Tenants in Common—Clerks of Court—Adverse Interests—Nonsuit—Certiorari.*—Every proper party to proceedings to partition lands among tenants in common have an interest in its final division among them; and where issue is joined it is the duty of the clerk of the Superior Court to transfer the cause to the trial docket of the court. Hence, when the proceedings have become adversary, putting at issue the rights of one of the parties defendant, the action of the clerk in permitting the plaintiffs to take a nonsuit is a nullity (Revisal, sec. 2485), and upon proper application to the Superior Court the writ of *certiorari* will issue. *Haddock v. Stocks*, 70.

TENDER. See Equity.

TERMS. See Courts, 26.

TIMBER DEEDS. See Deeds and Conveyances, 24, 26, 28, 29; Contracts.

TITLE. See Judicial Sales, 4, 5.

TORRENS LAW. See Statutes, 4, 6.

TORTS. See Contracts, 5; Counties; Abatement and Revivor.

TRADE NAME. See Injunction.

TRANSACTIONS. See Statutes, 52.

TRESPASS.

1. *Counties—Torts of Officers—Trespass.*—Counties are instrumentalities of government given corporate powers for executing the purposes for which they were created, and, in the absence of statutory provisions, are not liable in damages for the torts of their officers. Hence, an action will not lie against a county for wrongful trespass and damages. *Keenan v. Commissioners*, 356.
2. *Trespass—Authorized—Adjoining Owners—Lessor and Lessee—Measure of Damages.*—Where an action for wrongful trespass and damages for quarrying rock on the plaintiff's land is brought against the lessor of adjoining lands upon the theory that the defendant authorized the trespass and entry of his lessee and received the profits, which is denied, with further defense that if the lessee quarried beyond the line of the leased land upon the plaintiff's land, it was done without his authority, the only damages recoverable by the plaintiff are for the defendant's authorized act of his lessee in going beyond the line of the leased lands and committing the trespass and for which he received the proceeds. *Ibid.*
3. *Trespass—Adjoining Lands—Dividing Line—Judgment Rolls—Parties—Evidence.*—Where in an action for wrongful trespass and damage to lands it becomes necessary to locate the true dividing line between the parties, a judgment roll in a former action to which the defendant was not a party is incompetent as evidence against him of the location of the dividing line. *Ibid.*

TRESPASSERS. See Street Railways.

TRIALS. See New Trials.

1. *Railroads—Ponding Water—Malaria—Mosquitoes—Evidence.* — In an action to recover damages of a railroad company for malarial sickness alleged to have been caused in the plaintiff's family from the negligence of the defendant in not keeping a drain under its track properly cleaned out and open, thus ponding water under the plaintiff's dwelling, his physician testified that the ponded water bred mosquitoes whose bite caused the malaria, and it is held competent for plaintiff to testify as to the sickness of certain of his children thus caused. *Rice v. R. R.*, 1.
2. *Same—Children—Value of Services—Observation of Jury—Witnesses—Evidence.*—Where damages are allowable to the parent by reason of the sickness of his children, caused by the act of defendant in pond-

TRIALS—*Continued.*

ing water under his dwelling, and the children are exhibited to the jury, it is competent for the jury to take into their consideration in assessing the damages their own observation and knowledge of the value of such children to their parents in their own homes. *Ibid.*

3. *Railroads—Drain Pipes—Ponding Water—Malaria—Negligence—Trials—Evidence—Burden of Proof—Instructions.*—Where a railroad company is sued for not keeping its drain pipe under its roadbed properly cleaned out, thus ponding water under the plaintiff's house, and causing sickness in his family, and there is evidence tending to show this resulted in the sickness complained of, it is competent to ask a witness whether the water would have been thus ponded had the drain been cleaned; and in this case it is held that the instruction of the judge as to the burden of proof was not objectionable to the defendant. *Ibid.*

4. *Trials—Evidence — Nonsuit — Conflicting Evidence — Plaintiff's Testimony.*—The rule that the evidence is to be considered in the light most favorable to the plaintiff upon a motion to nonsuit applies to his own testimony when material and conflicting, and also to his and the testimony of the other witnesses, taken as a whole. *Christman v. Hilliard,* 4.

5. *Slander—Libel—Communications—Demands—Denials—Latitude—Proof—Trials—Evidence—Nonsuit.*—The purchaser of a car-load of hay, shipped bill of lading attached to draft, paid the draft, received the shipment from the carrier, and then made claim on the seller for shortage of weight, which was refused, and the purchaser put the claim in the hands of his attorneys, who wrote to the seller, and in reply received a letter upon which the purchaser brought this action for libel, saying that the writer had personally superintended the weighing of the hay, that weight was correctly charged, and that it was only a case in which the purchaser "wanted to get $10 allowance on a car of hay." *Held,* more latitude is permitted in communications of this character, in reply to a demand made by the purchaser, and where a failure to answer may furnish evidence of the justness of the claim; and the admissions of the parties showing that the statement complained of was at least partly true, and believed to be so by the defendant, the plaintiff's action cannot be maintained. *Brown v. Lumber Co.,* 9.

6. *Bills and Notes—Negotiable Instruments—Banks and Banking—Holders in Due Course—Discount—For Collection—Bills of Lading Attached—Trials—Instructions.*—In this case there was evidence that a foreign bank discounted a draft, bill of lading attached, placed the money to the credit of the drawer, who checked it out, and then sent the draft to a Philadelphia bank for collection, from whence it reached the local bank of the drawee and was paid; but before remittance made the funds were attached by the drawee. The foreign bank interpleaded and the plaintiff maintained that from the amount the interpleader received on the draft and from its custom to charge it was evidently a charge made for collection and not a discount of the paper. *Held,* the instruction of the court defining a holder in due course is correct (Revisal, 2201); and the rights of a purchaser of a draft with bill of lading attached defined in the instructions are within the principles of *Mason v. Cotton Mills,* 148 N. C., 498; and the charge

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is further approved upon the question of whether or not the interpleader was a holder in due course, or the transfer was made for collection or a transfer in order to secure the bank for money advanced. *Lumber Co. v. Childerhose*, 34.

7. *Limitations of Actions—Reference—Debtor and Creditor—Application of Payment—Intent—Trials—Evidence.*—In an action by the mortgagor against the mortgagee for an account, etc., it appeared that the parties had various and sundry dealings, the defendant mortgagee keeping the accounts, and there was evidence tending to show that certain credits were made by him on the mortgage note in time to prevent the running of the statute of limitation in plaintiff's favor, with conflicting evidence as to whether the plaintiff had authorized these credits to be made upon the note, some of it tending to show that the plaintiff had contended that the credits should be in a larger amount. *Held*, the direction of the creditor as to the application of his payment may be express or deduced from circumstances tending to show his intention; and in this case the question was one of fact as to the authority of the defendant creditor to enter the credit upon the note, which should have been passed upon and determined by the referee. *French v. Richardson*, 41.

8. *Vendor and Purchaser — Contracts—Implied Warranty—Trials—Burden of Proof.*—There is ordinarily no implied warranty of quality of wares upon a contract of sale made between dealers, but the wares delivered thereunder must, at least, be salable; and where oranges are sold by the box, without reference to quality, there is an implied warranty that they will not be delivered in such unsound or rotten condition that they will not be merchantable; and the burden of proof is on the purchaser in his action to recover the consequent damages in his action upon the implied warranty. *Ashford v. Shrader*, 45.

9. *Same—Waiver—Inspection—Questions for Jury.*—Where the seller of oranges by the box ships them bill of lading attached to draft, subject to inspection, and they are accepted by the purchaser, and there is evidence tending to show that he had first inspected them in the usual or customary manner without discovering their damaged condition, the question of whether he waived his right to recover damages by his inspection is properly left to the determination of the jury, with the burden of proof on the plaintiff to show that he made the inspection with ordinary care. *Ibid.*

10. *Railroads—Principal and Agent—Contracts—Special Authority—Trials—Evidence—Questions for Jury.*—Upon the question whether a railroad company through its proper officers authorized its local agent to make a contract for furnishing the plaintiff a baggage car at certain other of its stations at stated times, or ratified the act of the agent in making such contract, evidence is held sufficient which tends to show the plaintiff requested the car from the local agent, who asked time before replying, and subsequently entered into the contract, and the car was thereafter furnished at two of the stations. The charge of the court is approved in this case. *Newberry v. R. R.*, 50.

11. *Tenants in Common—Clerks of Court—Adverse Interests—Nonsuit—Certiorari.*—Every proper party to proceedings to partition lands among tenants in common have an interest in its final division among them; and where issue is joined it is the duty of the clerk of the

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Superior Court to transfer the cause to the trial docket of the court. Hence, when the proceedings have become adversary, putting at issue the rights of one of the parties defendant, the action of the clerk in permitting the plaintiffs to take a nonsuit is a nullity (Revisal, sec. 2485), and upon proper application to the Superior Court the writ of *certiorari* will issue. *Haddock v. Stocks*, 70.

12. *Telegraphs—Death Message—Failure to Deliver—Trials — Evidence—Prima Facie Case—Burden of Proof.*—The agent of a telegraph company at its receiving office accepted a telegram for transmission and delivery, requiring the use of telephone connection at the delivering end of the line, and there was evidence tending to show that the operator accepted the message with the promise to "put it through"; that like messages were customarily telephoned to sendees at the same address; and that no service message was sent informing the sender that an additional charge for delivery would be required. *Held*, the failure of the telegraph company to deliver the message raised a *prima facie* case of its negligence, and the burden rests upon it to prove it had not been neglectful of its duty; and the defense of the company that it was not required to transmit the message to the sendee over the lines of the telephone company is unavailing under the circumstances of this case. *Betts v. Telegraph Co.*, 76.

13. *Telegraphs—Death Message—Postponement of Funeral—Trials—Evidence—Damages—Questions for Jury.*—Where damages for mental anguish are sought in an action against a telegraph company for its negligent failure to deliver a message announcing a death and the time of the funeral, and the defense is set up that the message was filed with it too late for the sendee to arrive in time for the funeral; and there is evidence tending to show that had the message been delivered with reasonable promptness, the funeral would have been postponed and that the sendee would have arrived in time, the question of whether the failure of the company to perform its duty caused the damages alleged is for the determination of the jury. *Ibid.*

14. *Telegraphs—Negligence—Service of Other Company—Trials—Evidence.*—Where a telegraph company is sued for damages alleged to have been caused by its negligent failure to deliver a telegram, it is competent for the plaintiff to show, upon the question of defendant's negligence, that another telegraph company, upon the same occasion, gave very prompt and efficient service to the same parties under substantially similar conditions. *Ibid.*

15. *Trials—Dividing Boundaries—Burden of Proof.*—The burden of proof is on the movant or plaintiff, in proceedings to establish the true dividing line between his own lands and those of adjoining owners, which is not affected by the fact that the defendant sets up another line as the true one; and an instruction that puts the burden of proof on plaintiff to establish the line contended for by him, and upon the defendant to establish the line he claims, is reversible error as to the latter. *Garris v. Harrington*, 86.

16. *Evidence—Witnesses—Medical Experts — Opinion — Facts at Issue—Trials.*—The plaintiff sues to recover damages of the defendant for the death of his intestate, caused by moving her from one of its tenant-houses to another during an illness of typhoid fever. *Held*, a question is competent, asked the witness, a medical expert, as to the causes

of the intestate's death predicated upon the symptoms of the patient and attendant facts, assumed to have been found by the jury, and not objectionable as an expression of opinion upon a fact at issue to be passed upon by them; and while in this case the question asked included the question of proximate cause, it is further held that the case, if established, was so clearly the proximate cause that the error was rendered harmless. *Lynch v. Mfg. Co.*, 98.

17. *Measure of Damages—Wrongful Death—Net Value of Life—Children—Trials—Evidence.*—In an action to recover damages for a wrongful death the present net value of the life wrongfully taken determines the measure of damages recoverable, and evidence tending to show the number and ages of the children of the deceased is incompetent; and where the judge in his charge has correctly stated in general terms that the jury should award a fair and just compensation for the pecuniary injury, and then specifically instruct them to find from the evidence what the earnings of the deceased would have been during the balance of his life, the instruction is held for reversible error. *Ibid.*

18. *Trials—Evidence—Nonsuit—Court—Expression of Opinion — Interpretation of Statutes.*—In an action by executors of the grantor to set aside a deed made by him to a former hireling, whose services have been of value to him, and in which said services were recited as the consideration, the grounds for the attack upon the conveyance being that it was obtained by fraud, deceit, and undue influence, and that the grantor did not have sufficient mental capacity to execute it, and also the insufficiency of the description to admit of parol evidence of identification, the judge said, in the presence of the jury, that he would not permit a landlord to acknowledge in his deed that he had received services from a negro tenant, as its consideration, and avoid the deed for vagueness of description, without permitting the tenant to show that he had rendered the services, etc., for which he has not been paid. *Held*, such remarks are, in their tendency and probable effect, an expression of opinion by the judge forbidden by the statute. Revisal, sec. 535, which is explained and discussed by WALKER, J. *Speed v. Perry*, 122.

19. *Appeal and Error—Assignments of Error—Trials—Instructions—Special Requests.*—Error assigned for a failure of the court to instruct the jury upon certain presumptions of law arising from the evidence on a matter at issue will not be considered, for if fuller instructions are desired they should be set out in a prayer for special instructions. *Carter v. Reaves*, 131.

20. *Pleadings—Answers—Counterclaim—Title to Lands—Slander of Title—Equity—Injunction—Trials—Nonsuit.*—The right of a plaintiff to abandon his action and submit to a judgment of nonsuit at any time before verdict rendered, or what is tantamount to it, does not apply where the defendant has pleaded as a counterclaim a cause of action arising out of a contract or transaction set forth in the complaint as a ground for the plaintiff's cause; and where in an action for the possession of land the defendant sets forth his title and, asking for injunctive relief, alleges the insolvency of the plaintiff, his frequent acts of trespass, and that his claim of title constitutes slander upon the defendant's title, depriving him of the opportunity to sell his land,

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etc., the plaintiff may not take a voluntary nonsuit and deprive the defendant of his right to try out the action to obtain the relief he has demanded. *Yellowday v. Perkinson*, 144.

21. *Railroads—Rights of Way—Pedestrians—Look and Listen—Contributory Negligence—Proximate Cause—Trials—Nonsuit.*—Whether a trespasser or a licensee by custom, a person walking along a railroad track is required, by his having thus chosen a dangerous place to walk, to use diligence in protecting himself from being run over or injured by a train passing there, by the use of both his faculties of looking and listening; and the employees of the railroad, having a superior right to the usage of the track for the running of the company's trains, may assume to the last moment that the pedestrian, apparently having a proper use of his faculties, will leave the track in time to avoid an injury; and when he has failed to do so, and the track is unobstructed, and by the use of his faculties he could have perceived his danger in time to avoid the injury complained of, his omission to perform this duty required of him is the proximate cause of his injury, and a recovery of damages will be denied. *Talley v. R. R.*, 163 N. C., 567, cited and distinguished. *Ward v. R. R.*, 148.

22. *Pleadings—Amendments—Power of Courts—Trials—Issues—Instructions.*—It is within the discretion of the trial court to permit amendments to the pleadings during the progress of the trial (Revisal, sec. 307), and where by such amendment certain matters formerly at issue have been eliminated, it is proper for the court to rule out evidence relating to the matters eliminated, and to reject issues and prayers for special instructions relating thereto. *Tilghman v. R. R.*, 163.

23. *Collisions—Trials—Evidence—Questions for Jury.*—Where damages are sought in an action against a railroad company for its alleged negligence in giving the proper order for the meeting of trains at a certain station, resulting in an injury to an employee on one of the trains, upon which the evidence is conflicting, the controversy presents issues of fact for the determination of the jury. *Ibid.*

24. *Evidence, Conflicting—Medical Expert—Trials—Questions for Jury.*—Where expert evidence is conflicting as to whether *locomotor ataxia* could result from an injury received in a collision of two railroad trains, it is for the jury to determine the truth of the matter. *Ibid.*

25. *Trials—Verdict, Directing—Evidence.*—A verdict cannot be directed in favor of a plaintiff where the evidence is conflicting and therefrom the jury may find contrary to the plaintiff's contention, or where there is evidence which will justify them in drawing an inference in defendant's favor. *Forsyth v. Oil Mill*, 179.

26. *Master and Servant—Safe Place to Work—Negligence—Trials—Evidence—Questions for Jury.*—Negligence is necessarily a relative term, depending upon the circumstances of each particular case, and the courts will not decide, as a matter of law, the question of negligence, where from the evidence the jury are justified in reaching a conclusion in favor of either the plaintiff or defendant; and where a plaintiff was an employee in the cotton-seed room of a defendant mill, to put cotton seed in a seed conveyor, where he had worked for several weeks, and there is evidence tending to show that the conditions were such that the seed were necessarily piled high in this room for

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the purposes of storing and feeding the conveyor; that at the time of the injury these seed were piled so high that in leaving his work the plaintiff crawled between the end of the shafting, in operation, and the side of the house, and thus was injured by coming in contact with the shafting; and also evidence that there was another way out which the plaintiff could have safely taken: it is *Held*, it was for the jury to determine, as an issue of fact, whether the plaintiff was injured by the negligent failure of the defendant to provide him a safe way to leave his work. *Ibid.*

27. *Fraud—Mortgagor and Mortgagee—Inadequacy of Consideration—Trials —Questions for Jury.*—In this action to set aside a deed for fraud and undue influence there was evidence tending to show that the grantee was also a mortgagee of the plaintiff at the time of the execution of the deed, and falsely represented that the deed in question was only a mortgage, and thus induced its execution; that the defendant only had paid $8 an acre for the land, which was worth at the time $30 an acre, and it is *Held*, that the evidence of inadequacy of the consideration paid is, under the circumstances, proper for the consideration of the jury upon the question of fraud. *McPhaul v. Walters*, 182.

28. *Railroads—Relief Departments—Advisory Boards—Final Arbitration— Fraud—Notice of Meetings—Trials—Evidence—Nonsuit.*—It having been held on a former appeal in this case that the plaintiff was concluded by the action of the advisory committee of the defendant railroad company's relief department, when such is not fraudulent or oppressive (157 N. C., 194), by amendment the plaintiff, upon another trial, seeks to invalidate the adverse conclusion of the committee upon the grounds stated, and his evidence tends to show that the committee acted in his absence after failing to notify him, as it had promised to do, of the meeting at which it would consider his claim, and the evidence of the defendant, which was not denied, that its superintendent caused a letter of notification to be mailed him, and it appears that several days thereafter the committee received a letter from plaintiff's attorneys inclosing affidavits upon which he based his claim, without intimating his desire or intention to be present, and there is no evidence that the board did not consider the matter fairly and impartially, or that, under the rules, the plaintiff would have been admitted to its consideration of the question had he been present: *Held*, there was not sufficient evidence of fraud on the part of the committee, and a motion to nonsuit is allowed. *Nelson v. R. R.*, 185.

29. *Master and Servant — Employment of Children — Trials — Evidence— Acts of Vice Principal—Scope of Employment.*—In this case a child under 12 years of age was injured in the lapper room of the defendant cotton mill. There was evidence tending to show that the plaintiff was not on the pay roll of the mill, but had for a length of time been continuously at work around the mill, with the knowledge and approval of the superintendent and foreman; that the foreman of the lapper room, when plaintiff was passing through, ordered and forced him "to throw cotton from the lapper while the machine was in motion," which resulted in the injury complained of. *Held*, evidence sufficient to show that the act of the foreman in causing the said injury was within the scope of his employment, and one for which

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the defendant is responsible, whether at common law or under the provisions of our statute. Revisal, sec. 1981 (*a*). *McGowan v. Mfg. Co.*, 192.

30. *Cities and Towns—Streets and Sidewalks—Negligence — Trials — Evidence—Nonsuit.*—In an action against a city for damages alleged to have been negligently inflicted on the plaintiff by reason of the defendant allowing a ditch or excavation to remain unlighted and unguarded on its street, at night, it was shown that the city issued a permit to plumbers to make sewer connections there, which were completed and the ditch properly filled and the bricks of the sidewalk replaced nine days before the occurrence; that less than an hour before the plaintiff's injury occurred a sunken place, alleged to be the cause thereof, came into the sidewalk, where the street was well lighted, evidently resulting from a cave-in from an excavation in a private lot: *Held*, this evidence was insufficient, unsupported by other evidence, to be submitted to the jury on the question of defendant's actionable negligence. *Seagroves v. Winston*, 206.

31. *Interpretation of Statutes — Motor Cars — Negligence — Intersecting Streets.*—Public Laws 1913, ch. 107, providing, among other things, that a person operating a motor vehicle, when approaching an intersecting highway or traversing it, shall have the car under control and operate it at a speed not exceeding 7 miles an hour, having regard to the traffic then on the highway and the safety of the public, is construed with reference to its subject-matter and the purpose and intent of the act gathered from the language employed, and it is held that the words "intersecting highways" include all space made by the junction of frequented streets of a town, though one of the streets enters the other without crossing or going beyond it. *Manly v. Abernathy*, 220.

32. *Statutes—Motor Cars—Negligence—Trials—Instructions.*—It appearing in this case that the defendant knocked the plaintiff down and injured him, while the former was running his motor vehicle at an excessive speed upon a public and frequented street that ran into, but did not cross another, which he was approaching, without slowing down or giving the signal required by section 1, chapter 107, Public Laws 1913, it was error for the trial judge to charge the jury that the second section of said chapter did not apply to the facts of the case, upon the ground that to come within the meaning of the statute the defendant must have been running his car on a street which crossed beyond the other street he was approaching in order for the streets to have been intersecting each other. *Ibid.*

33. *Appeal and Error—Trials—Evidence—Facts Admitted.*—The exclusion of evidence relating to facts admitted at the trial is not erroneous. *Dunnevant v. R. R.*, 232.

34. *Trials — Contributory Negligence — Evidence — Nonsuit.*—A motion to nonsuit upon the evidence is properly allowed when the plaintiff's own evidence discloses such contributory negligence as bars his recovery. *Ibid.*

35. *Carriers of Passengers—Stations — Safe Egress — Contributory Negligence—Trials—Questions for Court.*—Where a person *sui juris* is lawfully on the platform of a railroad company, at night, with a lighted

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lantern near him, which he had used in going there, and knew the existing conditions, that the platform was elevated some distance from the ground and was without guard or railing at a certain place used for the handling of freight, which was a dark and dangerous place at the time; and the light from his lantern was shining upon some steps near him from the platform to the ground, a shorter distance, where the railroad had provided a railing or guard, his attempting to leave the platform, without his lantern, by the dangerous way, instead of by the safe way opened to him, is such contributory negligence, as a matter of law, as will bar his recovery in his action for damages against the railroad company for its alleged negligence in failing to provide a safe place for the use of its passengers. *Ibid.*

36. *Telegraphs — Negligence—Mental Anguish—Issues—Causal Connection —Trials—Instructions.*—Where damages are sought for mental anguish and the negligent delay of a message by a telegraph company, and the first issue relates solely to the question of defendant's negligence, and the second as to whether the damages were caused by the negligence of the defendant, and where the jury has affirmatively answered the second issue under proper instructions, it includes the question of proximate cause. Hence, an instruction on the first issue, that the jury could answer it without finding that the negligence of the defendant was the cause of the injury, is not erroneous. In this case, it appearing that the name of the sendee of the message was changed in transmission, without explanation, and otherwise it would have been promptly delivered, there was no real controversy presented as to proximate cause arising under the second issue, and the judge would have been justified in instructing the jury that the defendant was negligent upon the admitted facts, upon the first one. *Hedrick v. Telegraph Co.*, 234.

37. *Trials — Verdicts — Motion to Set Aside—Courts—Discretion—Appeal and Error.*—Motions to set aside a verdict on the ground that it is against the weight of the evidence should be addressed to the conscience and sound discretion of the trial judge, and will not be considered on appeal, in the absence of the abuse of this discretionary power. *Pruitt v .R. R.*, 246.

38. *Railroads—Inspection of Trains—Unusual Conditions—Projections from Trains—Injury to Pedestrians—Trials—Questions for Jury.*—A railroad company is fixed with knowledge of whatever a careful inspection of its trains will disclose, and the burden is upon it to show that a proper inspection had been made, which failed to discover an unusual condition causing an injury, the subject of an action; and the evidence in this case tending to show that while the plaintiff was standing alongside the defendant's track at a crossing, and where he had a right to be, waiting the passage of its train, some unusual projection 4 or 5 feet from the side of the train struck his knee and hurled him beneath the train, to his injury, the question of defendant's actionable negligence is one for the jury under a proper instruction from the court. The charge in this case is approved. *Ibid.*

39. *Telegraphs—Mental Anguish—Funeral Postponed—Addressee's Duty— Negligence — Trials — Evidence.*—In an action to recover damages against a telegraph company for the negligent delay in delivering a telegram from A. S. Adams to Annie E. Smith, reading, "Baby died

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this evening. Come," delivered to the husband of the plaintiff, the addressee, the evidence tended to show that the husband wired back to the sender to ascertain the name of the deceased baby, and was informed in reply that it was the 1-year-old baby of the sender, the plaintiff's brother. The plaintiff acknowledged receiving the two messages, and there was evidence tending to show that other telegraphic correspondence had passed between the parties, wherein the sender stated that the funeral of the child would be postponed on plaintiff's request, of which the plaintiff denied knowledge; and with further evidence that the plaintiff had ample time after receiving the messages to have had the funeral postponed and attended the burial. *Held*, it was the duty of the plaintiff to have had the funeral postponed and attended it, had she received the message to that effect and could reasonably have done so, which presented an issue of fact for the jury under the conflicting evidence; and upon an affirmative finding thereon, the plaintiff's recovery of damages occasioned by not attending the funeral will be denied. *Smith v. Telegraph Co.*, 248.

40. *Same—Measure of Damages—Nominal Damages—Trials—Instructions.* Where damages for mental anguish are sought in an action against a telegraph company for negligent delay in the delivery of a death message, in an action brought by the addressee, and there is evidence tending to show negligence on the defendant's part in failing to deliver the message with reasonable promptness, and that the addressee could have had the funeral of the deceased postponed and attended it, it is *Held*, that the negligence of the defendant, if established, would be a tort arising from its failure to perform a public duty, and that nominal damages, at least, would be recoverable, and such additional damages as the plaintiff may have suffered up to the time she first had the opportunity to attend the funeral; and a charge is held erroneous that fails to instruct the jury upon the plaintiff's duty to have had the funeral postponed and attend it, under the circumstances of this case. *Ibid.*

41. *Same — Proximate Cause — Special Instructions—Appeal and Error.*— Where in an action against a telegraph company to recover damages for its failure to promptly deliver a death message, there is evidence tending to show that at the time it was received for transmission the sender was asked for a better address, which he could not give, and a service message was delivered to him thereafter stating that the party addressed could not be found and asking for a better address, which the sender promised to obtain; and that he obtained and gave the correct address several hours thereafter, but too late for the addressee to come, and which was promptly forwarded by the defendant, resulting in the prompt delivery of the first message; and there is further evidence that the messenger boy of the defendant at the terminal point was negligent in not promptly finding the addressee and delivering the first message, it is held to be erroneous for the trial judge to refuse to give a prayer for special instructions on this phase of the case, presenting the question of proximate cause, which was not cured by the general charge given in the case. *Ibid.*

42. *Bills and Notes—Holder—Due Course—Presumptions—Trials—Erroneous Instructions—Appeal and Error.*—The possession of a negotiable instrument by the indorsee, or by a transferee where indorsement is

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not necessary, imports *prima facie* that he is the lawful owner of the paper, and that he acquired it before maturity, for value, in the usual course of business, without notice of any circumstance impeaching its validity; and where fraud is not alleged or suggested, it is error for the trial judge to instruct the jury that such holder is *prima facie* one in due course, and then add, "that is, if he takes it in good faith, for value, without notice of infirmity, and is the owner thereof and entitled to sue thereon." *Trust Co. v. Bank*, 260.

43. *Appeal and Error—Nonsuit—Incompetent Evidence.*—Where the only evidence to sustain the cause of action alleged by the plaintiff is incompetent, but erroneously admitted, and an appeal has been taken by the defendant for the refusal of judgment of nonsuit thereon, the Supreme Court will not overrule the trial court and grant the nonsuit, for the plaintiff would then have been deprived of the opportunity of substituting other and competent evidence which might have been available, and therefore a new trial will be ordered. *Morgan v. Benefit Society*, 262.

44. *Schools — Contracts—Board and Lodging—Presumptions—Reasonably Clean and Wholesome—Trials—Evidence—Questions for Jury—Courts —Verdict, Directing.*—Where the plaintiff sues upon a contract for the price agreed to be paid by the defendant for the tuition, board and lodging of his sons, the law implies that the board and lodging to be furnished by plaintiff must be clean, decent, and reasonably wholesome, and when the evidence is conflicting as to whether the plaintiff has performed these requirements, the question should be submitted to the jury, and it is reversible error for the judge to direct a verdict in the plaintiff's favor because the terms of the contract are admitted or established. *Military School v. Rogers*, 270.

45. *Railroads — Injury to Live Stock — Negligence — Opinion Evidence— Trials—Questions for Jury.*—Where the evidence is conflicting as to whether or not the engineer on defendant's train could have stopped his train in time to have prevented an injury to plaintiff's horse, which had become frightened and had run some distance down and near the defendant's track in the same direction the train was going, before attempting to cross the track, where the engine struck him, it is competent for an engineer who had been long in the defendant's service and knew the condition existing as to grade, etc., at the place of the injury, to testify that from his knowledge of the locality, experience and observation, the train could have been stopped in time to have avoided it; and the evidence presenting questions of fact, a judgment of nonsuit was properly denied. *Hanford v. R. R.*, 277.

46. *Railroads—Injury to Live Stock—Ordinary Noises—Frightening Horses —Trials—Negligence.*—The principle that railroad companies are not liable in damages occurring to travelers along the road in consequence of their teams taking fright at the noises ordinarily made by the operating of its trains does not apply to cases wherein the company, by the exercise of reasonable diligence, could have prevented the injury after the horse had become frightend and, running along the track for some distance, had attempted to cross in front of the train. *Barnes v. Public-service Corporation*, 163 N. C., 365, cited and distinguished. *Ibid.*

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47. *Contracts — Goods Sold on Commission — Amount Due — Trials—Evidence.*—Where the matter at issue between the parties to an action is as to the amount due the plaintiff in commissions upon the accepted sales of goods he has made for the defendant, it is competent for the plaintiff to testify as to the full amount of his sales, for the purpose of subsequently showing how many of them the defendant had shipped out under his contract; and he may be permitted to refer to corresponding sections of complaint and answer to make his testimony more intelligible, without necessarily making such sections evidence in the case. The plaintiff may also state the amount he claims as owing to him by the defendant, and explain its items, including those he contends were wrongfully charged against him on the defendant's books; and it is further held that the defendant will not be permitted unfairly to hold back shipments merely for the purpose of depriving the plaintiff of his commissions. *Peyton v. Shoe Co.*, 280.

48. *Trials — Instructions — Verdict, Directing—Questions for Jury.*—A request by appellant for instructions directing a verdict, based on only a part of the evidence, which was in favor of the requesting party, and excluding that favorable to appellee, was properly refused, and the dispute in this case being over the amount due plaintiff from the defendant as commissions on sales of merchandise made under a contract between them, and the evidence being conflicting, the question thus raised was properly left to the determination of the jury. *Ibid.*

49. *Street Railways—Trials—Negligence—Evidence—Questions for Jury.*—When a judgment of nonsuit is granted upon the evidence, the evidence is viewed on appeal in the light most favorable to the plaintiff; and in this action to recover damages for the death of plaintiff's horse, wherein there was evidence in plaintiff's behalf that he was sitting on his horse in a narrow street of a town, when the horse, becoming frightened on the approach of the defendant's car, ran backward in the direction the car was going, which the motorman must have seen, but failed to stop the car or slacken the speed, which he could have done in time, resulting in the injury, while the plaintiff was doing all he could to control the horse and avoid it. *Held*, it was sufficient to be submitted to the jury upon the question of defendant's actionable negligence. *Barnes v. Public-service Corporation*, 163 N. C., 363; *Doster v. Street Ry.*, 117 N. C., 661, cited and distinguished. *Hall v. Electric Railway*, 284.

50. *Trials—Material Witnesses—Present at Trial—Matters in Excuse.*—It is competent to show that material witnesses had been subpoenaed by the other side, and were present at the trial, for the purpose of showing why the party had not himself subpoenaed them. *Ferebee v. R. R.*, 290.

51. *Appeal and Error—Error as to One Issue—Trial—Damages—Evidence.* Where on appeal of an action to recover damages for a personal injury no error is found as to the issues of negligence and contributory negligence, and the case is sent back for trial solely on the issue of damages, instructions bearing upon the first two issues, as, in this case, the conduct of the plaintiff on the witness stand, are properly refused. *Ibid.*

52. *Trials — Instructions—"Large Damages"—Ability to Pay—Appeal and Error.*—In this case the modification of defendant's requested instruc-

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tions, so as to make them read that the jury should not consider the ability of the defendant to pay "large damages" instead of "damages," if erroneous, is held as harmless error. *Ibid.*

53. *Trials — Instructions — Interested Witnesses.*—A prayer for special instructions, that the expert witnesses testifying in plaintiff's behalf were inclined to view the circumstances in a favorable light for plaintiff, is objectionable as an expression of opinion by the court forbidden by statute. *Ibid.*

54. *Same—Appeal and Error—Former Appeal—Courts—Improper Remarks.* —Upon the consideration to be given by the jury to the testimony of interested witnesses, *Herndon v. R. R.*, 162 N. C., 317, is approved and the charge of the judge is recommended as the correct form; and in this case, sent back for a new trial by the Supreme Court, it is not held for error that the trial court correctly charged upon this phase of the controversy by following the directions laid down in the former appeal, and added that he did so because the Supreme Court had held that it must be done; "but after you have done so, and you shall conclude that the witness had told the truth, you will give the same weight to his evidence that you would to that of any other credible witness." *Ibid.*

55. *Trials—Evidence Withdrawn—Instructions—Appeal and Error.*—When the trial judge instructs the jury that certain evidence introduced is withdrawn, and they shall not consider it in their deliberations, the admission of the evidence will not be held for error, and in this action for damages for a personal injury the plaintiff's expenses for nursing were properly allowed as an element of damages. *Ibid.*

56. *Liens—Contracts—Material Men—Trials—Amount Due—Instructions—Appeal and Error—Harmless Error.*—In an action by the material man against the owner of a dwelling to recover the amount due him by the contractor for materials furnished and used in the construction of the building under Revisal, sec. 2020, and there is conflicting evidence as to the amount due by the owner to the contractor on his contract at the time of receiving the statutory notice, it is erroneous for the trial judge to charge the jury upon the question of plaintiff's recovery, without laying down any rule for ascertaining the amount due on the contract, or furnishing a guide for them in reaching their conclusion upon the alternative propositions contained in the instruction; but when, taking the charge as a whole, it may be seen that instructions on this point were correctly given, and the jury understood them, an incorrect instruction appearing in a part of the charge will not be held for reversible error. *Bain v. Lamb*, 304.

57. *Liens—Contracts—Material Men—Amount Due Contractor—Trials—Instructions—Measure of Damages.*—In an action by the material man against the owner of a dwelling to recover the price of material furnished by him to the contractor and used in the building (Revisal, sec. 2020), and the evidence discloses that the contractor has abandoned his contract and it is conflicting as to the amount the owner is due the contractor under the contract, the rule for the ascertainment of what amount, if any, is due to the contractor is the contract price, less the amount paid to him, and the reasonable cost of completing the building; and if the amount thus due exceeds the claim of the plaintiff, and the materials furnished were used in the house, he

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should recover the amount of his claim; and if less, he can only recover the amount due the contractor. *Ibid.*

58. *Vendor and Purchaser — Fraud — Conjecture—Trials—Evidence.*—Evidence which raises no more than a mere conjecture of fraud is insufficient to raise the issue; and recommendations which are only commendatory in the sale of a horse, relating to his foal-getting qualities, are insufficient, when they do not materialize, to raise the issue of fraud in the procurement of a note given for its purchase price. *Altman v. Williams*, 312.

59. *Trials—Issues—Evidence—Insufficiency—Verdict Set Aside—Judgments —Appeal and Error.*—When an issue, among others, has been submitted to the jury, upon which there is insufficient evidence, and so held by the trial judge, it is the better practice for the judge to set aside the verdict as to that issue and let the others stand, when such is allowable; but where the judgment rendered in effect sets the verdict to the issue aside, no error will be found on appeal. *Ibid.*

60. *Appeal and Error — Objections and Exceptions — Effect of Evidence— Record—Instruction.*—Exceptions made upon the trial to the effect of evidence and not to its competency will not be favorably considered on appeal, when the charge is not excepted to or set out in the record, the presumption being in favor of the correctness of the charge of the court as to the effect of the evidence admitted. *Miller v. Telegraph Co.*, 315.

61. *Contracts—Sale of Business—Good-will—Agreements Not to Enter Business—Breach of Agreement—Trials—Evidence—Nonsuit.*—In an action upon an alleged breach of contract for the sale of a mercantile business, good-will, etc., with provision that the vendor would not again engage in that character of business in the same town for a year and a half, the plaintiff's evidence tended only to show that his vendor had loaned money to another and newly formed partnership between third persons in the same town, engaged in the same character of business; that the telephone number he had used while in business had been given to this new concern, etc., and that in a few specific instances customers who had traded with him occasionally had, at times, traded with the new partnership. *Held*, the defendant had a perfect right to lend his money to the new concern, and that this, and the further instances mentioned, were not evidence sufficient to be submitted to the jury upon the question of his violating his contract by engaging in a business of a similar character to that sold by him to the plaintiff. *Finch v. Michael*, 322.

62. *Corporation — Officers—Vice President—Authority—Trials—Evidence— Nonsuit.*—In an action against a corporation to recover for medical attention, and care of its employee by the plaintiff sanatorium, the defendant resisted recovery upon the ground that it had not authorized the services rendered. There was evidence tending to show that the employee was carried to the sanatorium by the salaried physician of the defendant company, and thereafter its vice president called up the plaintiff by phone and directed that special care be given this patient; that the bill should be sent to him and that the defendant would pay it; and, also, that formerly the defendant had paid for the attention given by the plaintiff to another employee on such authorization. *Held*, the position of vice president of a corporation does not

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necessarily empower this officer to bind the company by such acts; but the evidence in this case was sufficient to be submitted to the jury upon the question of his authority, and judgment of nonsuit was properly denied. *Sanatorium v. Yadkin River Co.*, 326.

63. *Corporations—Subscribers to Stock—Management—Release—Contracts—Consideration—Trials—Evidence—Questions for Jury.*—Both by the general law and under our statute, Revisal, sec. 1141, the management of a corporation, before the first directors are elected, vests entirely in the subscribers, and, before the rights of creditors have supervened, the subscribers or stockholders may, by the consent of each and all of them and within the limits of the charter, release one from his subscription to the stock, the consent of one party to such arrangement, as in other contracts, being a sufficient consideration for the consent of the others; and under the circumstances of this case it is held that there was sufficient evidence of the release of the defendant, against whom action was brought for payment of his subscription to stock in a corporation, to be submitted to the jury. *Boushall v. Myatt*, 328.

64. *Insurance, Life—Premium Notes—Conditions of Forfeiture—Subsequent Agreements—Waiver—Trials—Questions for Jury.*—The delivery of a life insurance policy absolute and unconditional is a waiver of the stipulation for a previous or contemporaneous payment of the first premium; and where the insurer has received the insured's note for the payment of this premium upon condition that the policy shall be avoided unless the note is paid at maturity, the condition will be upheld unless the time for its payment has been postponed by valid agreement or the stipulation, made for the benefit of the company, has in some way been waived by it, or the company has so acted in reference to the matter as to induce the policy-holder, in the exercise of reasonable business prudence, to believe that prompt payment is not expected and that forfeiture on that account will not be insisted upon. *Murphy v. Insurance Co.*, 334.

65. *Same—Renewal Notes—Principal and Agent.*—Where the insured has had the policy of life insurance sued on delivered to him by the company, and for the payment of the first premium has given his note with provision that unless paid at maturity the policy should become null and void, and there was evidence tending to show that this note was indorsed to its agent, likewise indorsed by him and given to the local bank for collection, and by it transmitted to the bank of the home office for collection, and that the insured, before the maturity of the note, went to the company's home office to make arrangements for an extension of time of payment, was referred by it to the bank there, which accepted a part payment on the note and a renewal note extending the time of payment for the balance; that the company sent written notice to the insured's address, to pay the extension note given by him, advising him to get remittance there by its due date to keep his policy from lapsing; that the insured died after the date the first premium note was due, but before that of the renewal note, for which payment was offered at the home office of the company before maturity, and refused: *Held*, sufficient for the determination of the jury upon the question of whether there was a valid agreement to postpone the payment of the first note or a waiver of its conditions,

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by which the insured was given until the due date of the renewal note to make payment of the balance due on his first premium. *Ibid.*

66. *Insurance, Life—Premium Notes — Renewals — Conditions of Policy—Waiver — Specified Officers—Approval—Trials—Questions for Jury.*—Where the insured has given his note for the payment of his first premium on his life insurance policy with provision that the policy should become null and void if the note is not then paid, and it is shown that the insured applied at the home office of the company for a renewal of the note, which was accorded by the company's bank, to which the insured was referred; that the insured subsequently received a notice from the home office, in its official envelope signed by its cashier, son of the secretary, that the premium (renewal) note was due on a certain date, and be sure to get remittance there by that date, to keep the policy from lapsing, it is *Held*, sufficient for the determination of the jury upon the question as to whether the notice was sent with the knowledge and approval of the officers designated in the policy, the president, vice president, and secretary, as having sole power in behalf of the company to extend the time for the payment of the premium, etc., so as to bind the company therewith. *Ibid.*

67. *Principal and Agent—Commissions—Pleadings—Trials—Proof.*—In an action to recover commissions for sale of lands it is unnecessary for the plaintiff to allege in his complaint the various stages leading up to the consummation of the transaction; and in this case it is held that it was not necessary for the plaintiff to have alleged that the defendant procured a loan for the purchaser through the agent of the former as a condition for the sale, and that the same agent therein acted for both, in order to show the fact by his evidence. The charge of the court is according to the decision on a former appeal. 164 N. C., 19. *Trust Co. v. Goode*, 338.

68. *Negligence — Contributory Negligence—Trials—Evidence—Nonsuit.*—It appearing from the evidence in this case that an alderman of the city of Charlotte and an employee of an oil company there, in his endeavor to relieve the city from a "water famine" by the use of trains of the defendant railroad company tendered by the defendant to the city for the purpose, and the use of the oil company's tanks, hired hands and organized a force to pump the water into the tanks for transportation over the defendant's road; and the plaintiff, so employed, but when off duty, went up the road a short distance, and to get out of the rain then falling went under an empty box car placed on a siding frequently in use, and while sitting there was injured by a freight train backing into the car he was under, without signal or warning. Apart from the question of the breach of any duty owed by the defendant to the plaintiff, it is held that the latter's contributory negligence continuing to the time of impact, barred his recovery as a matter of law, and defendant's motion for nonsuit was properly granted. *Watts v. R. R.*, 345.

69. *Divorce a Mensa — Husband's Misconduct — Provocation—Statutes—Trials — Questions for Jury — Formal Appeal — Appeal and Error—Weight of Evidence—Courts.*—In this action for divorce *a mensa et thoro*, brought by the wife, it is *Held*, that the separate issues as to the husband's conduct and the wife's provocation are sufficiently raised by the pleadings, Revisal, sec. 1562 (4), and the verdict of the

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jury thereon in the plaintiff's favor, rendered upon competent evidence and correct rulings of law, will not be disturbed; the question of the sufficiency of the evidence to sustain the verdict is one that should have been addressed to the discretion of the trial judge; and it is *Further held*, that the former appeal in this case, deciding that the wife was not entitled to alimony *pendente lite*, did not affect the right of the plaintiff to introduce further evidence in her favor upon the issues raised. *Page v. Page*, 346.

70. *Penalty Statutes—Register of Deeds—Age of Woman—Inquiry—Trials Instructions.*—In this action brought by the father of the woman against the register of deeds, for issuing a license for the marriage of his daughter under 18 years of age, the judge charged the jury, among other things, that it was the duty of the register of deeds to make the inquiry as to the age of the woman, not as a mere matter of form, but for the purpose, conscientiously, of ascertaining the fact; such inquiry as a business man, acting in the important affairs of life, would make. *Held*, the charge is correct, and approved under *Joyner v. Harris*, 157 N. C., 298; *Furr v. Johnson*, 140 N. C., 159; *Trollinger v. Burroughs*, 133 N. C., 312. *Savage v. Moore*, 383.

71. *Trials—Verdict, Directing—Nominal Damages—Costs—Appeal and Error—Harmless Error.*—The failure of the jury to regard the instruction of the trial judge for them to allow nominal damages upon the issue of the defendant's counterclaim, which only had significance upon the question of costs, is held immaterial, the plaintiff being entitled to recover costs by reason of the verdict of the jury in his favor on the other issues involved in the action. *Crowell v. Jones*, 386.

72. *Witnesses—Hypothetical Questions—Trials—Evidence.*—A hypothetical question, asked an expert witness upon evidence that the party thereafter expected to introduce, is incompetent. *Keenan v. Commissioners*, 356.

73. *Trials — Instructions Construed—Railroads—Headlights—Negligence—Expression of Opinion—Appeal and Error.*—Where there is evidence tending to show that the plaintiff's intestate was killed at night by the defendant railroad company's train running without a headlight, under circumstances requiring the plaintiff to prove that the defendant's negligent act was the proximate cause of the death of the deceased, a charge that it made no difference, upon the issue of defendant's negligence, that the train was running without a headlight, though erroneous, when standing alone, is not held for reversible error in this case as an expression of opinion by the court forbidden by statute, it appearing from construing the charge as a whole that the jury could not have been misled thereby, and the charge being otherwise correct. *McNeill v. R. R.*, 390.

74. *Trials—Instructions Construed—Railroads—Usefulness — Character of Plaintiff — Prejudice — Expression of Opinion.*—Where damages are sought of a railroad company for the negligent killing of plaintiff's intestate, a charge, construed as a whole, is not held for error as an expression of opinion forbidden by our statute which in effect instructs the jury that they should not decide the case from any sympathy or consideration for the deceased, or any admiration for his good qualities or detestation for his bad qualities, if he should have

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any; or consider that the defendant is a railroad, explaining the usefulness of railroads; and saying that to award damages against them except upon the law and evidence would be robbery, tending to cripple them; and that not to award damages to the plaintiff upon the law and testimony would be equal robbery; that as honest men and good jurors they, uninfluenced by moving appeals and powerful oratory, should coolly, quietly, without sympathy, passion, or prejudice, try to pass upon the evidence, and reconcile it, and answer the issues submitted. *Ibid.*

75. *Pleadings — Trials — Instructions—Appeal and Error.*—In an action to recover damages of a railroad company for the negligent killing of plaintiff's intestate by its train, a requested instruction as to the defendant's duty to keep a lookout was properly refused, there being no allegation in the complaint to that effect. *Ibid.*

76. *Pleadings—Variance—Appeal and Error—Objections and Exceptions—Trials—Instructions.*—The objection by the defendant that there has been a variance between the allegations of the complaint and the proof of the plaintiff, in his action, and that recovery has been permitted him upon evidence of an entirely distinct and independent theory than that alleged, must be taken to the evidence when it is offered, and when no objection is then made, an exception to the charge of the trial judge because he stated that phase of the plaintiff's contention is untenable on appeal. *Green v. Biggs*, 417.

77. *Contracts—Sale of Goods—Loss of Profits—Measure of Damages—Trials—Questions for Jury.*—Loss of profits on goods which the vendor contracted to deliver, but wrongfully failed to do, may be recovered by the purchaser as damages for the breach of the contract, when they were in reasonable contemplation of the parties and contract, and are ascertainable with a reasonable degree of certainty; and it is accordingly held, where the contract thus broken by the vendor was for the sale of thirty-six buggies, that evidence tending to show that the purchaser, a dealer, being unable to supply himself elsewhere in time for his trade, had lost the sale of thirty or more buggies based upon his last year's business, and the demand of his trade for the present season, at an average profit of $15 each, is competent to be submitted to the jury for their determination in fixing the amount of the plaintiff's recovery for the breach of the contract. *Hardware Co. v. Buggy Co.*, 423.

78. *Contracts—Sale of Goods by Name—Implied Warranty—Trials—Evidence.*—There is an implied warranty in the sale of goods under a certain name indicating kind or quality, that they shall be merchantable and salable as the name implies, whether the defect may be hidden or might possibly be discovered by inspection; and in an action upon the implied warranty in the sale of a car-load of red-marrow beans, there being evidence tending to show that beans by this name are readibly salable for table use exclusively, cook easily, and will not keep over summer without rotting, it is competent for the plaintiff to show, by his evidence, that the beans in question could not be cooked soft so as to be edible, remained hard for several years, contrary to the characteristics of the beans of the kind purchased. *Grocery Co. v. Vernoy*, 427.

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79. *Trials—Nonsuit—Evidence—How Construed.*—In this case it is held that there was sufficient evidence to take the case to the jury, viewing it in the light most favorable to the plaintiff, and defendant's motion to nonsuit was properly disallowed. *Gray v. R. R.*, 433.

80. *Limitations of Actions—Adverse Possession—Trials—Mixed Law and Fact—Questions for Jury—Instructions.*—In this action to recover possession of lands by virtue of a claim of adverse possession under color of title, it is held that the issues raised mixed questions of law and fact, to be determined by the jury under proper instructions from the court. *Reynolds v. Palmer*, 454.

81. *Contracts — Parol — Independent Contractor—Evidence, Conflicting—Trials—Questions for Jury.*—Where the entire contract is in writing, the question of independent contractor is a question of law arising from the interpretation of its terms; but where the contract relied on rests in parol, and the evidence of its terms is conflicting in that respect, the question of independent contractor is one for the determination of the jury, under proper instructions from the court. *Embler v. Lumber Co.*, 457.

82. *Same—Burden of Proof—Supervision by Owner.*—The defendant corporation contracted by parol for the erection of a dry-kiln, and in an action to recover damages for an injury received by an employee from a wall thereof upon which he was at work falling upon him, there was evidence tending to show that it resulted from an improper foundation; that the blue-prints furnished the contractor showed that the foundations were to have been made of concrete, but were changed to brick by the order of the defendant under objection by the contractor that it would be dangerous, with further evidence that the officers of the defendant frequently inspected the work and gave occasional orders respecting it. There was evidence on the defendant's behalf that the erection of the dry-kiln was to be done by an independent contractor. *Held*, the burden of proof was on the defendant to show that the work was to have been done under an independent contract, which could not be passed upon by the court under the conflicting evidence, but was for the determination of the jury. The term "independent contractor" defined by WALKER, *J. Ibid.*

83. *Contracts — Independent Contractor — Pleadings — Issues — Burden of Proof.*—When the defense of independent contractor is relied upon, it must be alleged in the answer, with the burden of proof upon the defendant. *Ibid.*

84. *Measure of Damages—Trials—Instructions.*—The charge of the court upon the measure of damages for a personal injury received by the plaintiff is approved upon the facts in this case under authority of *Johnston v. R. R.*, 163 N. C., 451, and that line of cases. *Ibid.*

85. *Retrials—Issues—Former Trial.*—Where the trial judge has set aside the answers to certain of the issues involved in the action and ordered them to be again submitted to the jury, it is proper for the court on the subsequent trial to submit only those issues to the jury, though counsel may in their argument to the jury comment upon the issues already answered; and it appearing on this appeal that the

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jury must have clearly understood the case on the issues submitted, no error is found. *Smathers v. Hotel Co.*, 469.

86. *Same—Pleadings—Evidence.*—Where in an action to set aside notes and a deed in trust securing the same, as fraudulent against creditors, holders of certain of the notes secured by the instrument have intervened, claiming to have acquired them in due course, without notice, etc., and the jury have found upon the issue of fraud in the plaintiff's favor and the issue raised by the intervenor has been set aside by the trial judge, it is not error, upon the retrial of the remaining issues, for the court to refuse to permit the reading of the original complaint, the pleadings applicable being the interplea and the answer; and it is further held that the reading of a certain section of the complaint, not as evidence, but in explanation of the issues being tried, was sufficient in this case. *Ibid.*

87. *Trials—Evidence—Intervenors—Appeal and Error—Objections and Exceptions.*—Where there are two intervenors, each claiming to be a holder in due course of separate notes secured by a deed of trust fraudulent as to creditors of the maker, who are the plaintiffs in the action, exceptions by the plaintiffs, referring solely to matters relating to one of the intervenors, cannot be considered on the appeal as to the other. *Ibid.*

88. *Appeal and Error—Lost Notes—Trials—Argument of Counsel.*—Objections to counsel referring on the trial to certain notes, introduced on a former trial and since lost by the clerk of the court, are held to be without merit. *Ibid.*

89. *Telegraphs—Nominal Damages—Issues—Special Instructions—Appeal and Error—Harmless Error—Punitive Damages—Trials—Evidence—Questions of Law.*—Where a telegraph company is sued for its negligent delay in the delivery of a message, and issues of negligence, amount of compensatory and punitive damages are separately submitted, exceptions to the second issue, upon which the jury has found only nominal damages in accordance with the defendant's special request for instructions, became immaterial, so far as the defendant is concerned, it appearing that the company has negligently delayed its delivery; and while punitive damages are recoverable when the amount of compensatory damages are only nominal, the evidence, to sustain such recovery, must not only tend to show an unexplained delay of the message which, being a failure of the defendant to perform a public duty, will sound in tort, but some acts on the part of the defendant or circumstances of aggravation which will amount to willful, wanton, or malicious conduct, in regard to the message sued on. The grounds upon which punitive damages may be awarded, and whether it is necessary that the corporation, as principal, must in some way have recognized or participated in the wrongful conduct of its local agent, and whether the recovery is not necessarily dependent upon the company's profits or loss at the particular locality, discussed by WALKER, J. *Webb v. Telegraph Co.*, 483.

90. *Telegraphs—Issues—Appeal and Error—Punitive Damages—Courts—Trials—Instructions.*—An action to recover damages for mental anguish, physical suffering, etc., of a telegraph company, for its negligent failure to transmit or deliver a telegram relating to sickness or

death, ordinarily may be submitted to the jury under two issues, though the question of punitive damages arises therein; and where a third issue, as to punitive damages, has been erroneously submitted, or there is no evidence as to it, the court should withdraw it or instruct the jury to answer it in the negative. *Ibid.*

91. *Deeds and Conveyances—Color—Adverse Possession—Wire Fence—Evidence—Trials—Instructions—Limitations of Actions.*—The plaintiff in this action claims title to the land in dispute by adverse possession under color, and there is evidence on defendant's part that her agent entered upon the land, being on the east side of a certain wire fence, and cut timber therefrom in 1908, and the plaintiff, in response to his request, pointed out the wire fence as the dividing line between the lands. There was also evidence of plaintiff's adverse possession of the land on the east of this fence prior to 1908, sufficient to ripen his title. The court charged the jury, according to defendant's request for special instruction, in substance, that if the plaintiff pointed out the wire fence as the dividing line "and stated that the lands on the east thereof belonged to defendant, and the wire fence was constructed by permission of the defendant," that would be a recognition of the ownership of the defendant of the lands on the east side of the fence, and the possession of these lands by plaintiff thereafter would not be hostile, etc.: *Held*, it was not error for the court to modify this instruction by charging this would be so unless the plaintiff's title had ripened by adverse possession before 1908; and if it had, occurrences or conversations thereafter had between the parties could not divest it; and it is *Further held*, that construing the charge as a whole, the principles of law were clearly and correctly charged upon this phase of the controversy and the jury could not have been misled or confused in their deliberations to the defendant's prejudice. *Padgett v. McKay*, 504.

92. *Trials—Nonsuit—Evidence.*—In the suit of an employee against his employer to recover damages for a personal injury, it is necessary that the plaintiff's evidence should be sufficient to show actionable negligence, but a motion to nonsuit will not be granted when there is legal evidence of such negligence. *Ridge v. R. R.*, 510.

93. *Negligence — Proximate Cause—Definition—Trials—Instructions—Appeal and Error.*—Proximate cause of an injury arising from the negligence of a party is that which, in natural and continuous sequence, unbroken by any new and independent cause, produces the result, without which it would not have occurred, and from which a man of ordinary prudence could have foreseen that the result was probable under all the circumstances as they existed and were known or should by the exercise of due care have been known to him; and a charge of the court, in this case, that proximity in point of time and space is not part of the definition, was not erroneous. *Norman v. R. R.*, 533.

94. *Street Railways—Cities and Towns—Ordinances—Speed Limits—Excessive Speed—Negligence—Last Clear Chance—Trials—Evidence—Questions for Jury.*—Where there is evidence that one running an automobile had negligently placed himself upon a street car track on the street of a city, in front of an approaching car, and that the

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street car was exceeding the speed limit of the city at the time it ran into the plaintiff, causing the injury complained of in the action, a motion to nonsuit upon the evidence is properly denied, the excessive speed of the car being evidence of the defendant's actionable negligence, upon the issue of the last clear chance, it being for the jury to determine whether by the excessive speed of the car the defendant's motorman had deprived himself of the ability to avoid the injury after discovering the plaintiff's danger. *Ibid.*

95. *Insurance—Proof of Death—Absence—Evidence—Trials—Questions for Jury.*—Evidence in this action to recover on a life insurance policy, on behalf of the beneficiary, that the deceased had been absent for more than seven years, without hearing from him, whether he were alive or dead; that she had made frequent inquiries for him, had employed an attorney and detective to help find him, who had actively endeavored to do so without result, etc., is held sufficient, upon the question of the death of the insured, to be submitted to the jury. *Sizer v. Severs*, 165 N. C., 500, cited and applied. *Shuford v. Insurance Co.*, 547.

96. *Trials—Instructions—Directing Verdict—Evidence, How Construed.*—A requested instruction of a party that the judge charge the jury to answer the issues in his favor if they believe the evidence is equivalent to a demurrer or a motion to nonsuit; and in such instances the evidence should be most strongly construed in favor of the adverse party, and all facts which it reasonably tends to prove for him must be considered as established, the evidence which tends to disprove them being taken as true. *Smith v. Holmes*, 561.

97. *Same—Conflicting Evidence—Timber Contract — Breach — Measure of Damages.*—In this action to recover damages for a breach of contract of defendant to cut timber from plaintiff's land at a certain price, the plaintiff excepted and appealed from the refusal of the trial judge to give certain of his prayers for instruction directing a verdict in a certain sum upon the issue as to the measure of damages, evidently based upon the theory that under the terms and conditions of the contract he should be permitted to recover damages for all the timber upon the entire tract of land which should have been cut by the defendant within the time specified. There was evidence in defendant's behalf tending to show that the plaintiff entered upon the land, stopped the defendant from cutting the timber, and sold it to another party, with further conflicting evidence as to the amount of timber actually cut, etc., and it is *Held*, that the plaintiff's requested prayers were properly refused, and that the case was properly left to the jury. The charge of the court is approved. *Ibid.*

98. *Corporations—Officers—Compensation—Agreement in Advance—Trials —General Rule—Limitations to Rule—Evidence—Nonsuit.*—In an action brought by an officer against a corporation to recover for services rendered, it is error for the trial judge to nonsuit the plaintiff upon evidence tending to show that the corporation was composed of himself and two others, all of whom were elected officers, with the plaintiff as president, who met and decided that the plaintiff should enter the duties of salesman of the concern at a certain minimum salary, and that the services were accordingly rendered by the plain-

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tiff, the recovery of which is the subject-matter of the action, for from evidence of this character an express promise in advance on the part of the defendant to pay for such services may be reasonably inferred, and presents an issue of fact to be determined by the jury. The principles of law limiting the more general rule that an officer of a corporation may not recover for services rendered when compensation therefor has not been authoritatively agreed upon in advance, etc., discussed by HOKE, J. *Chiles v. Mfg. Co.*, 574.

99. *Negligence — Explosives — Children—Trials—Evidence—Questions for Jury.*—In an action to recover damages for injury caused to an 11-year-old boy in exploding a dynamite cap alleged to have been negligently left on the ground near a well which the defendant corporation had dug on its premises, there was evidence in plaintiff's behalf tending to show that the defendant had used dynamite in digging the well, and the boy found the dynamite cap on the ground or in an uncovered box near by, in an open or uninclosed place, and the injury occurred when he exploded the cap with a hammer; that this place was 8 or 10 steps from a much used path, 76 yards from the main entrance of defendant's mill where 600 or 700 people worked, and within a short distance of the defendant's store and of the post-office, and where children frequently went, the plaintiff on this occasion having gone upon seeing other children there. *Held*, evidence of defendant's actionable negligence sufficient to be submitted to the jury, and to sustain the charge of the court upon the question of whether the dynamite caps were left on the ground by the defendant's employees, whether the place was a public one, and whether the place or caps were likely to attract children. *Barnett v. Mills*, 576.

100. *Negligence—Explosives—Commensurate Care — Children—Invitation—Trials—Instruction.*—Those who use high explosives in the conduct of their business are held to a degree of care in their use commensurate with the danger of such instrumentalities, and where there is evidence, in an action to recover damages sustained by an 11-year-old boy, that he was injured by bursting a dynamite cap he had found on the defendant's premises, publicly situated and frequented by children, etc., near a well the defendant had been blasting, it is not error for the judge to charge the jury that one who maintains dangerous instrumentalities on inclosed premises, of a nature likely to attract children at play, or permit dangerous conditions to exist, while not liable to an adult under those circumstances, he is liable to a child so injured, though a trespasser at the time the injuries were received. *Ibid.*

101. *Parent and Child—Support of Child—Willful Abandonment—Trials—Evidence—Burden of Proof.*—In an action against a father to recover for the support, tuition, etc., of his minor children furnished by their grandmother, the plaintiff, there was evidence in behalf of the defendant tending to show that the plaintiff took possession of his children against his will and prevented him from having access to them or performing his parental duty as to their support and maintenance, and had then voluntarily surrendered them to him; as well as evidence to the contrary. *Held*, the burden of proof was on the plaintiff to show that she supported and maintained the children,

TRIALS—*Continued.*

and on the defendant that he was prevented by plaintiff from performing the duty himself, and when the verdict of the jury has been rendered, under proper instructions from the court, in defendant's favor, the case does not fall within the meaning of Revisal, sec. 180, providing that the parent shall be deemed to have forfeited all rights and privileges with respect to the care, custody, and services of his children whom he has willfully abandoned. *Howell v. Solomon*, 588.

102. *Same — Contract Implied — Torts—Damages.*—Where a grandmother seeks to recover in an action against the father for the tuition, board, etc., of his minor children, and the jury by their verdict, under proper instructions, have found that the plaintiff had deprived the defendant of their care and custody against his will during the time in question and should recover nothing, though ordinarily a recovery may be had as upon a *quasi* contract for services rendered, etc., the verdict will not be disturbed, for the plaintiff will not be permitted to take advantage of her own wrong. *Ibid.*

103. *Railroads—Excessive Speed—Public Crossings—Negligence — Automobiles—Guests—Last Clear Chance—Trials—Issues—Complex Instructions—Appeal and Error.*—In an action to recover damages of a railway company caused by its train in running upon an automobile in which the plaintiff was riding as a guest, at a public crossing, where the driver of the machine was attempting to cross at the time, there was evidence submitted to the jury upon the question of whether the defendant's train was being run at an unlawful speed, but the case was tried upon the theory, (1) that the defendant had failed to give notice of its approach, and (2) that the engineer thereon, by the exercise of proper care, could have stopped the train in time to have avoided the injury after he had seen or should have seen the plaintiff's danger. The evidence as to the excessive speed of the defendant's train was not relied on as a distinct ground of action, but in support of the other issues; and construing the charge as a whole it is *Held*, in this case, that the principles of law were correctly charged by the court as applicable to the evidence in their relation to the issues of negligence and last clear chance, and not objectionable as making the plaintiff responsible for any negligent act of the driver of the car; and it is *Further held*, that a new trial will not be awarded on a theory that a charge was more complex than necessary and that the jury did not understand it. *Bagwell v. R. R.*, 611.

104. *Trials—Nonsuit—Evidence.*—Upon a motion to nonsuit, the evidence should be considered in the most favorable aspect for the plaintiff; and there being evidence in this case that the plaintiff notified the surety in a bond given to indemnify him for loss on account of a contract entered into for the construction of a house, in accordance with the terms of the bond, the motion was properly denied. *Harris v. Guaranty Co.*, 624.

105. *Trials — Instructions—Unconflicting Evidence—Directing Verdict.*—In an action to recover from an indemnity company damages caused to the owner by a contractor's default under his contract to erect a house, the evidence being uncontradicted, it is held that the judge properly instructed the jury to find the amount of damages in plaintiff's favor. *Ibid.*

TRIALS—*Continued.*

106. *Appeal and Error—Record—Trials — Instructions — Exceptions — Presumptions—Supreme Court—Discretionary Powers.*—When exceptions are taken to the refusal of the trial judge to give proper instructions of law upon the evidence and issues in controversy, which were duly requested, it must appear of record that these instructions were not substantially given in the charge; and when the record does not set out the charge it will be presumed that the court correctly charged the law applicable to the case, though the Supreme Court, acting under its discretionary powers, may order the charge to be sent up when it thinks that a clear miscarriage of justice may thereby be prevented. *Hornthal v. R. R.*, 627.

107. *Electricity—Negligence—High Degree of Care—Trials—Instructions—Ordinary Care—Appeal and Error.*—While corporations engaged in the business of furnishing electric power and light to their patrons are not regarded as insurers against injury, they owe the duty to the public and to their patrons to exercise a high skill and the most consummate diligence and foresight in the construction, maintenance, and inspection of their plants, wires, and appliances consistent with the practical operation of their business; and when in an action for damages there is evidence tending to show that the plaintiff was injured on the streets of a city by coming in contact with the defendant's live wire, heavily charged with electricity, lying down upon the sidewalk, it is reversible error for the trial judge to charge the jury, in effect, upon the issue of defendant's negligence, that the care required of the defendant in such instances was that of the ordinarily prudent man. *Turner v. Power Co.*, 630.

108. *Trials—Issues—Electric Wires—Control and Ownership.*—It being contended in this action against an electric power company that the wire with which the plaintiff came in contact, causing the injury, was not operated by the defendant or under its control, a separate issue upon that question should be submitted to the jury. *Ibid.*

109. *Trusts and Trustees—Parol Trusts—Equitable Mortgage—Ready, Etc., to Pay—Issues—Verdict.*—The plaintiff having established by parol an interest in his favor in the nature of an equitable mortgage in the lands, conveyed to the defendant, it is *Held*, that an answer to an issue including the findings of facts, that the plaintiff was not and is not ready, able, and willing to comply with the terms of the agreement, does not bar the plaintiff of his equitable interest, it appearing of record that the plaintiff had offered to pay the full amount of the purchase price, with interest, etc., into court for the use of the defendant, and that actual payment was waived by him, and it is *Further held*, under the instruction of the court, in this case, that the jury must have found by their answer to this issue that the plaintiff could not have paid the money from his own earnings, which does not preclude the right of the plaintiff to have obtained the money from other sources. *Lutz v. Hoyle*, 632.

110. *Trials—Instructions—Construed as Whole—Appeal and Error.* — The charge of the court in this case is construed as a whole, and being according to Laws 1913, ch. 6, sec. 1, and precedents, no error is found. *Ward v. R. R.*, 161 N. C., 180, cited and applied. *Ingle v. R. R.*, 636.

TRIALS—*Continued.*

111. *Trials—Negligence—Instructions—Appeal and Error—Harmless Error.*—The plaintiff's intestate, a brakeman on defendant's train, was caught between the tank of the engine and box car and mashed to death, and it is *Held*, that the court in his general charge upon the question as to whether the intestate went between the cars without the knowledge of defendant and against its orders, etc., instructed more favorably to the defendant than it had specially requested, and no reversible error is found. *Ibid.*

112. *Railroads—Negligence—Employees—Willful and Reckless Acts—Trials—Evidence—Nonsuit.*—The plaintiff, at the request of an employee of the defendant railroad company, was on the ground assisting him in lifting a 500-pound keg down from the car, while another employee in the car was helping from that place. A hoop of the keg in some way caught in the side of the car door, and owing to the efforts of the employee in the car in helping to free it, the keg came loose and fell upon the plaintiff, causing the injury complained of. The question of the defendant's negligence being eliminated, it is *Held*, that the evidence was insufficient to sustain a judgment for exemplary damages for the willful or reckless acts of the defendant's employee; and if it were otherwise, the judgment rendered could not be sustained, there being no finding that the defendant was responsible for the willful or reckless acts of its agent, if any were committed by him. *Brittain v. R. R.*, 642.

113. *Automobiles — Negligence—Trials—Issues—Proximate Cause—Instructions—Appeal and Error.*—In an action to recover damages for injuries alleged to have been sustained by the negligence of the defendant, while driving an automobile, in running over the plaintiff, it is error for the trial judge to instruct the jury to answer the issue as to defendant's negligence in the affirmative if the evidence satisfied them, by its greater weight, that the machine was being run in a negligent manner; for this eliminated the question of proximate cause; and when it appears that the error was not cured by construing the charge as a whole, it is reversible error. *Clark v. Wright*, 646.

114. *Deeds and Conveyances—Registration—Immediate Parties—Delivery—Parol Evidence—Trials—Burden of Proof.*—It may be shown that a deed registered after the death of the grantor had never been executed or delivered, as between the immediate parties, the burden of proof being on the plaintiff. *Linker v. Linker*, 651.

115. *Trials—Instructions—Verbal Requests—Appeal and Error.*—The trial judge has the right to ignore a prayer for special instructions when not reduced to writing, and an exception to his doing so will not be considered on appeal. *Ibid.*

116. *Deeds and Conveyances — Delivery — Evidence—Issues—Answers—Instructions.*—Where the issues in an action to set aside a deed, one as to its actual signing and delivery and the other as to the mental capacity of the maker, it is proper for the trial judge to instruct the jury not to consider the second issue, should they find the first one in the negative. *Ibid.*

117. *Partition—Title.*—It is held, under the evidence in this action, involving the disputed title to lands, that the plaintiff's contentions that the land was allotted to the one under whom he claims in proceedings for

TRIALS—*Continued.*

partition in 1835 were clearly and properly submitted to the jury upon a proper issue. *Horton v. Jones*, 664.

118. *Limitations of Actions—Adverse Possession—Color—Trials—Questions for Jury.*—Evidence of adverse possession to ripen title to lands under color is sufficient to be submitted to the jury which tends to prove actual possession for the statutory period by one claiming the title in his own right, and that he has made such use of the land as its condition rendered capable of, with acts of ownership so repeated as to show they were committed in his character as owner, in opposition to the right or claim of any other person, and not as an occasional trespasser; and the charge of the court under the evidence of this case is not objectionable on the ground that the evidence of plaintiff's adverse possession was insufficient to authorize it. *Ibid.*

119. *Judicial Sales—Trials—Evidence—Questions for Jury.*—In this action, involving title to lands, the plaintiff's claim by adverse possession under color is made to depend upon whether the lands were included in an exception of lands in a junior grant from those granted in a senior grant, and by way of estoppel the defendant sets up that in 1855 these lands were sold as being contained in the junior grant under an order of a court of equity to pay the debts of the original owner, and that those under whom the plaintiff claims were parties to these proceedings as his heirs at law. The petition for sale describes the land in accordance with the description contained in the junior grant, the order of sale conformed therewith, but the deed of the commissioner to sell nevertheless included the *locus in quo*. The decree of sale generally referred to the description in the junior grant and the order of sale confirming it, and it is held that it is for the jury to determine whether the *locus in quo* was embraced in the lands covered by the exception in the junior grant, the deed of the commissioner being invalid to pass title to more lands than those described in the petition and order of sale, and the decree therefor and to that extent being inoperative to estop the plaintiff. *Ibid.*

120. *Contracts—Breach—Damages—Second Contract—Amendments—Court's Discretion—Nonsuit.*—Where upon a trial for damages for a breach of a written contract it is admitted that the contract sued on had been superseded by another and different one, requiring answers to issues not raised by the pleadings, and a requested amendment to the complaint has been refused by the trial judge, a judgment of nonsuit is properly allowed. *Adickes v. Chatham*, 681.

121. *Contracts — Breach—Damages—Second Contract—Nonsuit.*—The plaintiff sued for damages on breach of contract for the sale of certificates of capital stock in a corporation held by D., by the terms of which the plaintiff and defendant would have practically been created partners in equal interest with D., who was not a party to the contract. D. refused to perform the contract and failed to furnish the stock. The plaintiff afterwards acquired the stock and entered into a new contract with the defendant. This action is upon the first contract, and it is held that it would not lie, for the later contract necessarily superseded and put an end to it. *Ibid.*

122. *Deeds and Conveyances — Adverse Possession — Tenants—Trials—Evidence—Questions for Jury.*—The plaintiff having shown a sufficient

TRIALS—*Continued.*

and connected title to the land in controversy in himself, it is necessary for the defendant, claiming by adverse possession under a deed to his ancestor, as color, to show a continuity of such possession for seven years; and it is held in this case that the possession by a tenant of his ancestor for one year, under his deed, and the occasional entry upon the land by his heirs at law after his death, for the purpose of cutting a few logs, is insufficient evidence of adverse possession in character and continuity to be submitted to the jury. *Land Co. v. Floyd*, 686.

TRUSTS.

1. *Trusts and Trustees—Active Trusts—Title—Execution—Sales—Statute of Uses.*—A trustee created by deed for the purpose of collecting rents and profits from lands and paying them over to the *cestuis que trustent* named in the conveyance is a trustee of an active trust, which is not executed by the statute of uses, and during the continuance thereof the interests in the lands of one of the *cestuis que trustent* may not be sold under execution of a judgment obtained against him, the title to and the possession of the land necessarily being in the trustee. *Rouse v. Rouse*, 208.
2. *Trusts and Trustees—Active Trusts—Title and Possession—Execution Sales—Trustee a Purchaser—Limitation of Actions.*—Where the wife of the grantor is to share in the rents and profits of certain lands, to be held in trust, with his children, and at her death the lands to be divided between his children; and during the lifetime of the wife, a personal judgment is obtained against one of the children and his interest in the lands is sold under execution of the judgment and purchased by the trustee named in the deed, who immediately declares his possession of said interest in his own right, and so notifies the judgment debtor, the sale of such interest is void, and the latter having no present right to the possession of his interest in the land, the title and possession being in the trustee for the purposes of the trust, the statute of limitation will not run in favor of the trustee, his possession being also the possession of all of the *cestuis que trustent*. *Ibid.*
3. *Deeds and Conveyances—Equitable Estates — Estate in Fee—Limitations—Uses and Trusts—Contingent Uses.*—While at common law an estate in fee cannot be made to cease as to one and to take effect as to another by way of limitation, depending upon a contingent event, it may be so under the doctrine of springing and shifting uses, or conditional limitations; and construing the deed in this case to effectuate the clear intention of the grantors without regard to the severely technical rules of the common law, it is held that the grantors intended to reserve the legal title to the land in themselves for life and to convey an equitable fee therein to the grantee, subject to the life estate of the grantors, to be divested in case she does not survive them, or fails to perform, during their lives, the conditions therein named, and if these conditions are not fulfilled, then the limitations to the makers' heirs shall take effect. *Phifer v. Mullis*, 405.
4. *Corporations — Capital Stock — Trusts and Trustees—Subscribers to Stock.*—The capital stock of a corporation is a trust fund for the benefit of the creditors of the corporation and its stockholders, and its

directors or other governing officers cannot release an original subscribed to its capital stock, or make any arrangement with him by which the company, its creditors, or the State shall lose any of the rightful benefits of his subscription. *Gilmore v. Smathers*, 440.

5. *Corporations — Subscription to Stock — Trusts and Trustees—Unpaid Stock—Creditors.*—Subscriptions of indebtedness for stock due a corporation are a trust fund for the benefit of its creditors, and whatever may be the rights of the stockholders as among themselves, the creditors have the right to have such fund collected and applied to the discharge of their debts, which may be required by the courts, when necessary, and in a proper and appropriate action. *Bernard v. Carr*, 481.

6. *Trusts and Trustees—Parol Trusts—Evidence—Common Law.*—There being no statute in North Carolina to the contrary, the common-law rule prevails here, that a trust may be created by parol agreement entered into between the parties before or at the time of the transmission of the legal title to lands, and that when created it attaches to and becomes a part of the title, the difference between establishing a parol trust and that under a sufficient writing being only in the mode and degree of proof. *Lutz v. Hoyle*, 632.

7. *Same — Equitable Mortgage — Equity of Redemption — Foreclosing—Power of Sale—Court's Decree.*—Where it is established that a purchaser of lands agreed by parol at the time of the purchase that he would bid in the lands at a certain price and hold them for the benefit of the other party to the agreement, and convey to him upon a part payment of the purchase price at a specified time, and take a mortgage for the balance, etc., and subsequently refuses to carry out this agreement, in a suit to declare a parol trust upon the land it is *Held*, that the effect of the conveyance is to vest in the plaintiff an equitable estate of redemption, which cannot be foreclosed in the absence of an abandonment of the right and in the absence of a power of sale, legally ascertained, except by decree of a court of equity, the relation of the parties being that of mortgagor and mortgagee. *Ibid.*

8. *Trusts and Trustees—Parol Trusts—Equitable Mortgage—Readiness to Pay—Equity of Redemption.*—A parol trust in plaintiff's favor engrafted upon the title to lands acquired by the defendant, and the relation of mortgagor and mortgagee (without power of sale) having been established, an answer to the issue finding that the plaintiff was not ready, able, and willing to pay the money secured, does not necessarily bar the plaintiff's right to redeem. *Ibid.*

9. *Trusts and Trustees—Parol Trusts—Equitable Mortgage—Ready, etc., to Pay—Issues—Verdict.*—The plaintiff having established by parol an interest in his favor in the nature of an equitable mortgage in the lands, conveyed to the defendant, it is *Held*, that an answer to an issue, including the findings of facts, that the plaintiff was not and is not ready, able, and willing to comply with the terms of the agreement, does not bar the plaintiff of his equitable interest, it appearing of record that the plaintiff had offered to pay the full amount of the purchase price, with interest, etc., into court for the use of the defendant, and that actual payment was waived by him, and it is *Further held*, under the instruction of the court, in this case, that the

TRUSTS—*Continued.*

jury must have found by their answer to this issue that the plaintiff could not have paid the money from his own earnings, which does not preclude the right of the plaintiff to have obtained the money from other sources. *Ibid.*

10. *Trusts and Trustees—Parol Trust—Lease—Estoppel.*—In this action to establish an equity arising "in the defendant's title to land" it is *Held*, that an issue as to whether the plaintiff was estopped by certain leases from maintaining his action for specific performance was correctly answered under the authority of *Hauser v. Morrison*, 146 N. C., 252. *Ibid.*

TRUSTS AND TRUSTEES. See Trusts.

USES. See Trusts.

USURY. See Bills and Notes, 5.

VENDOR AND PURCHASER. See Judicial Sales, 9.

1. *Vendor and Purchaser—Contracts—Implied Warranty—Trials—Burden of Proof.*—There is ordinarily no implied warranty of quality of wares upon a contract of sale made between dealers, but the wares delivered thereunder must, at least, be salable; and where oranges are sold by the box, without reference to quality, there is an implied warranty that they will not be delivered in such unsound or rotten condition that they will not be merchantable; and the burden of proof is on the purchaser in his action to recover the consequent damages in his action upon the implied warranty. *Ashford v. Shrader*, 45.

2. *Same—Waiver—Inspection—Questions for Jury.*—Where the seller of oranges by the box ships them bill of lading attached to draft, subject to inspection, and they are accepted by the purchaser, and there is evidence tending to show that he had first inspected them in the usual or customary manner without discovering their damaged condition, the question of whether he waived his right to recover damages by his inspection is properly left to the determination of the jury, with the burden of proof on the plaintiff to show that he made the inspection with ordinary care. *Ibid.*

3. *Contracts — Goods Sold on Commission — Amount Due — Trials—Evidence.*—Where the matter at issue between the parties to an action is as to the amount due the plaintiff in commissions upon the accepted sales of goods he has made for the defendant, it is competent for the plaintiff to testify as to the full amount of his sales, for the purpose of subsequently showing how many of them the defendant had shipped out under his contract; and he may be permitted to refer to corresponding sections of complaint and answer to make his testimony more intelligible, without necessarily making such sections evidence in the case. The plaintiff may also state the amount he claims as owing to him by the defendant, and explain its items, including those he contends were wrongfully charged against him on the defendant's books; and it is further held that the defendant will not be permitted unfairly to hold back shipments merely for the purpose of depriving the plaintiff of his commissions. *Peyton v. Shoe Co.*, 280.

5. *Vendor and Purchaser — Fraud — Conjecture—Trials—Evidence.*—Evidence which raises no more than a mere conjecture of fraud is insuffi-

VENDOR AND PURCHASER—*Continued.*

cient to raise the issue; and recommendations which are only commendatory in the sale of a horse, relating to his foal-getting qualities, are insufficient, when they do not materialize, to raise the issue of fraud in the procurement of a note given for its purchase price. *Altman v. Williams*, 312.

6. *Vendor and Purchaser — Contracts—Warranties—Breach—Damages—Conditions—Performance by Purchaser.*—Where the vendor brings an action on a note given for a stallion, and the purchaser claims damages on a written warranty of the vendor that the stallion "be at least 60 per cent foal-getter," and if not as represented and returned by a certain date, he would replace it with another or return the purchase money, it is necessary, to maintain his counterclaim, that the defendant shall have performed the conditions required of him and returned the stallion in the time specified. *Ibid.*

7. *Vendor and Vendee—Goods Returned—Purchase Price.*—In an action for the purchase price of goods sold and delivered, it appeared that the purchaser returned a part of the goods as unsatisfactory, paying for the balance, and that the seller received and kept them. *Held*, the latter cannot recover for those returned, the case being governed by *Medicine Co. v. Davenport*, 163 N. C., 294. *Jewelry Co. v. Pittman*, 626.

VENUE.

1. *Actions—Venue—Accounting—Personal Property—Incidental Relief.*—Where the main relief sought in an action is for an accounting by the defendant of promissory notes, moneys, and other personal property of the plaintiff's in his hands, and the possession of the property is incidental thereto, it is error for the court to remove the cause to the county of the defendant's residence upon his motion therefor; and where it is alleged that the defendant wrongfully induced the plaintiff to sign a paper, falsely representing it to be a power of attorney for certain purposes, which in fact was a deed to lands, that the defendant sold these lands and had received certain moneys, notes, etc., therefor, to the possession of which the plaintiff was entitled, and demanded an accounting and settlement, the defendant's motion to remove should be denied. *Clow v. McNeill*, 212.

2. *Same—Jurisdiction—Equity—Injunction.*—Where the court erroneously orders a cause of action removed to the county of the defendant's residence, upon the ground that it was an action to recover personal property, the main relief sought being that for an accounting, and at the same time continues the plaintiff's restraining order, arising in said cause, to the final hearing, exception to the latter order on the ground that it was made in a county where the court was without jurisdiction cannot be sustained. *Ibid.*

VERDICT. See Courts, 2, 26, 39; Trials, 32.

VERICT, DIRECTING. See Trials.

VERIFIED ACCOUNT. See Evidence, 28.

VIS MAJOR. See Evidence, 37.

WAIVER. See Pleadings, 9, 10; Reference, 5; Process, 6; Insurance.

1. *Evidence—Depositions—Irregularities—Waiver.*—Where a party agrees that depositions, which have been taken by his opponent, may be opened and read upon the trial, reserving only the right to object to incompetent testimony therein, he waives his right to object to the irregularity of taking the depositions. *Hardy v. Insurance Co.*, 22.

2. *Carriers of Goods—Bills of Lading—Stipulations—Live Stock—Written Notice—Waiver—Evidence.*—A stipulation in a bill of lading given by a common carrier for a shipment of live stock, requiring that written notice of claim for damages be given the delivering carrier before the live stock is removed or intermingled with other live stock, is a reasonable one to afford the carrier an opportunity of such examination as will enable it to protect itself from false or unjust claims, and will be upheld as a condition precedent to the right of recovery. And the mere fact that the claimant verbally notified some one employed by the carrier as a laborer, in the absence of the agent, of an injury to one of a car-load of mules, which had been transported by the carrier, before accepting and taking the mule away and intermingling it with other live stock, is neither a compliance with the terms of the stipulation by the claimant nor a waiver thereof on the part of the carrier. *Jones' case*, 148 N. C., 580, and *Southerland's case*, 158 N. C., 327, cited and distinguished. *Duvall v. R. R.*, 24.

3. *Vendor and Purchaser — Waiver — Inspection — Questions for Jury.*—Where the seller of oranges by the box ships them bill of lading attached to draft, subject to inspection, and they are accepted by the purchaser, and there is evidence tending to show that he had first inspected them in the usual or customary manner without discovering their damaged condition, the question of whether he waived his right to recover damages by his inspection is properly left to the determination of the jury, with the burden of proof on the plaintiff to show that he made the inspection with ordinary care. *Ashford v. Shrader*, 41.

4. *Torrens Law—Remedial Statutes—Interpretation.*—Chapter 90, Laws 1913, known as the "Torrens Law," is not in derogation of common right, but is of a remedial character, and should be liberally construed according to its intent. *Cape Lookout Co. v. Gold*, 63.

5. *Same — Summons—Notice—Publication.*—Where the summons in proceedings to register lands under chapter 90, Laws 1913, known as the "Torrens Law," has been issued and served under the provisions of section 6 of the act, it is not requisite to the validity of the proceedings that the publication of notice of filing should have been made on exactly the day the summons was issued, if the publication has been made in the designated paper once a week for four successive weeks, as directed by section 7 thereof. It appears in this case that the publication in a weekly paper was made in its first issue after the clerk of the court received the summons, and that all other requirements of the statute had been complied with. *Ibid.*

6. *Torrens Law—Notice—Publication—Waiver.*—In proceedings under the "Torrens Law" (ch. 90, Laws 1913, secs. 6 and 7) to register a title to lands, a party claiming an interest in the lands waives his right to object on the ground of the irregularity in the publication of notice by appearing and answering the petition. *Ibid.*

WAIVER—*Continued.*

7. *Insurance, Life—Premium Notes—Condition of Forfeiture—Subsequent Agreements—Waiver—Trials—Questions for Jury.*—The delivery of a life insurance policy absolute and unconditional is a waiver of the stipulation for a previous or contemporaneous payment of the first premium; and where the insurer has received the insured's note for the payment of this premium upon condition that the policy shall be avoided unless the note is paid at maturity, the condition will be upheld unless the time for its payment has been postponed by valid agreement or the stipulation, made for the benefit of the company, has in some way been waived by it, or the company has so acted in reference to the matter as to induce the policy-holder, in the exercise of reasonable business prudence, to believe that prompt payment is not expected and that forfeiture on that account will not be insisted upon. *Murphy v. Insurance Co.*, 334.

8. *Same—Renewal Notes—Principal and Agent.*—Where the insured has had the policy of life insurance sued on delivered to him by the company, and for the payment of the first premium has given his note with provision that unless paid at maturity the policy should become null and void, and there was evidence tending to show that this note was indorsed to its agent, likewise indorsed by him and given to the local bank for collection, and by it transmitted to the bank of the home office for collection, and that the insured, before the maturity of the note, went to the company's home office to make arrangements for an extension of time of payment, was referred by it to the bank there, which accepted a part payment on the note, and a renewal note extending the time of payment for the balance; that the company sent written notice to the insured's address, to pay the extension note given by him, advising him to get remittance there by its due date to keep his policy from lapsing; that the insured died after the date the first premium note was due, but before that of the renewal note, for which payment was offered at the home office of the company before maturity, and refused: *Held*, sufficient for the determination of the jury upon the question of whether there was a valid agreement to postpone the payment of the first note or a waiver of its conditions, by which the insured was given until the due date of the renewal note to make payment of the balance due on his first premium. *Ibid.*

WARRANTY. See Contracts, 25.

WATER AND WATER-COURSES.

1. *Railroads—Construction—Negligence—Drain Pipes—Ponding Water—Limitations of Actions.*—Where a plaintiff sues a railroad company for damages arising from sickness in his family alleged to have been caused by the negligence of the defendant in failing to properly keep open a culvert under its track to carry off accumulating or running waters, resulting in ponding the waters upon plaintiff's lands under his dwelling-house, the negligence complained of is not barred by the five-year statute of limitation, running from the time the culvert was constructed, the damages sought having arisen from an alleged subsequent negligent act in connection with the drain. *Rice v. R. R.*, 1.

WATER AND WATER-COURSES—*Continued.*

2. *Railroads — Ponding Water — Malaria—Mosquitoes—Evidence.*—In an action to recover damages of a railroad company for malarial sickness alleged to have been caused in the plaintiff's family from the negligence of the defendant in not keeping a drain under its track properly cleaned out and open, thus ponding water under the plaintiff's dwelling, his physician testified that the ponded water bred mosquitoes whose bite caused the malaria, and it is held competent for plaintiff to testify as to the sickness of certain of his children thus caused. *Ibid.*

3. *Railroads—Drain Pipes—Ponding Water—Malaria—Negligence—Trials—Evidence—Burden of Proof—Instructions.*—Where a railroad company is sued for not keeping its drain pipe under its roadbed properly cleaned out, thus ponding water under the plaintiff's house, and causing sickness in his family, and there is evidence tending to show this resulted in the sickness complained of, it is competent to ask a witness whether the water would have been thus ponded had the drain been cleaned; and in this case it is held that the instruction of the judge as to the burden of proof was not objectionable to the defendant. *Ibid.*

WILLS.

1. *Wills—Estates—Limitations Over—"Blood Relative"—Heirs—Rule in Shelley's Case.*—A devise of an estate for life with limitation over to G. "to have and to hold during her natural life and at her death to her nearest blood relative," does not create a fee simple in the remainderman after the death of the first taker, for the term "nearest blood relative" is not equivalent to the word "heirs." The rule in *Shelley's case* does not apply. *Miller v. Harding*, 53.

2. *Wills—Interpretation—Intent.*—While the intent of the testator as contained in the entire instrument is the object to be sought in construing a will, this intent must be gathered primarily from the language used by him, and when he has explained such intent in language that is clear, definite, and plain of meaning, this must be given effect by the courts, and other means of interpretation are not permissible. *McCallum v. McCallum*, 310.

3. *Wills — Presumptions of Testacy—Interpretation—Intent—Intestacy.*—The presumption that a testator did not intend to die intestate as to any of his property does not obtain when a different intent appears from the language used by him in his will; and it is *Held*, that a devise of land for life to the testator's widow and to his daughters remaining unmarried, without further direction or limitation, expresses the testator's intent to provide the daughters a home so long as they remain single, and at their death unmarried and the death of the widow the lands will descend to his heirs at law. *Ibid.*

4. *Deeds and Conveyances—Legal Significance—Caveat—Wills—Parol Evidence.*—Where a paper-writing sought to be probated as a will gives unmistakable evidence of its legal character as a deed, *i. e.*, passes a present irrevocable interest, though not necessarily the immediate possession, and made upon a valuable consideration, parol evidence is inadmissible to show a contrary intent, that it was to operate as the will of the maker. *Phifer v. Mullis*, 405.

WILLS—*Continued.*

5. *Deeds and Conveyances—Caveat—Wills — Consideration of Services—Equitable Fee — Registration — Delivery—Presumptive Evidence.*—A paper-writing made by a man and his wife, agreeing to convey to their granddaughter certain described lands, and stating that she shall have the same in consideration of taking care of the makers, that is, she shall well and truly take care of them during their natural lives, etc., and that the conditions of the agreement are such that if the said granddaughter should die before said parties of the first part, then the property belonging to the said parties of the first part at their death shall descend to their lawful heirs and assigns as the law directs: *Held*, the granddaughter, in consideration of the services to be performed, and conditioned upon the consideration of her performing them, took, upon her accepting the deed, an equitable fee *in præsenti* in the lands described, the enjoyment of which was postponed until after the death of the grantors, and then vested absolutely if she had performed the conditions; and it is *Further held*, that the registration of the deed after the death of one of its makers, and found in the possession of the grantee, is evidence of its delivery. *Ibid.*

6. *Wills—Caveat—Issues—Deeds and Conveyances—Execution.*—Upon the proceedings to caveat a paper-writing sought to be established as a will, the issue should only relate to the question of *devisavit vel non*, and where it is established from the legal character of the paper offered that it is not a will, but a deed, the courts in that proceeding will not pass upon the validity of its execution. *Ibid.*

7. *Deeds and Conveyances—Witness to Deeds—Weight of Evidence—Wills—Witnesses of the Law.*—The testimony of a witness to a deed sought to be set aside for lack of execution and delivery has no greater weight than that of any other witness under oath. It is otherwise with witnesses to a will, who are witnesses of the law. *Cornelius v. Cornelius*, 52 N. C., 593. *Linker v. Linker*, 651.

WITNESSES. See Libel and Slander, 8; Courts, 17; Trials; Wills.

*Trials—Instructions—Interested Witnesses.*—A prayer for special instructions, that the expert witnesses testifying in plaintiff's behalf were inclined to view the circumstances in a favorable light for plaintiff, is objectionable as an expression of opinion by the court forbidden by statute. *Ferebee v. R. R.*, 290.