ANNOTATIONS INCLUDE VOL. 209

NORTH CAROLINA REPORTS

VOL. 168

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1914
(IN PART).

SPRING TERM, 1915
(IN PART).

BY

ROBERT C. STRONG,
STATE REPORTER

REPRINTED UNDER AUTHORITY OF C. S. 7671

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1936

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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

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

ATTORNEY-GENERAL:

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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.*
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John H. Kerr	Third	Warren.
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H. Clement	Fifteenth	Rowan.
Thomas M. Newland	Sixteenth	Caldwell.
J. J. Hayes	Seventeenth	Wilkes.
Michael Schenck	Eighteenth	Henderson.
J. E. Swain	Nineteenth	Buncombe.
G. L. Jones	Twentieth	Macon.

ATTORNEYS LICENSED BY SUPREME COURT

SPRING TERM, 1915.

Name.	*Town.*	*County.*
CHARLES CRAWFORD SMATHERS	Canton	Haywood.
WAVERLY ALEXANDER RUDISILL	Iron Station	Lincoln.
GEORGE CLINGMAN PENNELL	Asheville	Buncombe.
LEON SIMPSON BRASSFIELD	Neuse	Wake.
JULIUS CLARENCE SMITH	High Point	Guilford.
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LOUIS B. MYER	Enfield	Halifax.
ROBERT BAYARD GREEN	Rutherfordton	Rutherford.
ROBERT RAY INGRAM	Albemarle	Stanly.
CALVIN MONROE ADAMS	Statesville	Iredell.
BURWELL DUKE CRITCHER	Williamston	Martin.
JETER MCKINLEY PRITCHARD	Asheville	Buncombe.
PAUL SIMMONS HERRING	Garland	Sampson.
ROY CLAYTON CAUSEY	Winterville	Pitt.
RICHARD HENRY LEWIS	Kinston	Lenoir.
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HENRY ADAMS WHITFIELD	Goldsboro	Wayne.
JOSEPH MANSON TURBYFILL	Waynesville	Haywood.
CHARLES DONALD COFFEY, JR.	North Wilkesboro	Wilkes.
LAUCHLIN MCNEILL	Burgaw	Pender.

LICENSED ATTORNEYS.

Name.	*Town.*	*County.*
JOSEPH SANFORD COWLES	Wilkesboro	Wilkes.
AUGUSTINE WALSTON MACNAIR	Tarboro	Edgecombe.
JOSEPH GREEN DAWSON	New Bern	Craven.
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CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1915

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. HENRY 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, Asheboro.

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

FALL TERM, 1914

EVON L. HOUSER, ADMINISTRATOR, v. T. M. FAYSSOUX, L. F. GROVES, AND E. L. WILSON.

(Filed 9 December, 1914.)

1. Corporations—Bills and Notes—Indorser—Notice of Dishonor.

One who places his signature upon the back of a commercial paper without indication that he signed in any other capacity is deemed an indorser (Revisal, 2212), and is entitled to notice of dishonor; and the entity of a corporation being distinct, the rule applies when its directors indorse the corporate note for accommodation.

2. Bills and notes—Payment by Maker—Indorser—Limitations of Actions.

Payments made by the maker of a commercial paper will not repel the bar of the statute of limitations as to an indorser.

APPEAL by plaintiff from *Shaw, J.*, at September Term, 1914, of GASTON.

Civil action to recover on a promissory note, as follows:

$2,000.

One day after date we promise to pay J. B. White or his order the sum of $2,000, for value received of him, interest at 6 per cent per annum from 1 July, 1902.

This the 2d day of July, 1902. DALLAS COTTON MILLS.

(Seal) J. R. LEWIS, *President.*

Attest: J. D. MOORE, *Secretary and Treasurer.*

(2) The defendants indorsed this note by writing their names on the back before delivery to plaintiff's intestate, said defendants being directors of Dallas Cotton Mills. The interest on the note was paid by the corporation semiannually to 1 July, 1910. On 1 October, 1910, $100 was paid by the corporation, and similar payments 15 November, 1910, and 1 February, 1911.

At the conclusion of the evidence the court rendered judgment for the defendants, dismissing the action, and the plaintiffs appealed.

S. J. Durham and F. I. Osborne for plaintiffs.
Mason & Mason and Mangum & Woltz for defendants.

BROWN, J. There are two defenses interposed: Want of notice of dishonor, statute of limitations. That the defendants were accommodation indorsers on the note sued on is admitted.

It appears that the defendants placed their signatures on the back of the note; that they were not otherwise parties to the note; and it not appearing that they intended to be bound in some other capacity, they became liable as indorsers and were entitled to notice of dishonor. *Perry v. Taylor,* 148 N. C., 362; Eaton and Gilbert on Commercial Paper, sec. 108.

It is contended, however, that the defendants were directors of the cotton mills and, therefore, no notice of dishonor was required; and for this position the plaintiff cites *Hall v. Myers,* 90 Ga., 674.

It appears in the declaration in that case, and is admitted by the demurrer:

1. "That each of said directors so signing said notes did so as surety for the maker, and it was so understood and agreed between each of them"; and

2. "That the maker (the company) was 'utterly insolvent' at the time of the execution of the note."

The Court bases its decision upon these facts, and the inference from this opinion is that the Court would have decided the case differently if it had not been *understood and agreed between the directors, who indorsed their names on the notes,* that they were "doing so as *sureties for the maker,*" or if the company had been solvent.

In the case at bar there was no understanding or agreement that the indorsers were signing the note in controversy as sureties, and there was no evidence tending to prove that the Dallas Cotton Mills was insolvent. The facts in that case distinguish it from this. If the defendants had "understood and agreed that they were signing the note in controversy as sureties," it would take the case out of the provisions of section 2212

of the Revisal; but nothing of that nature appears in the case. The *Hall case, supra,* is not in line with the great weight of authority.

It is generally held that the fact that the indorsers constituted (3) a majority of the board of directors of a corporation does not dispense with the necessity of notice of dishonor. *Phipps v. Harding,* 70 Fed. Rep., 468, C. P. A., and cases cited.

The prevailing doctrine is that the corporate entity is as distinct from its officers and directors as it is from third persons with whom it transacts business, and stockholders or directors who lend their individual credit to the corporation of which they are members by indorsement of negotiable paper, or otherwise, are entitled to the same rights and immunities which attach to the status of indorser or surety, where third parties have assumed those liabilities. Eaton and Gilbert on Commercial Paper, p. 486; *Burg v. Legge,* 5 M. and W. (Eng.), 418; *Carter v. Flower,* 16 M. and W. (Eng.), 749; *Brown v. Ferguson,* 4 Leigh (Va.), 39; 24th Am. Dec., 707.

Referring to *Hall v. Myers, supra,* the Circuit Court of Appeals, in *Phipps v. Harding, supra,* says: "The case of *Hall v. Myers,* 90 Ga., 674 (16 S. E., 653), is urged upon our attention in support of this contention. The decision of the Court upon this question is bottomed, as we think, upon incorrect reasoning, and is without the support of authority."

A very full and able discussion of this subject is to be found in the case of *McDonald v. Luckenback,* 170 Fed. Rep., 434, in which it is said: "It is true that the defendant and the two other indorsers were officers and stockholders of the company, as was also the decedent and payee of the note; that they were interested in the success of the corporation of which they were directors and stockholders; that they were, so to speak, managing directors, and as such were financing the affairs of the corporation. . . . We think there is no evidence disclosed by the record tending to show that anything else was contemplated by those who negotiated this loan than that it was to be a loan to the corporation for the promotion of its business, for which the corporation was to be primarily bound by the promissory note, which it made, and that the directors who loaned their credit by indorsement assumed the secondary liability of indorsers, and none other.

"All evidence is consistent with this state of the transaction, and no other interpretation, it seems to us, can be given to it, unless, indeed, directors and officers of a corporation interested in its successful operation cannot, in negotiating a loan for the benefit of the corporation, insure its credit by assuming only the liability of indorser of its nego-

tiable paper. Such a proposition, of course, can be sustained neither by reason nor authority."

As to the plea of the statute of limitations, we think the note is barred. It is true that it is well settled in this State that a payment by the principal on a note before the bar of the statute operates as a re-
(4) newal of the debt as to himself and also as to the sureties on the note. At one time this was true as to indorsers likewise, as an indorser was regarded as a surety. *Green v. Greensboro College,* 83 N. C., 449; *Garrett v. Reeves,* 125 N. C., 529.

In *Johnson v. Hooker,* 47 N. C., 29, *Pearson, J.,* says: "The act of 1827 makes an indorser liable as surety. The effect is to put him on the footing of a maker of the note and to make him liable to the holder, the same as if his name was on the face of the note instead of being on the back."

While the law remains the same as to a surety, and a payment by the principal will operate as a renewal of the debt, as to the surety, who is regarded as a maker of the note, an indorser is no longer so regarded.

There is a broad and well recognized distinction between a surety and an indorser, as is pointed out clearly in *LeDuc v. Butler,* 112 N. C., 458, in which case it is said: "Part payment of a note by the payee, who has indorsed it, will not repel the bar of the statute of limitations as against the maker, the statute confining the act, admission, or acknowledgment, as evidence to repel the bar, to the associated partners, obligors, and makers of a note."

The judgment is

Affirmed.

Cited: Bank v. Johnston, 169 N. C., 528; *Meyers v. Battle,* 170 N. C., 169; *Edwards v. Ins. Co.,* 173 N. C., 617; *Barber v. Absher Co.,* 175 N. C., 605; *Gillam v. Walker,* 189 N. C., 192; *Dillard v. Mercantile Co.,* 190 N. C., 227; *Lancaster v. Stanfield,* 191 N. C., 344, 346; *Nance v. Hulin,* 192 N. C., 665; *Wrenn v. Cotton Mills,* 198 N. C., 91; *Trust Co. v. York,* 199 N. C., 627; *Grocery Co. v. Hoyle,* 204 N. C., 113; *Hyde v. Tatham,* 204 N. C., 161; *Franklin v. Franks,* 205 N. C., 97; *Bank v. Hessee,* 207 N. C., 76; *Davis v. Alexander,* 207 N. C., 422; *Miller v. Bumgarner,* 209 N. C., 736.

HARRIET BROWN v. MARTHA A. BROWN ET AL.

(Filed 13 January, 1915.)

1. Deeds and Conveyances—How Construed—Intent—Estates for Life.

Under the modern doctrine that a deed should be interpreted as a whole to give effect to the grantor's intent, and without undue weight to its formal parts, *it is held* that a deed for lands to the sons of the grantor as tenants in common, with an *habendum* "reserving and retaining" in the grantor "an estate in the land during his life and the lives of" his four daughters, naming them, expressing the desire of the grantor that he and his said daughters shall and may live on the said lands during their lives as members of his family, and after his death his daughters as members of the family or families of his sons, conveys to the sons the fee in the lands after the termination of the life interests reserved.

2. Same—Repugnancy.

A conveyance of the fee, with reservation in the *habendum* of a life estate in the grantor for his own benefit and for the use of his four daughters during their lives, will not be construed as repugnant when it appears, interpreting the deed as a whole, that it was the intent of the grantor that the grantees should take in remainder, nor will the word "reserves" used in connection with the first estate, be given a technical meaning to defeat the intent of the grantor thus ascertained.

3. Deeds and Conveyances—Interpretation—Estates for Life—Expressed Motives.

Where a deed to lands, by proper interpretation, conveys the fee in remainder after reserving to the grantor and his daughters life estates, the object or motive for making the gift to the daughters, stated in the conveyance, will not be permitted to affect the clear intent of the grantor, as gathered from the unambiguous language expressed in the deed construed as a whole, it not being, in this case, inconsistent therewith.

4. Deeds and Conveyances—Estates for Life—Reservation—Uses and Trusts—Statute of Uses—Estates in Remainder.

Where the grantor reserves in his conveyance of land a life estate to himself and for the use and benefit of his daughters during their lives, with remainder over to his sons, it is immaterial whether the life estate for the daughters is regarded as reserved directly to them or indirectly through their father, as their trustee, they having the use or equitable estate; for if reserved to them directly, the statute of uses would merge both the legal and equitable estates in the daughters upon the death of the grantor; and if reserved to them indirectly through the grantor, at his death the heirs at law would hold the legal title in trust for the daughters during their lives, with remainder over to the sons.

5. Deeds and Conveyances—Estates for Life—Remainder—Limitation of Actions—Adverse Possession.

The grantor of lands, reserving a life estate to himself and for the benefit of his four daughters for their lives, conveyed the remainder to

his two sons in fee, who by proper conveyances divided their interest in the lands, expressly referring therein to the reservation of the life estates. Thereafter one of the sons conveyed to the other his estate in the divided lands, and continued to live thereon with his father and sisters until their death. After the death of his father and soon after the death of his last surviving sister, his grantee brought this action for possession of the land, to which he pleaded title by adverse possession and introduced evidence tending only to show that he had lived on the lands with his sisters during their lives and used the rents and profits. *Held:* The evidence was insufficient to be submitted to the jury upon the question of defendant's adverse possession, and judgment should have been entered for the plaintiff.

6. Same—Happening of Contingency—Time of Entry.

Where the grantor of lands reserves a life estate in the lands for himself and also for the use and benefit of his daughters during their lives, with limitation over to his sons, who agree to a division of their interest and convey the same to each other by interchangeable deeds, and thereafter one of them conveys his interest to the other, not to take effect until "after the falling in of the life estate of the grantor's daughters," by the terms of this conveyance his grantee's right of entry on the lands, or of possession, does not take effect until the happening of the event stated, and the grantor's possession cannot be considered adverse until then, and at that time only the statute of limitations will commence to run.

7. Estates Per Autre Vie—Uses and Trusts—Statute of Uses.

The English law as settled by 29 Charles II, that where there is no special occupant in whom an estate may vest, the tenant *per autre vie* may devise it by will or it shall go to the executors or administrators and be assets in their hands for payment of debts; and by 14 Geo. II, ch. 20, that the surplus of such estates *per autre vie*, after payment of debts, shall go in the course of distribution like a chattel interest, was changed by Revised Code, brought forward in section 128, Rule 11, Code of 1883 (Revisal, sec. 1556), and under our statute the estate *per autre vie* is descendible to the heirs of its owner. But this rule does not apply to the facts of this case, where the estate was held in trust by the donor to the use of his daughters and at his death descended to his heirs at law charged with the trust, or where the statute of uses would execute the legal estate in the daughters for whose use the estate was created.

8. Deeds and Conveyances—Estates for Life—Remaindermen—Limitation of Actions—Adverse Possession.

A limitation over to the two sons of the grantor of lands after reserving a life estate in favor of the grantor and his daughters, in which one of the sons conveyed his interest to the other during the continuance of the first estate, and remained in possession with his father and sisters. *Held:* The possession of the grantor was only permissive, and not adverse to the grantee and the daughters remaining in possession, until their death, and the possession of the grantor could not have been adverse, though the statute of uses did not unite in the daughters both the legal and the equitable title.

BROWN *v.* BROWN.

APPEAL by plaintiff from *Bond, J.*, at June Term, 1914, of (6) EDGECOMBE.

This is an action to recover the possession of land, and depends for its decision upon the construction of certain deeds and the evidence as to the possession of defendants and those under whom they claim, the nature of which will fully appear by reference to the verdict and charge of the court, which are herein set out.

On 9 March, 1869, Littleberry Brown, common ancestor of plaintiffs and defendants, made a deed to his two sons, Gray L. and Joseph H., by which he conveyed a tract of land, of which the land in controversy is a part. The conveyance to them was as tenants in common of equal interests. In this deed, which is set out in the record, the grantor, in the *habendum* clause, makes a reservation in the following language, to wit: "Reserving and retaining, however, to the said Littleberry Brown an estate in the said land during the life of the said Littleberry and the lives of his four daughters, Rebecca, Martha, Mary, and Lydia; it being the intention and understanding of the said Littleberry Brown and Joseph H. Brown and Gray L. Brown that the said daughters shall and may live on the said land during their lives as members of the family of the said Littleberry Brown during his life, and, after his death, of the family or families of the said Joseph H. Brown and Gray L. Brown." This deed was at once recorded in the registry of Edgecombe County. (7) A few days later, and during the same month, Joseph and Gray, having agreed upon the parts of the tract that each was to have, executed respectively deeds of release, or partition, by which Joseph released to Gray all his interest in one-half of the land, describing it by metes and bounds, and Gray released to Joseph all his interest in the other one-half of the land, likewise describing it by metes and bounds. These deeds were promptly recorded, and in each of them the same reservation is made as in the original deed from their father, Littleberry Brown, and is adopted as part of each deed, as follows: "Whereas Littleberry Brown of said county has conveyed to his two sons, Joseph H. Brown and Gray L. Brown, a tract of land, situated in said county, containing 210 acres, more or less, reserving an estate for his own life and that of his four daughters, and the said Joseph H. Brown and Gray L. Brown have agreed upon a division of the said land and have ascertained by metes and bounds the part thereof to which each is to be respectively entitled: Now, therefore, this indenture," etc.; then follow the usual words of conveyance. On 30 June, 1876, Joseph H., who is the ancestor of the defendants, conveyed to Gray L., who is the ancestor of the plaintiffs, his one-half of the tract of land, thereby making Gray L. the owner of the whole; but in this deed there is the same reservation as in Littleberry

Brown's original deed, it being expressly referred to and adopted as a part of the instrument; and there is this provision after the said reservation: "And the said Joseph H. and Gray L. having agreed between themselves upon a division of the said land, and having ascertained by metes and bounds the part thereof to which each is to be respectively entitled after the falling in of the life estates, and executed deeds of release to each other, and the said Gray L. Brown, being anxious to become the owner of the entire tract, this day purchased the interest of the said Joseph H. for the considerations hereinafter named ($600): Now, therefore, this deed witnesseth," etc. Then follow the words of conveyance. This deed was likewise at once recorded.

The following were admitted by the parties to be the facts: The plaintiffs, as widow and heirs of Gray L. Brown, claim the original one-half, which was conveyed to him by the deed of Littleberry Brown, as an undivided interest subject to the reservation, and assigned to him in the partition by metes and bounds and released to him by deed of Joseph H. Brown, and the other half by the deed of Joseph H. Brown to Gray L. Brown, under all of which deeds the plaintiffs, Gray L. Brown's heirs, claim all of the land, that piece in dispute being the one-half of the original tract set apart to Joseph H. Brown when he and Gray L. Brown divided it, which is specifically described in the deed from J. H. Brown to Gray L. Brown.

(8) The defendants claim, as the heirs of Joseph H. Brown, that they own all of that piece set apart by the partition deed from Gray L. Brown to Joseph H. Brown, presumably one-half of the original tract, and being the identical land that Joseph H. Brown purported to convey to Gray L. Brown, and the same described in the complaint.

Littleberry Brown died in 1870 and the last of his four daughters died in August, 1912, prior to the beginning of this action.

It is admitted that the actual rental value of the piece of land in controversy is $125 a year. The plaintiffs do not desire to hold any person, now a party defendant to the action, for any rent except from and after 1 January, 1914, as those under whom defendants claim had possession up to 1 January, 1914. Mrs. Martha Brown, as the widow and devisee of Joseph H. Brown, was in actual possession of the land in controversy when the action was begun, and the present defendants are heirs at law or devisees, and were made parties as defendants since then. Ever since the making of the second deed by Joseph H. Brown to Gray L. Brown, in 1876, said Joseph H. Brown, his widow, and heirs at law have remained continuously in possession of the land in dispute, up to the trial of this action, and are still in possession, regularly using and occupying the same for their own purpose and without paying any rent to any other

person. In 1869 J. H. Brown was in the actual possession of that piece of land set apart to him by the partition deed from Gray L. Brown, and continued in possession of it until 1876, and thereafter until his death. Neither Joseph H. Brown nor his widow, nor his heirs at law, defendants, have by any overt act recognized any outstanding claim or title to said land since the deed was made by Joseph H. Brown, but have at all times occupied the land continuously and used it for their own purpose, without paying rent to anybody. "During their respective lives and up to the death of each of the four daughters who are mentioned in the deed of Littleberry Brown, they lived, in accordance with the terms of the deed, on the lands described in his deed, alternately living on the land afterwards set apart to Joseph H. Brown and the piece set apart to Gray L. Brown, asserting no title to the property, except the right of occupancy, if any, spoken of in their behalf in the deed from Littleberry Brown."

The jury returned the following verdict:

1. Have the defendants, since deed was made by Joseph H. Brown to Gray L. Brown in 1876, been for more than twenty years prior to the beginning of this action in the actual, open, continuous, notorious possession of the lands in controversy under known and visible lines and boundaries, claiming same as their own and receiving its rents and profits? Answer: "Yes."

2. Did right of plaintiffs, and those under whom plaintiffs (9) claim the possession of the lands in controversy, arise and accrue more than twenty years before the beginning of this action? Answer: "Yes."

3. Are the plaintiffs the owners and entitled to the possession of the land sued for? Answer: "No."

Plaintiffs requested that the following instructions be given to the jury:

"1. The plaintiffs pray the court to instruct the jury upon the fact admitted, that the possession of the land by the defendants was not adverse to the plaintiffs until after the death of the last daughter in August, 1912, and that they should answer the first issue 'No.'

"2. The jury are instructed to answer the third issue 'Yes.' "

The court charged the jury: "If you find from the admissions made, by the greater weight of the evidence, that for more than twenty years prior to and next preceding the bringing of this action defendants and those under whom they claim have been in the actual, open, continuous, notorious possession of the land in controversy under known and visible lines and boundaries, claiming same as their own and receiving and using its rents and profits, they should answer the first issue 'Yes'; otherwise, answer it 'No.' "

The court further charged the jury that if they should answer the first issue "Yes," they should also answer the second issue "Yes," being of the opinion that Gray L. Brown, as soon as he got the first (last) deed from Joseph H. Brown, had the right to sue for possession so far as Joseph H. was concerned, leaving the ladies to stay on the land as members of the family.

Plaintiffs excepted to the refusal to give their prayer for instructions, and also to the several instructions as given.

Judgment was entered upon the verdict for defendants, and the plaintiffs excepted thereto and appealed.

F. S. Spruill and W. O. Howard for plaintiffs.
H. A. Gilliam, James H. Pou, and J. M. Norfleet for defendants.

WALKER, J., after stating the case: We have well-nigh discarded the technical rule of the common law by which a deed was construed, and under which undue prominence and effect had been given to its formal parts and their position in the instrument, to the sacrifice of the real intention of the grantor, and further, by which too much importance was attached to the use of technical language in which the meaning and intention were clothed, all of which resulted in defeating the purpose for which the deed was executed. We have gradually enlarged our view and liberalized our methods, which before were somewhat narrow and
(10) contracted, and now we seek after the intention by putting a construction upon the deed as a whole, and not paying too much attention to technical forms of expression, which tended to conceal the true meaning. We now turn on all the light, while formerly it was to some extent shut out, thereby hiding or obscuring the grantor's meaning and disappointing his intention, which, of course, is thwarting the very object of all legal construction. With the evident purpose of doing justice by revealing and not concealing the truth behind ancient and threadbare forms, we have held that all parts of a deed should be given due force and effect. Words deliberately put in a deed, and inserted there for a distinct purpose, are not to be lightly considered or arbitrarily thrust aside, the discovery of the intention of the parties being the first and main object in view; and when it is ascertained, nothing remains to be done but to execute it, without excessive regard for merely technical inaccuracies or formal divisions of the deed. We have adhered to this rule, following the modern English doctrine, from the earliest periods of this Court, and continuously to the present time, as will appear from our decisions. *Campbell v. McArthur,* 9 N. C., 33; *Kea v. Robeson,* 40 N. C., 373; *Rowland v. Rowland,* 93 N. C., 214; *Gudger v. White,* 141

N. C., 507; *Featherston v. Merrimon,* 148 N. C., 199; *Triplett v. Williams,* 149 N. C., 394. It was early said by *Chief Justice Taylor:* "Words shall always operate according to the intention of the parties, if by law they may, and if they cannot operate in one form, they shall operate in that which by law shall effectuate the intention. This is the more just and rational mode of expounding a deed, for if the intention cannot be ascertained, the rigorous rule is resorted to, from the necessity of taking the deed most strongly against the grantor." *Campbell v. McArthur, supra.* And by *Chief Justice Ruffin,* at a later period, in *Kea v. Robeson, supra:* "Courts are always desirous of giving effect to instruments according to the intention of the parties, as far as the law will allow. It is so just and reasonable that it should be so that it has long grown into a maxim that favorable constructions are to be put on deeds; *benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat.* Hence, words, when it can be seen that the parties have so used them, may be received in a sense different from that which is proper to them; and the different parts of the instrument may be transposed in order to carry out the intent." We said in *Gudger v. White, supra:* "It is not difficult by reading the deed to reach a satisfactory conclusion as to what the parties meant, and we are required by the settled canon of construction so to interpret it as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instrument; but it is proper to seek for a rational purpose in the language and provisions of the deed and to construe it consistently with reason and common sense. If there is any doubt entertained as to the real intention, we should reject that interpre- (11) tation which plainly leads to injustice, and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results. All this is subject, however, to the inflexible rule that the intention must be gathered from the entire instrument, 'after looking,' as the phrase is, 'at the four corners of it.'" See, also, *Real Estate Co. v. Bland,* 152 N. C., 225; *Puckett v. Morgan,* 158 N. C., 344. An effort should be made to give some meaning, and the correct one, to the deed, if possible. If the effort is doomed to failure by reason of uncertainty or repugnancy, so that we cannot ascertain the meaning by any fair rule of construction, or by reason of its ambiguity of expression, so that we are unable to understand, from the language of the deed, who are the parties or what is the subject matter, or if they be known, what estate is conveyed, or any other matter essential to its validity, the instrument, of necessity, must fail. *Kea v. Robeson, supra.*

Let us examine these deeds in the light of the foregoing principles. We will first consider the deed from Littleberry Brown to his sons. It is

manifest therefrom that the grantor intended to convey to his two sons the fee in the land after a life estate in himself, for his own benefit, and also for the use and benefit of his four daughters during their joint lives and the life of the survivor of them. It makes no difference that this intent is gathered from the *habendum* clause, while in the premises an estate absolute and in fee is given to the sons, for all parts of the deed must be taken and construed together, as was expressly held in *Triplett v. Williams, supra,* where the *habendum* was allowed to cut down the fee conveyed in the premises to an estate for life, although, at first glance, and without distinctly regarding the real intention, the two estates, according to the words when separately construed, appeared to be repugnant to each other. The language of this deed is even more explicit than was the deed of John Greenwood to Margaret Greenwood in the *Triplett case, supra.* It expressly "reserves and retains" to Littleberry Brown, for his life, an estate for his own life and benefit, and for that of his four daughters, for their use, during their lives. We attach no importance to the use of the technical word, "reserves," but will give it the meaning which will subserve the intention, which is, that he did not convey to his sons so much of the estate in the lands as was necessary to create a life estate in him, for himself and his daughters, and it is the same as if he had first conveyed such a life estate with remainder in fee to his said sons, for the deed must operate according to the intention, giving, of course, due regard to words when apparently used in a technical sense. Again, it may be said that the deed expressly, and not by mere implication, excepts from its operation the life estates of the grantor and his daughters. The statement in the deed of the object in making it, or the motive for the gift to his daughters, is not material to a proper
(12) construction of it, and should not change its evident meaning, when ascertained by unambiguous language, which is plainly sufficient to create a life estate in them. It merely shows that they were the objects of his first concern, and that he was making provision of a home for them. The best way to safeguard the execution of this purpose was to invest them with the title, legal or equitable, for their lives, and not rely solely upon the covenant of the sons, who might or might not be faithful or loyal to his injunction, that the daughters should live with them, singly, jointly, or alternately, on the land. This construction is greatly strengthened by the meaning which the parties have attached to the deed, in their subsequent conveyances for the purpose of partition, and in the deed of his several interest by Joseph H. Brown to Gray L. Brown. All of them recite that Littleberry Brown, by his deed, had reserved an estate to himself for his own life and the lives of his daughters. The expression is substantially this: "Whereas Littleberry Brown

has conveyed to Joseph H. and Gray L. Brown a tract of land containing 210 acres, more or less," reserving an estate for his life and that of his four daughters. They then proceed to make partition by the deeds, conveying a several portion, by metes and bounds, each to the other. The deed of Joseph H. Brown, for his share, to Gray L. Brown, is even more explicit in this respect, for it not only contains the above recital as to the life estates reserved, but adds these most significant words: "And the said Joseph H. and Gray L. Brown, having agreed between themselves upon a division of the said land, and having ascertained, by metes and bounds, the part thereof to which each is to be entitled *after the falling in of the life estates,*" etc. We do not think it makes any difference whether we consider the life estate for the daughters as reserved directly to them or indirectly, through their father, as their trustee, they having the use or equitable estate. If the latter is the correct interpretation, and the trust is not a simple one which the statute does not execute by transferring to the use the legal estate, the latter, at the death of Littleberry Brown, descended to his heirs for the benefit of the said daughters, they holding it in the same plight as their father did. If, in answer to this, it be said that the reservation was to Littleberry Brown only for his life, and the legal estate did not, therefore, descend, our reply is that the law implies such an estate in Littleberry Brown as is sufficient to support the use, or as is commensurate with the probable exigencies of the trust; and that, in this case, would be a fee, even without express words of inheritance annexed to the grant, as it was not only permissible, but actually necessary to extend the limitation beyond the life of Littleberry Brown. This rule will always be operative in practice when the trust is active and the person entitled to the use, or the *cestui que vie* does or may survive the trustees or him who holds the legal estate, as in this case. *Smith v. Proctor,* 139 N. C., 314; (13) *Kirkman v. Holland, ibid.,* 185; *Haywood v. Trust Co.,* 149 N. C., 208; *Haywood v. Wright,* 152 N. C., 421. As there is only a simple declaration of a trust in the deed of Littleberry Brown, there is no reason why, after his death, the legal estate and the use should not be merged in his unmarried daughters for their lives, or, in other words, why the statute of uses should not execute the unnecessary portion of his estate, whether the same rule would apply before his death or not, so as to make it, in the first instance, an estate, first, for his life, then for their lives, and finally with remainder in fee to the sons. *Cameron v. Hicks,* 141 N. C., 27; *Smith v. Proctor, supra.* The defendants reply to all this by contending that the estate for the lives of the daughters was a chattel interest, prior to the enactment of Revisal, sec. 1556, Rule 11, and would pass to Littleberry Brown's personal representative, and that being so,

the possession of defendants and those under whom they claim could be adverse to such representative or to the heirs if the legal estate descended to them, as they had a right of entry during the forty-two years of such possession since the death of Littleberry Brown and failed to avail themselves of it; but we cannot agree to this view. Revisal, sec. 1556, Rule 11, was brought forward from Revised Code, ch. 38, Rule 12, of the Code of 1883, sec. 128, Rule 11, in identical language, as follows: "Every estate for the life of another, not devised, shall be deemed an inheritance of the deceased owner, within the meaning and operation of this chapter." So that in 1870 the same rule was in force as before and since that time. This was a departure from the English law as settled by 29 Charles II, which enacts (according to the ancient rule of law) that where there is no special occupant in whom the estate may vest, the tenant *per autre vie* may devise it by will, or it shall go to the executor or administrators, and be assets in their hands for payment of debts; and the other, that of 14 Geo. II, c. 20, which enacts that the surplus of such estate *per autre vie,* after payment of debts, shall go in a course of distribution like a chattel interest. 2 Blackstone, star pp. 259, 260 (1 Vol. of Cooley's 3d Ed., top p. 259). Under our statute the estate *per autre vie* is descendible to the heirs of its owner. But we are not dealing with such an estate, in the strict sense, but with an estate in trust for the lives of the daughters, where the legal estate descended to the heirs of Littleberry Brown charged with the trust, and as the separation of the two estates, the legal estate and the use, was no longer necessary, the statute executed the unnecessary portion of the legal estate in the daughters. The possession of defendants could not be adverse to them, as they were in possession themselves during the whole period of their lives. *Fowle v. Whitley,* 166 N. C., 445. But if the legal estate which descended to the heirs of Littleberry Brown was not executed by the statute,
(14) but remained in them, and the possession was adverse to them, it could only bar the daughters' life estate, as the trust ceased at the end of their lives, and did not extend to the sons. Consequently, only the life interest of the daughters could be acquired by adverse possession, and there was none as against them. There being no right of entry in Gray L. Brown during their lives, he was not barred. *Harris v. Bennett,* 160 N. C., 339, and cases there cited.

But there is another view of the matter. The deed of Joseph H. Brown to his brother, Gray L. Brown, expressly provides that the estate thereby conveyed shall not take effect "until after the falling in of the life estates" of the daughters, and also recognizes the existence of such life estates, as do the partition deeds executed between them. This being so,

whatever the true construction of the Littleberry Brown deed may be, and even if it only provided for them a home and did not convey to them a life interest, the recitals and agreement in the deeds above mentioned would prevent the estate from taking effect until the death of the daughters. While the agreement might not alter the construction of the former deed, or create any new estate for life in them by way of conveyance, it would, at least, suspend the vesting of the estate, under the Joseph H. Brown deed, until their deaths. It was so held substantially in the case of *In re Dixon,* 156 N. C., 26, where R. A. L. Carr conveyed land to his daughter, "reserving a life interest to himself and wife," and the reservation was held to be valid and the estate did not vest in the daughter until after his own death and that of his wife, "although the exception in favor of the grantor's wife did not operate as a conveyance to her." See, also, *Sasser v. Blyth,* 2 N. C., 259; *Baggett v. Jackson,* 160 N. C., 26; *Thomas v. Bunch,* 158 N. C., 175; *Jones v. Whichard,* 163 N. C., 241; *Jones v. Sandlin,* 160 N. C., 150. But taking a still broader view of the case, the heirs of Joseph H. Brown will not be heard to assert that his and their possession was adverse to Gray L. Brown and his heirs, in the face of the express recitals and stipulations in the deeds. To say the least, it would be unjust and inequitable to permit such an advantage to be taken of the possession, even though long continued and accompanied by the receipt of rents and profits, when Gray L. Brown's right of action was not to accrue until the death of the last surviving daughter of Littleberry Brown. The terms of the deeds were sufficient to lull him and his heirs into a sense of security against any such claim. If the daughters did not acquire an estate during their lives, but merely the right of a home, and Gray and Joseph remained tenants in common until their deaths, the adverse possession, if it existed, could only bar this joint interest, and the right of Gray and his representatives to an account and payment of his share of the rents and profits received by Joseph; but as to the several interest of Joseph, which he conveyed to Gray, there could be no bar, as it was not to take effect in possession until the (15) surviving daughter's death. The whole case shows that the possession of Joseph was merely permissive, and it was not contemplated that it should operate as a bar to his brother's right in the land. How could Gray L. Brown have recovered this several interest before the death of the last daughter? If he had sued his brother, who was in possession of the land, he would have been met by the terms of the deed to him, which withheld his right of entry until the happening of that event. It is very true that a party who has conveyed land to another may revest the title in himself, as against his vendee, by his possession, unexplained, continued

for twenty years, or by color of title and adverse possession thereunder for seven years. *Wilson v. Brown,* 134 N. C., 400; *Johnson v. Farlow,* 35 N. C., 84; *Scarboro v. Scarboro,* 122 N. C., 234. It was said in *Chatham v. Lansford,* 149 N. C., 363: "Though the mere continued possession of the vendor of land after conveyance executed is not adverse to his vendee, or one claiming under him, yet there is nothing in their relations which will prevent the vendor from acquiring title again by adverse possession. He may disseize his grantee, and by adverse possession for the necessary time bar the latter's entry," citing authorities. It is afterwards said that the same principle applies to a grantor, who afterwards takes a deed for the land from a third party, enters thereon, and continues his possession, under the color, for the requisite time, as he is presumed to have entered and taken possession under such title as he then held. Some of the cases hold that the possession of a grantor continued after the execution of his deed to the grantee is not adverse to the latter until its hostile character is plainly indicated to the grantee or brought home to him in some way, as he is presumed to hold it in trust for him until that is done. *Connor v. Bell,* 152 Pa. St., 444; *Paldi v. Paldi,* 84 Wis., 346; *Brinkman v. Jones,* 44 Wis., 498. But the authorities are conflicting upon this question, as to what will be necessary to constitute adverse possession under such circumstances, and when the possession has not been transferred by the grantor to his grantee, but simply continued by him after the making of his deed, and we need not enter upon its discussion with a view of deciding it. In *Brinkman v. Jones, supra,* it was held that "the possession of a grantor is presumably adverse to the grantee, where it has continued for a long time after the grant, *and is inconsistent in its nature with the grantee's rights by the terms of his deed,"* which principle is stated in the eleventh headnote of that case. We have already shown that Joseph H. Brown's possession was not inconsistent with the terms of his deed to Gray L. Brown, but entirely consistent therewith.

In no view of the facts, as they appear in the record, can we sustain the judgment. The single question being whether, upon the admitted facts, the defendants have acquired the title by adverse possession, and being of the opinion that they have not, the court should have entered judgment for the plaintiff, upon the facts agreed, for there was nothing for the jury to decide. The defendants excepted to the judgment, which was erroneous. The verdict and judgment will be set aside, and judgment entered in the court below in behalf of the plaintiffs, for the land, and also for the rents and profits from 15 January, 1914, to be ascertained by a jury, unless the parties can agree upon the amount. This meets fully the legal merits of the case.

(16)

It would be idle to order a new trial, when there is nothing to be tried, the parties having agreed upon facts sufficient to entitle the plaintiffs to judgment as above set forth.

Error.

Cited: Gold Mining Co. v. Lumber Co., 170 N. C., 275; *Lee v. Parker*, 171 N. C., 150; *Williams v. Williams*, 175 N. C., 163; *Patrick v. Ins. Co.*, 176 N. C., 670; *Pugh v. Allen*, 179 N. C., 309; *Seawell v. Hall*, 185 N. C., 83; *Ins. Co. v. Hunt*, 206 N. C., 726.

S. LOWMAN & CO. v. T. J. BALLARD.

(Filed 13 January, 1915.)

1. Judgments—Proceedings to Set Aside—Motions in the Cause.

Where a judgment obtained before a justice of the peace is sought to be set aside by the defendant for lack of service of summons, the remedy is by motion in the cause made before the court which had rendered the judgment.

2. Same—Limitations as to Time.

The statutes limiting the time within which motions shall be available to set aside judgment to one year applying to judgments in all respects regular, do not apply to where there has been defective service of the summons in the action or entire absence of it.

3. Process—Service—Methods Prescribed—Interpretation of Statutes.

Where a statute provides for service of summons or notices in the progress of a cause by certain persons or designated methods, the specified requirements must be complied with in order to make a valid service of the process.

4. Same—Telephones—Interpretation of Statutes.

Revisal, sec. 439, providing that the summons in an action "shall be served . . . by the sheriff or other officer reading the same to the party or parties named as defendant, and such reading shall be a legal and sufficient service," was originally enacted by the Legislature of 1876-77, and at a time when the telephone, as a general means of communication, was not in existence, and when the only method of service of process contemplated or provided for was the reading of the summons by the sheriff or other officer in the personal presence of the party to be served, contemplating the exhibition of the process to the party and affording him and the officer greater assurance, on the one hand, of its validity, and, on the other, that the person was the one designated. Hence, service of summons over a telephone line, the parties being necessarily separated and the method not contemplated by the statute, is not valid.

CLARK., C. J., dissenting; ALLEN, J., concurring in the dissenting opinion.

(17) APPEAL by defendant from *Shaw, J.*, at April Term, 1914, of ANSON.

Motion to set aside judgment, heard on appeal from a justice's court.

On the hearing it appeared that in 1911 plaintiff instituted an action on account against defendant, before a justice of the peace in said county, and on 16 March, 1911, recovered judgment for $173.75, defendant not appealing at this time; that defendant instituted a civil action against plaintiff to set aside said judgment, claiming that he owed plaintiff nothing and that he had never been served with summons in said cause, and, for many months after its rendition, he had no notice or knowledge of the existence of the judgment or of any suit against him by plaintiff.

Judgment in that cause was entered in favor of the present plaintiff, and, on appeal, judgment was affirmed, the court being of opinion that, on the facts presented in that record, defendant could only proceed by motion before the justice to set aside the judgment. See case, *Ballard v. Lowry,* 163 N. C., 487. Pursuant to that intimation, defendant, on notice duly served, made the present motion to set aside the judgment before the justice, J. H. Benton, Esq., and on the ground, among others, that the summons in the action had been originally served by telephone, the sheriff being at Wadesboro and defendant at Morven, 9 miles distant.

On the hearing the justice found that the sheriff had "read the summons by telephone to defendant, and, recognizing that it was defendant, by conversation had between them at the time he had made the return on the process served," etc. The justice being of opinion that there had been a valid service, refused to set aside the judgment, and on appeal to Superior Court this ruling was affirmed, the material portion of his Honor's judgment being as follows: "The court finds as a fact that J. T. Short was a deputy sheriff of Anson County on 27 February, 1911, and read the summons issued in said cause by said justice of the peace to the defendant T. J. Ballard over the telephone line connecting Wadesboro and Morven, and that the said deputy sheriff was well acquainted with said defendant and recognized his voice over the telephone in the conversation between them at said time, whereupon said deputy sheriff made the return and indorsement upon the summons. Upon these facts the court finds that, as a matter of law, said service and reading of said summons over the telephone was a legal and valid service of said summons, and the court so holds. From this judgment the defendant excepts and appeals to the Supreme Court."

Gulledge & Boggan for plaintiffs.
Lockhart & Dunlap for defendant.

HOKE, J. On the facts appearing of record, and in like case (18) whenever the remedy is available to him, the procedure open to defendant is by motion before the justice who tried the cause. This was virtually held on a former appeal between the parties, 163 N. C., 486, and the position is in accord with our decisions on the subject. *Thompson v. Notion Co.*, 160 N. C., 520; *Clark v. Mfg. Co.*, 110 N. C., 111; *Whitehurst v. Transportation Co.*, 109 N. C., 342; *McKee v. Angel*, 90 N. C., 60.

In *Thompson v. Notion Co., supra,* that being a case where service had been regularly made by publication and defendant had neither appeared nor answered, the decision was made to rest on section 1491 of Revisal, which allowed an appeal to be taken in such cases within fifteen days after personal notice of the rendition of the judgment, but *Associate Justice Allen,* in his well considered opinion, is careful to note that, in case of "defective process, or where there is the appearance of service when in fact there was none, the remedy by motion before the justice is properly available."

Both in the Superior and justices' courts the statutory limits as to time within which motion of this character shall be made are cases where the proceedings are in all respects regular, and do not apply in cases when there is defective service of process or an entire absence of it. *Massie v. Hainey,* 165 N. C., 174; *McKee v. Angel, supra.*

Authority here is also to the effect that where a statute provides for service of summons or notices in the progress of a cause by certain persons or by designated methods, the specified requirements must be complied with or there is no valid service. *Martin v. Buffaloe,* 128 N. C., 305; *Smith v. Smith,* 119 N. C., 314; *Allen v. Strickland,* 100 N. C., 225; *McKee v. Angel, supra.*

This, then, being proper procedure, and the only service of the original process in this cause having been by means of the telephone, "the sheriff being at Wadesboro and defendant at Morven, 9 miles distant," the question chiefly and directly presented by this appeal is whether, in this jurisdiction, there can be a valid service of original process by means of the telephone. Our statute on the subject (Revisal, sec. 439) provides that the summons "shall be served, in all cases except as hereinafter provided, by the sheriff or other officer reading the same to the party or parties named as defendant, and such reading shall be a legal and sufficient service."

This method of serving process was established by the Legislature of 1876 and 1877, and at the time the telephone as a general system of communication was not in existence. An interesting account of its origin and development will be found in 126 U. S. Reports, the volume

being devoted to a report of the telephone cases, from which it appears that the patents were applied for in 1876; that the litigation con-
(19) cerning them was continued for something over eleven years, and it was not until 1887 that decision was made declaring the rights in dispute to be in Professor Bell and his associates, and although the active development of the system was immediately and successfully entered upon, the telephone, as now operated, did not come into very general use and application until about the beginning of the present century, or a short period preceding that date.

At the time, therefore, when this legislation was enacted, the only method of service contemplated or provided for was by reading the summons in the personal presence of the party, and we are of opinion that this is and should continue to be the correct interpretation of the statute as it is now written. This service of original process by which courts of justice acquire jurisdiction over the rights of person and of property of the citizen has always been, and properly, regulated with circumspect care. In the Code of '68 it could only be done by leaving a copy of the summons under the court seal; later, in '76 and '77, the seal was omitted when the process ran to the county of the officer who issued it and, at the same session, a service by reading by the sheriff or some officer was established; both of these changes, it will be noted, being by legislative enactment. And this method of service, by reading in the personal presence of the party, affording as it does to the sheriff a more satisfactory and certain means of identifying the person on whom the service is made and giving assurance to the litigant of the true import of the act by present exhibition of the process, giving him better opportunity, too, to ascertain the position and authority of the officer, and being the method contemplated and described by the statute at the time it was passed, and the only one recognized for twenty years thereafter, should not be altered, if at all, save by express provision of the statute law.

The only valid objection to be made to this position is that it may, at times, make for the inconvenience of the officer; but, even as to him, the proposed change is of doubtful benefit. We know that a sheriff or other officer having a process of this character in charge is properly held to a strict account as to the verity of the service. If he makes a false return, he and his bondsmen may be subjected to serious penalties, and, looked at only from the officer's point of view, there is grave question if in the effort to perform this important duty he should be subjected to the additional uncertainties, sure to arise by recognizing the proposed manner of service.

On authority the question does not seem to have been very much discussed in the courts. The nearest case we have been able to find on the

subject is in *Ex Parte Terrel,* Court Criminal Appeals, Texas, reported in 95 S. W., 536. That case was an attachment for contempt against a defaulting witness, their statute requiring service of subpœna by "reading same in the hearing of the witness," and it was held (20) that service by telephone was no valid service; and the position derives some support in a New York case of *Gilpin v. Savage,* 201 N. Y., 167, to the effect that presentment of a note and demand for payment must be by actual exhibit of the instrument, and that a demand made by telephone was insufficient.

We are aware that in a number of cases it has been held that, under regulations requiring service of notices to be in writing, service by means of a telegram, written out by the agent and delivered, has been upheld; but these were generally in instances where the parties had voluntarily adopted that method of communication. And where the principle has been approved in reference to court process, the statute did not require that service be made by any particular or designated person, and the party being charged with the duty of having the notice served, the Court has held that such party could make the company his agent to write the notice, within the meaning of the law. Such was the case presented in *Western Union v. Bailey,* 115 Ga., 725, a case to which we were cited.

On service of writs of *certiorari* the statute required that the applicant should cause written notice of its proper sanction to be served on his opponent, and service by telegram was upheld, on the ground that, as the statute required the party to cause notice to be served and did not designate by whom, the plaintiff could designate the company as his agent, and the notice so written out would be considered a sufficient compliance with the law. Even in that aspect the case seems to have caused the Court much perplexity, and one of the judges dissented.

Again, there are cases in which notices of injunction were served by telegram and the service was sustained, but these decisions were in application of the principle declared by the English chancellors, to the effect that, under certain circumstances, if a party in an injunction proceeding knew of the existence of the order, and intentionally violated it or knowingly or intentionally acted so as to render the same of noneffect, he could be held for contempt. *Vansandan v. Rose,* 2 Jac. and Walker, 264; *Osborne v. Tenant,* 14 Ves., 136; *Rulings by Lord Chancellor Elden,* the first referred to in *Cape May R. R. v. Johnston,* 35 N. J. Eq., pp. 422-425, and the second in *Davis v. Fiber Co.,* 150 N. C., 84, erroneously printed in this last citation as Lord Erskine. But, while this ruling may be upheld in proceedings of that character, the exigency of the case at times requiring the recognition of such a principle, it should not be allowed to prevail in reference to the service of original process

where, as in this case, the statute, as heretofore stated, at the time it was enacted contemplated and provided for a service by reading the writ in the personal presence of the party, and involving, too, the necessary exhibition of the process to the litigant.

(21) On the facts in evidence, we are of opinion, and so hold, that there has been no valid service of process shown, and this will be certified, that the judgment of the justice's court be set aside and defendant allowed to answer.

Reversed.

CLARK, C. J., dissenting: Revisal, 439, provides that the summons shall be served by the officer "reading the same to the defendant, and such reading shall be a legal and sufficient service." *All this has been done in this case.* Unless the court can legislate by putting into the statute what the Legislature has not yet thought proper to put therein, this is "a legal and sufficient service." The summons, it is found as a fact, was read by the sheriff to this defendant, and indeed there is no question as to that fact or as to his being sheriff or as to the identity of the defendant. What more can be necessary? Whether or not there might be greater or less certainty as to the identity of the defendant, in service by phone, when he is brought to the phone by an agent of the sheriff, or the sheriff recognizes him, is a matter for the Legislature, if that body should find that the law needs amendment.

As to the identity of the sheriff, that is a matter for the court on the service of every process which is authenticated by his signature. As to the identity of the defendant, the officer takes that risk, whether he sees him (for he may not know him personally except by information) or phones him. The sheriff is under the highest obligations to be certain as to the identity of the defendant, for he is acting under the oath of his office and is also liable under a heavy penalty for making a false return.

The law does not require that the sheriff shall "leave a copy" with the defendant. That was long since dispensed with. Nor has it ever required that he should see the defendant. There can be no question that a nearsighted sheriff or deputy could serve process, the identity of the defendant being in all cases a matter of which the officer must assure himself under liability to a penalty. If there is a mistake as to the identity of the defendant, he can avail himself of it equally whether the sheriff is immediately present, or is blind, or speaks over the phone. In the Trojan War, Stentor made his summons to surrender to the enemy on the walls of Troy at a good distance, out of the reach of arrows, and the service was sufficient. In fact, in former days the heralds of opposing armies served their summons at a good distance by trumpet.

There is no statute and no decision that requires that the defendant shall see the paper, or read it himself, or that he shall know the identity of the officer. The court knows its own officers, and the defendant takes the risk if he does not recognize the officer's authority. The officer takes the risk under his oath, and under a penalty, if he mistakes the identity of the defendant. Whether the service is on a defendant who was personally present or who is at the end of a phone, these prin- (22) ciples apply.

In this day there is an urgent demand that courts shall reduce the time and expense of proceedings. Why should an officer ride all night over bad roads, and in bad weather, at great expense, to read a summons or a subpœna to a party who is needed in court next morning, when he can read the paper as intelligently to the party over the phone and with as much certainty of his identity as if he went to the locality and hunted him up. Indeed, when the service is made by phone the officer will take even greater precautions because he cannot reach the party in that way unless he is brought to the phone at his request by some agent of the sheriff, or voluntarily remains at the phone till the reading is completed.

It is suggested that "service by phone is not safe." Millions of dollars in contracts are made every day over the phone, often at a long distance, between parties who do not see each other, but who are satisfied of each other's identity, by taking proper precautions. The great transportation systems of the country find it safe to use the telephone in controlling the movements of trains on which depend the safety of thousands of lives and millions of property daily. Great armies, on whose movements rest the destiny of nations and the lives of thousands of men, are risked, every day, on the use of the telephone. Over the phone doctors give prescriptions on which the lives of patients depend, and lawyers give advice on which rests the disposal or transfer of property. Yet we are asked to say that it is unsafe for this officer to notify this defendant to appear before a magistrate in a small action involving a few dollars when it is found as a fact that this defendant was the proper party, that the officer was duly authorized, and that he fully read this summons to this defendant as required by the statute!

Why should the courts alone be deprived of the advantages of modern improvements, and retain every antiquated method as to service or as to pleadings, on the ground that it was "not thus done under the Saxon Heptarchy"? It is a great saving of useless expense and of time to use this method of summoning jurors and witnesses and parties over the phone, of which bank officials, business men, railroad officers, and everybody else avail themselves. Indeed, there is less risk of imposition as to identity in the service of a summons or subpœna than in any of the other

businesses of life, for the reason that the officer being under a penalty for making an erroneous return, will take extra care in that regard. Besides, the party who is served can rarely, if ever, have any motive to assume to be the defendant when he is not. Moreover, he waives any other service, as this defendant did, by remaining at the phone until the entire summons is read to him.

(23) If an officer should read a summons to a man on the other side of a screen, or of a curtain, or in another room, and his identity is certain, as is found in this case, and his hearing it is not denied, this surely would be sufficient. The invention of the phone has merely extended the range of the voice of the officer and of the hearing of the defendant.

The statute does not require that the officer should return that he "*saw* the defendant and read the summons to him." But it only requires "reading the same to defendant, and such *reading* shall be a legal and sufficient service." For the Court to add the requirement that the officer "saw the defendant" is legislation by the Court, and will make a very considerable addition of trouble and expense to the officers which the Legislature has not placed upon them.

Whether the officer sees or does not see the defendant, it is a defense that he was not an officer, or that there was a mistake of identity as to the defendant, or that the summons was not read to him. These defenses are in no wise affected by the circumstance that the summons was read over the phone, or at a distance, or to one in another room. The statute does not require the immediate presence of the defendant.

A captive with the Indians who received a letter told the chief its contents and from whom it came. The chieftain took the letter. He looked at it and saw nothing on it to that purport. He put it to his ears and heard nothing. He smelt of it and perceived nothing. He said that his captive was either a liar or a witch, and in either event he ought to be burned, and burned he was. The chief knew no other than oral means of communication.

When the invention of the telescope vastly extended human vision, Galileo, gauging the starry depths, announced that the world revolved around the sun, and not the sun around the world. The ignorant priests condemned him to be burned, and he only escaped by taking it back.

The most ignorant man in North Carolina now knows that by the invention of the telephone the range of the human voice and of human hearing has been lengthened. When this summons was read to the defendant by the officer over the phone (all of which are found as facts), it was the officer's voice and not a substitute—as in the case of a telegram or letter—which the defendant heard, and the officer truly reported, as

is found, that he had "read" the summons to him. The statute requires nothing more, and there is no reason that it should. A few years ago it might have been asserted that thus reading a summons to a man 9 miles off was a physical impossibility, and therefore on its face untrue. But modern invention has made it an ordinary occurrence. A conversation over the phone is competent in evidence; why not the "reading" of a summons, when the identity of the party is found as a fact?

This system of serving summonses and subpœnas is a great sav- (24) ing of expense and of time. It has been much resorted to in the courts, and now to hold it illegal may jeopardize the validity of many legal proceedings which have been based upon such service. In a practical age there is no reason why the courts should not avail themselves of the same conveniences which business men and indeed all others customarily use and have found to be safe and reliable as well as convenient. No statute forbids it, and the courts, in actual practice, have recognized and used it.

NOTE.—The General Assembly being in session, at once passed chapter 48, Laws 1915, authorizing service over the phone of subpœnas for witnesses and in summoning jurors, leaving still without legislation only the service of summons for defendants, which, however, is probably only about one-twentieth of the business, as witnesses and jurors are thus notified in both criminal and civil cases.

ALLEN, J., concurs in dissenting opinion.

Cited: Lupton v. Express Co., 169 N. C., 676; *Estes v. Rash,* 170 N. C., 342; *Herndon v. Autry,* 181 N. C., 273; *Graves v. Reidsville,* 182 N. C., 332; *Hatch v. R. R.,* 183 N. C., 621; *Pass v. Elias,* 192 N. C., 498; *Harrell v. Welstead,* 206 N. C., 820.

W. M. HANES v. SHAPIRO & SMITH.

(Filed 13 January, 1915.)

1. Vendor and Purchaser—Breach of Warranty—Tort—Election—Waiver.

Where, upon breach of the seller's warranty of goods, the purchaser agrees with him that he may take them and make them come up to the quality and kind they were warranted to be, and the seller accordingly and for the purpose takes the goods into his possession, the purchaser, by the new agreement, waives his right of action upon the breach of the warranty.

2. Same—Inconsistent Remedies.

One who is put to his election to choose between inconsistent remedies is bound by his choice of one of them to relinquish his right of action upon the other.

3. Vendor and Purchaser—Breach of Warranty—New Consideration—Bailment—Negligence.

The purchaser of a sideboard received and paid for it, and thereafter, discovering defects therein, agreed with the seller that the latter should take the property back and make it as warranted, and while the article was in the possession of the seller for that purpose it was destroyed by fire. *Held:* The title to the property remained in the purchaser, and its return to the seller made the latter a bailee for hire, upon a mutual consideration moving between the parties in adjustment of the matters in dispute arising from an alleged breach of the seller's warranty of the sideboard, making him liable to the purchaser for ordinary negligence in not taking care of the article, under the rule of the ordinarily prudent man. The law relating to the mutual rights of bailor and bailee, with respect to negligence, benefits received, and the care required by the latter under varying circumstances, discussed by WALKER, J.

4. Bailment—Destruction of Property—Negligence—Damages.

Ordinarily the liability of a bailee depends upon the question of his negligence, where the property has been destroyed while in his possession; and when his negligence has been properly established, he is liable in damages to the bailor for the full amount thereof, when the latter is not in fault.

5. Bailment—Damages—Negligence—Proximate Cause.

Negligence of a bailee, which makes him responsible in damages to the bailor for the loss or destruction of the property, is defined generally as a breach of his duty to exercise commensurate care under the surrounding circumstances, and to be actionable, it must proximately result in the injury for which damages are claimed. Slight, ordinary, and gross negligence discussed and defined by WALKER, J.

6. Bailment—Negligence—Trials—Evidence—Prima Facie Case—Burden of Proceedings—Burden of the Issue.

A bailee of goods is required to deliver the goods to the bailor in the condition they were in when received, or in accordance with the terms of the bailment, and if he fails to do so, he is liable unless he can show that his inability arises without fault on his part; and while the burden of proof continues to rest on the bailor in his action to recover damages for injury to or destruction of the property while in the bailee's possession, a *prima facie* case is made out against the latter by showing the fact of bailment and that the property had not been redelivered accordingly, which may be met by the defendant's showing he was not in default; whereupon the duty of going forward again shifts to the plaintiff; for this duty may rest first on one party and then on the other, while the burden of establishing the issue in his favor continues throughout with the plaintiff.

HANES *v.* SHAPIRO.

APPEAL by defendants from *Harding, J.*, at May Special Term, (25) 1914, of FORSYTH.

The plaintiff alleges that he purchased a lot of furniture from the defendant with a warranty for twelve months against defects as to workmanship and material. Among this furniture was a sideboard, for which he paid about $177. The furniture was delivered, and about thirty days after its receipt, and before the defects appeared, the plaintiff paid the purchase price for all of the furniture. Within a year, however, defects, both as to workmanship and material, did appear in one piece of the furniture purchased, viz., the sideboard. The defendants were notified of these defects, and demand was made upon them to make the sideboard conform with their warranty. The defendants requested the plaintiff to ship the sideboard to their factory at Norfolk, Virginia, where it could be repaired. In accordance with their request, the sideboard was shipped to them, in order to give them an opportunity to remedy the defects, and while they were at work on the furniture to remedy the same, their place of business, together with the sideboard, was totally destroyed by fire. The plaintiff then made demand upon them for his property, or that they should pay him back the amount of (26) money which he had paid them for this defective piece of furniture. This demand was refused, and the plaintiff brought this action for money had and received to his use. He contends that this furniture was bought with express warranty as to workmanship and material, that there was a breach of the warranty, in that this sideboard was defective, both as to workmanship and material; that the defendants, upon his notice to them of the defects and the demand of plaintiff that it be repaired, requested that the sideboard be returned to them in order that they might have an opportunity to remedy these defects and make good their warranty, and while it was in their possession it was destroyed by fire. Upon these facts he contends that he had his election to sue in tort, or to waive the tort and sue on contract for money had and received. He elected to sue on the warranty, and alleges that the defendant is indebted to him for money had and received to his use to the amount which he had paid for this sideboard. He says that the contract of warranty was a collateral undertaking on the part of the seller as to the quality of the subject of sale, and upon a breach of this collateral undertaking a cause of action arose to the plaintiff, and when the property was returned to the defendants, in compliance with plaintiff's demand and at their request, in order to permit them to comply with their contract and to make good their warranty, the plaintiff did not in any wise waive his rights to sue on the warranty, or, at his election, to sue for money had and received.

The following issues were tendered by the defendants, as the proper and only ones arising in the case:

"1. Is the plaintiff damaged by the negligence of the defendant in the loss of the sideboard in controversy?

"2. What damage is plaintiff entitled to recover?"

The court declined to submit these issues, and defendants excepted.

The jury rendered the following verdict upon the issues submitted by the court, and to which defendants duly excepted:

1. Did the defendants warrant the sideboard in question to be of first-class material and constructed in a workmanlike manner, as alleged? Answer: "Yes."

2. Was there a breach of said warranty by the defendants? Answer: "Yes."

3. What damage, if any, has the plaintiff sustained by reason of such breach? Answer: "$177."

Judgment and appeal by defendants.

P. Frank Hanes and L. M. Swink for plaintiff.
Alexander, Parrish & Korner for defendants.

(27) WALKER, J., after stating the facts: The case was tried below upon the wrong theory. When the sideboard was found to be defective in construction and material, the plaintiff could have stood upon his rights, under the warranty, and recovered his damages. But it was a question of election, and he chose to waive his right to sue upon the express covenant of warranty, and to allow this defendant to make good his warranty and to satisfy any damages that *might have been* recovered thereon, by repairing or restoring the sideboard so as to make it correspond with the thing warranted. It is such a manifest principle of justice and right, that a man, even in the ordinary affairs of life, should not be allowed to blow hot and cold in the same breath and to avail himself of inconsistent rights, that the attempt to establish the truth of the proposition would be worse than useless. To use a very suggestive phrase of Herbert: "Wouldst thou both eat thy cake and have it?" You cannot take two chances, hoping that if you lose the one, you may gain the other. The moral law forbids it and the technical law (as it is sometimes flippantly called) is also prohibitive of such a course. He cannot give up his warranty for a consideration, and afterwards take it back. Where a person has presented to him an election of inconsistent remedies, he must, once for all, choose between them, and is bound by his choice so made. When the plaintiff sent the sideboard to defendant for reparation, *so that it should be made to answer the warranty,* he thereby

waived all right to sue upon the covenant—provided, however, that defendant, being entitled to a reasonably sufficient time and opportunity to do the work and return the article, so as to discharge himself from blame, had really used due diligence and care, under the circumstances of the case, to comply with his undertaking to restore the sideboard to such a state that it would fulfill his contract. Plaintiff contends that there was no waiver of his right to sue upon the warranty by returning the sideboard for repairs, but we think that it is such a clear and unmistakable waiver, upon the conceded facts, as to require no further argument from us to establish this position. He received the sideboard, paid for it, and the title passed thereby from defendants to him. It was not *revested* in defendants by the return of the sideboard for the purpose of restoration, and we think the learned and able counsel of plaintiff virtually submitted to this view of the transaction when asked the question if such a change of title had taken place. If he did not, it is in law correct, and must, by reason and authority, be so, and could not well be otherwise.

But how does the law stand? We will attempt briefly to review it, with special reference to the facts of this case. According to the classification of the civil law, bailments are of six kinds: (1) *Depositum,* which is a delivery of goods to be kept for the bailor without recompense. (2) *Mandatum,* which is a delivery of goods to have (28) some service performed about them by the bailee without recompense. (3) *Commodatum,* which is a gratuitous loan of goods to be temporarily used by the bailee, and returned in specie. (4) *Mutuum,* which is a delivery of goods, not to be returned in specie, but to be replaced by other goods of the same kind. At common law such a transaction is regarded as a sale or exchange, and not a bailment. (5) *Pignus.* A *pignus,* pledge, or pawn, is a delivery of goods as security for some debt or engagement, accompanied by a power of sale in case of default. (6) *Locatio.* A *locatio,* or hiring, is a bailment for reward, and may be of four kinds: (*a*) *Locatio rei,* or the hiring of a chattel for use. (*b*) *Locatio operis faciendi,* or the hiring of work and labor. (*c*) *Locatio custodiæ,* or the hiring of care and services to be bestowed on the thing delivered. (*d*) *Locatio operis mercium vehendarum,* or the hiring of the transportation of goods.

The above classification is unnecessarily refined. The rights and liabilities of the parties to a bailment, as we shall see, depend primarily upon which one is to receive the benefits of the transaction. The law justly imposes a stricter liability upon the one who is to receive the whole benefit of the bailment than upon one who entered into it solely out of good will and for the accommodation of the other party. Accord-

ingly, bailments may be divided with reference to the party who is to receive the benefit into three classes, which will include all the principles of the law of bailments. The various kinds of bailments in the Roman classification group themselves naturally under these three heads, and it may be convenient to sometimes use the Roman terms to indicate subdivisions. The classification we adopt is:

The rights and liabilities of the parties to a bailment, as we have said, depend primarily upon which party the bailment is intended to benefit. Bailments may, therefore, fall within these divisions:

(*a*) Bailments for the bailor's sole benefit, including (1) *Depositum* and (2) *Mandatum.*

(*b*) Bailments for the bailee's sole benefit, including (1) *Commodatum.*

(*c*) Bailments for mutual benefit, including (1) *Pignus,* and (2) *Locatio.*

These views are well supported by the authorities, and especially by Hale on Bailments, pp. 36 and 37.

The transaction in this case more nearly resembles the *locatio custodiæ* of the civil law, or the hiring of care and services to be bestowed on the thing delivered, and comes under the head of *Locatio* in the last classification given above.

(29) The rights and liabilities of the parties to a bailment are primarily determined by the contract and bailment purpose. The following principles, however, are common to all classes of bailments: (*a*) The subject of the bailment must be personalty. (*b*) There must be a delivery, actual or constructive, of the property. (*c*) There must be a voluntary acceptance by the bailee. (*d*) There must be competent parties. (*e*) Possession by the bailor is considered as sufficient title to support a bailment. (*f*) The right of *property* remains in the bailor, and he may maintain an action to protect it. (*g*) The bailee is estopped from disputing that the bailor had title at the time the goods were delivered. (*h*) The bailor must not expose the bailee to danger without warning. (*i*) The bailee must exercise due care.

The parties may enlarge or diminish their liability by special contract, provided, first, that the contract is not in violation of law or against public policy; second, that the liability of the bailee is not to be enlarged or restricted by words of doubtful import, and, third, that the bailee must exercise perfect good faith at all times. He is always liable for his positive wrong or fraud. It is further required that the bailee must deliver up the property uninjured at the termination of the bailment, or else excuse his inability to do so. Hale on Bailments, pp. 10 and 11. Commensurate care, or due care under the circumstances, is the measure

of the bailee's obligation, in the absence of express contract, no matter what may be the object of the bailment.

In all ordinary classes of bailment losses occurring without negligence on the part of the bailee fall upon the bailor. The bailee's liability turns upon the presence or absence of negligence. In some exceptional kinds of bailments, as in the case of carriers or innkeepers, there is a special liability, approximating that of an insurer, but, generally speaking, there can be no recovery against a bailee for loss or damage to the property, in the absence of negligence.

In *Coggs v. Bernard, Lord Holt* distinguished as to bailments and divided them into three grades or degrees of negligence. Said he: "In bailments for the sole benefit of the bailor, the bailee will be liable only for gross negligence; in bailments for the mutual benefit of both parties, he will be liable for ordinary negligence; in bailments for the exclusive benefit of the bailee, he will be liable even for slight ngligence." This distinction and the consequent distinction into three degrees of negligence has been perpetuated in textbooks and decisions, until it has become so interwoven with the law of bailments that it is impossible to discard it, though it has been frequently, severely, and perhaps, in some respects, justly criticised. It certainly may be misleading, if not properly considered. Negligence may be defined generally as the breach of a duty to exercise commensurate care, and to be actionable it must proximately result in damage. *Brewster v. Elizabeth City,* 137 (30) N. C., 392. Any omission of the duty to exercise due care, and resulting in damage, ought to impose liability. There is no such thing as excusable negligence which causes a wrong. It is said that gross negligence is "ordinary negligence with a vituperative adjective." It would, perhaps, be more logical to apply the adjective of comparison to the term "diligence" rather than to the correlative term, "negligence." This conception of ordinary and gross negligence seems to have had its origin in the law of bailment, and we may illustrate here. Thus, where the exercise of great diligence is the duty imposed, a slight omission of care —*i.e.,* slight negligence—will be regarded as a failure to exercise commensurate care. Where only slight diligence is the measure of duty, slight omissions do not involve a failure to exercise commensurate care, and therefore there is no negligence. In such a case it is very misleading to say that there is slight negligence, but no liability. When only slight diligence is required, there must be a gross omission of diligence—an omission of almost all diligence—in order to involve a failure to exercise commensurate care, or, in other words, to constitute negligence; for commensurate care in such a case is slight care. Nevertheless, the terms "slight negligence," "gross negligence," and "ordinary negligence" are

convenient terms to indicate the degree of care required; but, in the last analysis, the care required by the law is that of the man of ordinary prudence. This is the safest and best rule, and rids us of the technical and useless distinctions in regard to the subject. Ordinary care, being that kind of care which should be used in the particular circumstances, is the correct standard in all cases. It may be high or low in degree, according to circumstances, but is, at least, that which is adapted to the situation.

It remains to show what is meant by the terms "slight," "ordinary," and "great or extraordinary" diligence or negligence—a task which is by no means an easy one. According to Judge Story, "Slight diligence is that which persons of less than common prudence or, indeed, of any prudence at all, take of their own concerns." By Sir William Jones, slight diligence is to be considered to be "the exercise of such diligence as a man of common sense (and prudence), however inattentive, takes of his own concerns." It is probably safe to say that the diligence shown in their own affairs by men careless in their habits, and not necessarily prudent by nature, but of ordinary intelligence, is slight diligence. Want of such diligence constitutes great or gross negligence, which has by some been held to amount to fraud, or to be evidence thereof. It may be safely stated, however, that gross negligence, except under unusual circumstances, is not equivalent to fraud, nor does it necessarily raise a presumption of fraud. Ordinarily, diligence may be said to be that displayed in the management of their own affairs by the average
(31) business or professional men met with in daily life—men who have the usual amount of common, practical sense in the management of the necessary details of their business, and who are endowed with ordinary prudence and foresight.

In this view of the question, it will be seen that what constitutes ordinary diligence is dependent upon and varies with the facts of each case. In the words of Judge Story, "That may be said to be common or ordinary diligence, in the sense of the law, which men of common prudence generally exercise about their own affairs in the age and country in which they live." As defined by Sir William Jones, it is "the care which every person of common prudence, and capable of governing a family, takes of his own concerns." The standard of ordinary diligence must, of necessity, vary with time and place, since what might be ordinary diligence at certain times and in certain localities might, at different times and at other places, amount to but slight diligence. The influence of custom of business must also be considered in determining what is ordinary diligence, as, in certain trades, disposition may be made of goods by a man of ordinary prudence which, under other circumstances, would certainly be open to the charge of great negligence. Moreover,

what would be the exercise of ordinary care with regard to articles of a certain kind might be far from such with regard to those of a different sort. Where one is wanting in the exercise of ordinary care, he is said to be guilty of ordinary negligence. Great diligence is that care shown in the management of his own business by a man of great vigilance and foresight, and of a prudent nature—one given to exerting unusual skill and care upon his business affairs. Want of it is slight negligence. These statements are supported by Hale on Bailments, pp. 25, 26, and 27.

As has been seen, the obligation to redeliver or deliver over the property at the termination of the bailment on demand is an essential part of every bailment contract. If the bailee fails to do so, he is liable, unless he can show that his inability arises without fault on his part. There is considerable confusion among the decisions in regard to the burden of proof in cases where a bailee is sued for a loss or injury. A line of decisions holds that in cases founded on negligence the burden of proving it affirmatively rests on the plaintiff throughout, and that, when a bailee is sued for a negligent loss or injury, mere proof of the loss or injury does not alone make a *prima facie* case. But the better opinion, supported by the weight of authority, holds that while the burden of proving negligence rests upon the plaintiff, and does not shift throughout the trial, the burden of proceeding does shift, and that where the plaintiff has shown that the bailee received the property in good condition, and failed to return it, or returned it injured, he has made out a *prima facie* case of negligence. "When he has shown a situation which could not have been produced except by the operation of (32) abnormal causes, the onus rests upon defendant to prove that the injury was caused without his fault." *Res ipsa loquitur.* Unless the bailee overcomes this *prima facie* case by satisfying the jury that the loss or damage was consistent with the absence of fault on his part, the plaintiff may prevail. Where the bailee makes such showing, however, as where it appears that the property was stolen or injured by *vis major,* the burden of proceeding shifts back to the plaintiff, and he must show that the bailee was negligent in exposing the property to risk of harm, or in failing to avoid the danger after it was known. In other words, the weight of the evidence may be in favor first of one party and then the other, but the burden of establishing the issue in his favor rests on plaintiff throughout. Hale on Bailments, pp. 31 and 32.

We have referred to Mr. Hale's excellent treatise on bailments very liberally, because the law is stated by him so clearly and seems to have such a direct bearing upon the facts of the case as to make the reference very apposite, though a little full. This is somewhat of a new question in this Court, and must be treated at some length in order to state fully

the essential principles. It bears, though, a close analogy to similar doctrines applicable in other branches of the law. Substantially the same views are expressed by other text-writers on the subject, such as Van Zile on Bailments and Carriers, sec. 26, *et seq.;* Story on Bailments (9 Ed.), ch. 1, secs. 1 to 40; Schouler's Bailments and Carriers, Part I, secs. 1 to 17; 5 Cyc., pp. 162, 163, 164, and 165. It is said in Cyc., *supra,* that the Roman classification of bailments is usually supplanted by a division with reference to compensation, under which bailments are divided into three kinds only: (1) Bailments for the benefit of both parties; (2) bailments for the sole benefit of the bailor; (3) bailments for the sole benefit of the bailee, and the *locatum,* or what is denominated generally as a bailment for hire. Judge Story, at section 426 of his 9th Ed., states that if, while the work is being done on a thing belonging to the employer, or after it is finished, but before it is delivered to the employer, the thing perishes by internal defect, by inevitable accident, or by irresistible force, without any default of the workman (as Pothier holds), the latter is entitled to compensation to the extent of the value of the labor actually performed on it, unless his contract imports a different obligation; for the maxim is, *Res perit domino.* Pothier, *supra,* further insists that if the workman has employed his own materials, as accessorial to those of the employer, he is in like manner entitled to be paid for them, if the thing perishes before it is completed. The same doctrine seems to have been promulgated in the Roman law, and was applied to the case of a house accidentally thrown down by an earthquake, while in building; and the loss was held to fall wholly on the owner. The following
(33) seems to have been deduced by Mr. Bell in his treatise on this subject as the true rules on the subject: (1) If the work is independent of any materials or property of the employer, the manufacturer has the risk, and the unfinished work perishes to him; (2) if he is employed in working up the materials, or adding his labor to the property of the employer, the risk is with the owner of the thing with which the labor is incorporated; (3) if the work has been performed in such a way as to afford a defense to the employer against a demand for the price, if the accident had not happened (as if it were defectively or improperly done), the same defense will be equally available to him after the loss. In this last point, Pothier also agrees with him, and he seems supported by the Roman law. Story on Bailments, sec. 426; 1 Bell Comm. (4 Ed.), 392, 394, and 5th Ed., pp. 456, 458.

But those rules are, of course, subject to the qualification that the bailee is bound, in all proper instances, when intrusted with the bailee's property, to exercise due care with respect to the subject. It is very clear that, at common law, if the thing of the employer, on which the

work is done, and for which materials are furnished, is by accident, and without any fault of the workman, destroyed or lost before the work is completed, or the thing is delivered back, the loss must be borne by the employer, and he must pay the workman a full compensation for the work and labor already done and materials furnished, although he has derived no benefit therefrom. Thus, where a ship was accidentally destroyed by fire while she was in the dock of a shipwright undergoing repairs, it was held that the shipwright was entitled *to full compensation for all his work* and labor done and materials found and applied thereto before the loss. But the general rule may be controlled by a special agreement of the parties, as in this case, or by general usage and custom of the trade. Schouler remarks that the fundamental idea of our whole subject is that one whose pains are to go wholly unrewarded ought to be the most lightly bound—a maxim which, however distasteful to the strict moralist, is thoroughly consonant with the teaching of the common law. And since no nice gradation by the amount of recompense is here attempted, bailments at common law may well be grouped under these three heads, as Judge Story himself has admitted: (1) Those for the sole benefit of the party on the bailor's side; (2) those for the sole benefit of the party on the bailee's side; (3) those for the benefit of both parties. In the first two instances the benefit designed is unilateral; in the third, bilateral or reciprocal.

We are to bear in mind that it is not the actual issue of the undertaking, but its intent, by which recompense is to be tested. Under such a classification, the foregoing titles fall readily into place; and the parade of Roman names imposes less readily upon the reader who reflects that there is much the same variety of transactions capable (34) of performance, whether one is to get his reward or serve gratuitously. Schouler's Bailments and Carriers, sec. 14, p. 15. Under the title, "Negligence or Diligence," with regard to bailments, Van Zile, at section 34, thus states the rule in a practical way: "Coupled with the question of benefit is the question of negligence or diligence; for the receiving of benefits brings the requirement of diligence, and the absence to a certain extent excuses negligence. If, for example, the bailee is to receive no compensation and no benefit, and the bailment relation is solely for the benefit of the bailor, a *depositum* or a *mandatum,* the law does not require of the bailee so high a degree of diligence as it would in case of *commodatum,* where the benefit is entirely for the bailee, and no benefit whatever to the bailor. And so the duties and liabilities of the bailee, when there is no special contract, depend almost entirely upon the benefit received, and the diligence he has shown or the negligence he is guilty of. If the bailment, for example, is for the sole benefit of the bailor, the

law only requires of the bailee slight diligence, and holds him liable for gross negligence. If for the sole benefit of the bailee, then he is held to high diligence, and liable for slight negligence; if for the benefit of both bailor and bailee, ordinary diligence and ordinary negligence. This is the correct summing up of the doctrines."

Let us apply this rule to our facts. Defendant had given a warranty as to quality of workmanship and material. Plaintiff says he breached it, as the sideboard proved to be defective; but defendant denied this allegation. The parties were, therefore, in controversy, and in order to adjust it, they agreed that, instead of plaintiff suing on the warranty, defendant should place the sideboard in the condition before warranted by him. The settlement of the dispute in this way was sufficient to make the consideration material and reciprocal between the parties, and sufficient to support the contract, just as, at common law, the payment of a part of a debt upon a promise to release or forgive the balance was *nudum pactum,* but if there was dispute between the parties as to the debt or the amount of it, this constituted a sufficient consideration to support the release of the balance upon a settlement. *York v. Westall,* 143 N. C., 276.

The bailment was, therefore, for the benefit of both parties, and not solely for that of the bailor or bailee, and consequently the bailee was bound to the use of ordinary care in respect to the thing bailed to him. While the burden was upon the bailor to show the bailee's negligence, the latter knew better than the bailor how the accident happened by which the property was destroyed, or should know, and is called upon to offer proof that the destruction arose from the operation of forces beyond his control or while he was exercising ordinary care for
(35) the preservation of the property and in the completion of the work upon it; not that the burden shifts to him, upon proof of the loss, which is *prima facie* evidence of negligence, but that he should satisfy the jury as to his due care or take the risk of an adverse verdict. *Wintringham v. Hayes,* 144 N. Y., 1. The *prima facie* case arising from his failure to return the property, and its destruction, does not forestall the verdict, as the burden of proof still rests upon the plaintiff and he must ultimately satisfy the jury of the existence of negligence; but defendant takes his chances on the verdict if he fails to go forward with proof and thereby prevents the jury from deciding according to the *prima facie* case; not that they are bound to do so, as the circumstances raising it may satisfy them, without further proof, that in fact there was no negligence, but that they may do so, and if they should so view the evidence, the defendant would lose. *S. v. Wilkerson,* 164 N. C., 436, and cases cited therein; *Sweeney v. Erving,* 228 U. S., 233.

This Court said in *Henderson v. Bessent,* 68 N. C., 223: "The bailment was for the benefit of the parties; so upon the settled distinction the bailee is only liable for ordinary neglect, which does not embrace a case of accidental destruction by fire, without default on the part of the bailee." That is the principle under which this case must be tried, and we cannot adopt the defendant's contention that it was a gratuitous bailment on his part, and he is liable, therefore, only for gross negligence, or, conversely, bound to the use of slight care. Plaintiff released the cause of action on the warranty, in exchange for his promise to repair the sideboard, and the benefit he thereby derived furnished the consideration for his undertaking as bailee.

It would seem that, by the common law, in such a case as this one the workman, regardless of any usage of trade, would not be entitled to any compensation for his labor and material, and that the rule would apply that the thing should perish to the bailor, and the work and material to the mechanic or bailee, if the latter has performed his duty by exercising the care required of him in the possession and preservation of the thing bailed to him for hire. Story on Bailments (9 Ed.), sec. 426b; *Gillett v. Mawman,* 1 Taunton, 137.

The judge should have tried the case upon the issue tendered by the defendant, and there was error in refusing to do so.

New trial.

Cited: Perry v. R. R., 171 N. C., 163; *Ridge v. High Point,* 176 N. C., 425; *Beck v. Wilkins,* 179 N. C., 233; *Trustees v. Banking Co.,* 182 N. C., 303; *McDearman v. Morris,* 183 N. C., 78; *Motor Co. v. Sands,* 186 N. C., 737; *Morgan v. Bank,* 190 N. C., 213; *Lawshe v. R. R.,* 191 N. C., 476; *Lacy v. Indemnity Co.,* 193 N. C., 181; *Holton v. Indemnity Co.,* 196 N. C., 351; *Watson v. Construction Co.,* 197 N. C., 592; *Hutchins v. Taylor-Buick Co.,* 198 N. C., 778; *Small v. Utilities Co.,* 200 N. C., 722; *Swain v. Motor Co.,* 207 N. C., 758.

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(36)

F. W. YOUNG v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 13 January, 1915.)

1. Telegraphs—Notice of Importance of Messages—Subsequent Communications to Agent—Evidence.

In an action against a telegraph company for its failure to promptly transmit and deliver a message reading, "Am coming today; have conveyance at station," it is competent for the plaintiff to show as notice to the company of its importance that after the message had been received for

transmission, but before it was in fact sent, he informed the operator at the receiving office that he was sick as the reason for sending the message; and the assurance of the defendant's agent at the time, that the message had been delivered, when it had not been, is not controlling.

2. Telegraphs—Commerce—Stipulations on Message—Limitation of Liability—Negligence—State's Decisions.

Where a telegraph company receives a telegram for transmission from another State via a point in this State to its destination here, and attempts to deliver it by telephone, the only means of wire communication between the latter points, which could reasonably have been done in time to have avoided the injury complained of, it is liable for its negligence in that respect; and the latter transaction being intrastate, the decisions of our own courts are alone applicable which declares to be invalid a printed stipulation on the message, that a recovery beyond $50 could not be had unless an extra charge had been paid for having the telegram repeated, etc. And it is further held that had the message been an interstate transaction, the result would be the same, under authority of *Tel. Co. v. Milling Co.*, 218 U. S., 406.

WALKER and BROWN, JJ., concurring in result.

APPEAL by defendant from *Webb, J.*, at April Term, 1914, of MITCHELL.

Charles E. Greene, John C. McBee, and J. W. Pless for plaintiff.
George H. Fearons and Alfred S. Barnard for defendant.

CLARK, C. J. On 13 February, 1913, the plaintiff filed in the defendant's office at Johnson City, Tenn., a message addressed to his wife, "Bakersville, N. C., *via* Toecane," reading as follows: "Am coming home today; have conveyance at station."

Exceptions 1 and 15 are that the plaintiff was allowed to testify that at 12 o'clock noon, about an hour after he had filed the message, he again went to the defendant's office in Johnson City and asked the official in charge if the message had been delivered, stating that he was very sick and anxious to have it delivered promptly. He was told in reply that it had been delivered all right. As the defendant's evidence is that the message did not reach Toecane till 2:30 p.m., this evidence was
(37) competent to show that the defendant had notice of the importance of promptness before the message in fact was sent. The plaintiff was not estopped by the incorrect reply that the message had already been delivered. It would not have taken the train two and a half hours to go from Johnson City to Toecane. The telegraph ought to be speedier.

It is 2½ miles from Toecane to Bakersville, and there is a telephone line over which the defendant should have transmitted this message to

Bakersville. Indeed, according to the evidence, it could have been sent over, with proper diligence, by the mail or other means long before the plaintiff arrived at 9:30 p.m.

The defendant undertook to transmit this message over its telegraph line from Johnson City to Toecane, which was an interstate transaction. There was no damage alleged in this respect, for though the message was not received at Toecane till 2:30 p.m., this was seven hours before the plaintiff's arrival at that point on the 9:30 p.m. train. The defendant further undertook to transmit the message, on behalf of the plaintiff, over the telephone line from Toecane to Bakersville. This was purely an intrastate transaction, and as to that default there was evidence of negligence, for the natural consequences of which the defendant is liable. It is not liable because the plaintiff had measles, nor for the weather, nor for the plaintiff's ill-advised conduct under such circumstances in walking out that night from Toecane to Bakersville, when the evidence shows that he could have secured lodging in Toecane, or might have phoned out to Bakersville for a conveyance after his arrival at Toecane.

In view of the errors assigned in these respects there must be a new trial. It is proper to say, however, that we do not sustain the objection to the maintenance of the action here, because the telegram originated in another State. This has been discussed and fully settled in *Penn v. Tel. Co.*, 159 N. C., and cases cited by *Hoke, J.*, at pp. 309, 310, and cases cited in the concurring opinion at page 315.

Nor do we concur in the objection that the plaintiff cannot recover more than $50 because of the stipulation to that effect as to unrepeated messages on the back of the message. This Court has always held such stipulation invalid. *Brown v. Tel. Co.*, 111 N. C., 187, citing numerous cases and the textbooks; *Sherrill v. Tel. Co.*, 116 N. C., 655; *Efird v. Tel. Co.*, 132 N. C., 267. Nor even if this were an interstate message—as the defendant contends—and the default was not solely at Toecane in this State, after the message was received there, would it affect this ruling. In *Tel. Co. v. Milling Co.*, 218 U. S., 406, it is held that where the State court held that telegraph companies cannot thus limit their liability for negligent failure to deliver a telegram addressed to a person in another State, this is not an interference with interstate commerce, and will be sustained. That case will be found with full annotations, 36 L. R. A. (N. S.), 220. The default complained of (38) having occurred in this State, is governed by our law, though the message originated in Tennessee. *Tel. Co. v. Brown*, 234 U. S., 547.

But for the reasons given there was, in other respects,

Error.

WALKER and BROWN, JJ., concur in the result, that there should be a new trial, but are of the opinion that in no view of the evidence, as presented in the record, can plaintiff recover damages beyond the amount paid for the service or the cost of the message, because the transaction was interstate, and the contract between the parties required a continuous transmission of the message from Johnson City, Tennessee, to Bakersville, for which the plaintiff paid the entire toll when the message was delivered by him to the operator at the former place. The record clearly shows that the defendant did not agree to transmit the message to Toecane, N. C., and, for plaintiff's accommodation, or as his agent, to forward it over the telephone line to Bakersville, but to send it through to Bakersville for one charge, which was prepaid. Being, therefore, an interstate message (*W. U. T. Co. v. Pendleton,* 122 U. S., 347; *Lance v. Brown,* 234 U. S., 542), the highest Federal court, by whose decisions upon the question we are bound, has held, contrary to our ruling, that the stipulation as to repeating the message, and as to the amount of damages to be recovered, if not repeated, is a valid one. Since the passage of the act of Congress of 18 June, 1910 (1 Fed. Statutes Anno., Suppl. of 1912, p. 112), telegraph companies are to be considered as common carriers within the meaning and provisions of the Interstate Commerce Act. The power of Congress over such interstate commerce is exclusive, as it has occupied the field, and the exercise of such power cannot be affected or impaired, or in any degree changed or modified, by State regulation. *Mich. C. R. Co. v. Vreeland,* 227 U. S., 59; *Erie R. Co. v. New York,* 233 U. S., 671. In the last case the Court said: "When Congress acts in such way as to manifest its purpose to exercise its constitutional authority, the regulating power of the State ceases to exist." But coming down to the very question herein presented, it has been held, in *Primrose v. W. U. Tel. Co.,* 154 U. S., 1, that a regulation of a telegraph company requiring the sender of a message to have it repeated and to pay an additional amount therefor, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering a message, is a reasonable one, and further, that the terms printed on the back of the message, so far as otherwise not inconsistent with law, form part of the contract between the sender and the company, under which the message is transmitted, citing numerous cases from the English and American courts, and stating that "the great
(39) preponderance of authority in this country sustains the reasonableness and validity of such regulation." Among other reasons for its decision is this one: "By the regulation now in question the telegraph company has not undertaken to wholly exempt itself from liability for negligence, but only to require the sender of the message to have it

repeated and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delay in transmitting or delivering, or for not delivering a message, whether happening by negligence of its servants or otherwise." The validity of like stipulations, limiting the measure of liability in case of loss of goods resulting from the negligence of an interstate carrier, has been sustained in numerous cases, and, among others, are the following: *Adams Express Co. v. Croninger,* 226 U. S., 491; *Ch. B. and D. R. Co. v. Miller, ibid.,* 517; *Ch., St. Paul, M. and O. R. Co. v. Latta, ibid.,* 519; *Mo., K. and T. R. Co. v. Harriman,* 227 U. S., 657; *S. A. L. R. Co. v. Pace Mule Co.,* 34 Supr. Ct. Rep. (U. S.), p. 775; *W. U. Tel. Co. v. Bilisoly,* 82 S. E. (Va.), 91; *W. U. Tel. Co. v. Compton,* 169 S. W., 946. See, also, *W. U. Tel. Co. v. Dant,* recently decided in the Court of Appeals of the District of Columbia.

Under the cases last cited, if plaintiff can recover more than the cost of the message, his recovery could not exceed the stipulated maximum amount of $50 as liquidated damages.

The case of *W. U. Tel. Co. v. Brown,* 234 U. S., 542, cited in the opinion of the Court, is not in point, the case involving the right of one State to control the law of another State, as to a transaction taking place partly in both, the Court specifically holding that the statute of South Carolina, as to the recovery for mental anguish in telegraph cases, could not operate in the District of Columbia; but it did give strong intimation that the statute was an unwarranted interference with interstate commerce.

Since the passage by Congress of the act of 1910, above mentioned, telegraph companies are subject to the provisions of the Interstate Commerce Act, and whatever the law may have been before that time, the case is now governed by the principles as stated in *Adams Express Co. v. Croninger* and other like cases, *supra.*

Cited: Blaylock v. R. R., 178 N. C., 357; *Hardie v. Tel. Co.,* 190 N. C., 47.

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(40)

D. L. BUCHANAN v. RITTER LUMBER COMPANY.

(Filed 13 January, 1915.)

1. Master and Servant—Safe Place to Work—Duty of Master—Railroads—Logging Roads.

The rule that an employer, in the exercise of reasonable care, must provide for his employee a safe place to do his work, and a failure of duty in this respect will constitute negligence, is very insistent in the case of railroads where a breach of such duty is not unlikely to result in serious

and often fatal injuries; and logging railroads operated by steam power come within this principle and are held to the same standard of care.

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

In an action against a logging railroad company to recover damages for the wrongful death of the plaintiff's intestate there was evidence tending to show that the intestate, within the custom of all employees of the defendant, and in connection with the discharge of his duties, was riding upon the running board of the tender to the defendant's steam locomotive, and was in some way struck from his position by a limb of a tree, 5 to 7 feet long, and 1½ to 2 inches in diameter, stuck into a hole on the right of way and projecting towards the roadbed at an angle of about 45 degrees, which had been thus placed for a week before, throwing him upon the track and the engine, running 3 or 4 miles an hour, running over him at about 70 to 75 feet further along; that the engine was backing at the time, and the engineer was not looking back in the direction the engine was running, and was unobservant of the intestate's danger until it was repeatedly called to his attention by persons along the right of way, whereupon he stopped his engine. *Held:* The evidence was sufficient to be submitted to the jury upon the question of defendant's negligence in permitting the limb to remain in this dangerous location and position, and whether the engineer should have perceived the intestate's danger, after he was struck from the running board, in time to have avoided killing him, under the doctrine of the last clear chance.

3. Master and Servant—Railroads—Negligence—Duty of Servant—Contributory Negligence—Proximate Cause—Trials—Questions for Jury.

The plaintiff's intestate was killed by being struck from the running board on the tender of defendant's locomotive by a projection extending from the side of the roadway, with evidence that it had been left there for a week or more, and that at the time the intestate was not holding to a handrail placed on the tender for his greater safety, and within his easy reach. *Held:* A prayer for instruction tendered by the defendant was properly refused which instructed the jury upon the duty of the intestate, under the rule of the prudent man, to take ordinary precautions for his own safety, leaving out the question as to whether his failure or omission to perform this duty was the proximate cause of the injury, which under the circumstances of this case were properly left to the determination of the jury.

4. Master and Servant—Vice Principal—Negligence—Contributory Negligence—Trials—Evidence—Questions for Jury.

There being evidence in this action to recover damages against a logging road company for the wrongful death of the plaintiff's intestate, an employee on the defendant's logging road, that the intestate was struck from the running board on the tender of the locomotive by a projection alongside the track, which the defendant had negligently permitted to remain there, when he was not holding to the hand bar provided for his greater security, and conflicting evidence as to whether he was in charge of the train at the time and should have observed the danger: *It is held*, that the question of the intestate's contributory negligence was one for the determination of the jury, involving also the existence of proximate cause.

5. Appeal and Error—Assignments of Error—Instructions—Court's Remarks—Harmless Error.

While there is a discrepancy in this case on appeal between the defendant's requested prayer for instructions as set out in its assignments of error and in the record, it readily appears that the trial judge modified the instruction requested; and the exception to his statement that he gave the instruction requested is without merit, as it appears from his statement and the entire context that the court intended it for a modification, and the jury so understood it.

6. Trials—Instructions—Appeal and Error—Omission to Charge—Collateral Matters.

In an action for wrongful death, where the allegations involve and the evidence chiefly relates to the question of negligence of the defendant in permitting an obstruction upon the right of way, knocking the intestate from the running board on the tender of the locomotive, and also involve the doctrines of contributory negligence and the last clear chance, the failure of the court, in his charge to the jury, to advert to a phase of the evidence from which it might be inferred that the intestate may have been inadvertently knocked from the running board by his companions, is not held erroneous, especially when requests for specific instructions thereon had not been preferred.

APPEAL by defendant from *Long, J.*, at July Term, 1914, of (41) MITCHELL.

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

There was evidence on part of plaintiff tending to show that on 23 April, 1910, the intestate, an employee of defendant company, then making $1 or $2 a day, a young man of 21 or 22 years of age, of good habits, industrious, of good vigor of mind and body, was run over and fatally injured, dying soon after, by a steam engine of defendant company which was being operated over defendant's road in the course of the company's work; that at the time of the injury defendant was engaged in doing a large lumbering business in Caldwell County, N. C., the mills being situate at Mortimer, in said county, and the logs being hauled there from a point about 4 miles further up, the company having a roadbed to that point with iron rails and steam engine of the ordinary kind used in such work, constructed so as to move backwards and forwards with equal facility and having a running board 8 or 10 inches along the side and across the rear of the tender, about 10 inches above the track, where employees were accustomed to ride and where they might (42) stand or move as the course of their duties should require, and there was a handrail higher on the tender to which they might hold as they stood or moved about; that the particular duties of the intestate, at the time, was as "top loader"—one who laid the logs straight and secured them as they were lifted onto the cars by machinery; the evidence of

plaintiff tending to show that this was not a position of authority and that he directed the engineer only in the sense that he gave him proper signals as a train of cars had to be moved backwards or forwards in efficient performance of the work; that the engineer was one Joe Effler, and, on the day in question, he was running the engine backwards over the road at 3 or 4 miles an hour; that intestate and three or four other employees were on the tender, and he and two others were standing on the running board at the rear of tender, Garfield Hughes being on the outside to the right, the intestate next, and Arthur Blevins on the left, and, at a point not far from the logging yards, a hemlock limb, 5 to 7 feet long and 1½ to 2 inches in diameter at the smaller end, which was stuck in a hole or pile of brush in the bank and projecting towards the roadbed at an angle of about 45 degrees, struck the intestate about the feet and in some way prized him off the engine, throwing him prone upon the track and, at about 70 or 75 feet further along, he was run over and fatally injured, dying in about an hour and a half. Several eyewitnesses testified to the fact that the intestate was knocked off the engine by the hemlock stick. There was evidence further for plaintiff tending to show that this stick had been in such a position, leaning towards the road, for a week; that the end was worn slick where it had scraped along the engine and cars; that there were signs of hemlock bark along the journal boxes of the engine and on the running board, giving indication that the stick had been continuously rubbed by the passing cars. There was also a statement of this engineer, Joe Effler, who was afterward examined as a witness for defendant, and which seems to have been admitted without objection, that he had noticed the stick and its position for a week before the occurrence. There was further testimony for plaintiff tending to show that when he was first knocked off there were calls and cries both from the crew and from persons outside the track to the engineer in the endeavor to attract his attention, but that he was looking out of the window at the side, and they failed to attract his attention, and the train ran, as stated, 70 to 75 feet up the track before the intestate was run over, and finally one man rushed up to the cab and called out to him, when he immediately stopped the engine, which was and had been moving at a very slow pace, not more than 3 or 4 miles an hour.

There was testimony on the part of defendant company to the effect that no stick had been seen in any position threatening the train
(43) before this occurrence; that the intestate's position as top loader gave him full authority over the train and crew, and that he was standing on the running board, where he had full opportunity to look ahead on the track, and if there was any obstruction threatening the

train he could have observed and noted it; that he was not holding by the rail along the engine at the time, but was standing there smoking, with his hands under the cape of his overcoat; that Garfield Hughes, who was on the outside nearer the stick, avoided the collision and escaped harm by reason of holding to the handrail and lifting himself up, and, further, that the intestate, before his death, had said to several persons that he was, in some way, pushed off the running board by one or both of the young men who were in there with him; that these men were there without permission, and the inference being that, in a playful scuffle between them, the intestate was unintentionally knocked off the engine.

On the ordinary issues in such action of negligence, contributory negligence, and damages, there was verdict for plaintiff, and defendant excepted and appealed.

John C. McBee and Pless & Winborne for plaintiff.
L. C. Bell and Bernard & Johnston for defendant.

HOKE, J., after stating the case: It was earnestly urged for error by defendant that his Honor refused to nonsuit plaintiff both on the pleadings and the evidence; but the position cannot be sustained. It is fully established with us that an employer, in the exercise of reasonable care, must provide for his employees a safe place to do his work, and a failure of duty in this respect will constitute negligence. *Cook v. Cranberry Furnace Co.*, 161 N. C., 39; *Jackson v. Lumber Co.*, 158 N. C., 317; *Tanner v. Lumber Co.*, 140 N. C., 475.

An examination of the authorities will show that the position is very insistent in the case of railroads where a breach of duty in this respect is not unlikely to result in serious and often fatal injuries, and, in various cases, it has been held that these logging roads come clearly within the principle and are held to the same standard of care. *Worley v. Logging Co.*, 157 N. C., 490; *Sawyer v. R. R.*, 145 N. C., 24; *Hemphill v. Lumber Co.*, 141 N. C., 487. In reference to these obligations, in *Sawyer's case, supra,* it was said that "These logging roads, in various instances and in different decisions, have been described and treated as railroads and held to the same measure of responsibility and the same standard of duty," citing *Hemphill's case, supra,* and *Simpson v. Lumber Co.*, 133 N. C., 95, and *Craft v. Timber Co.*, 132 N. C., 152; and further: "This duty arises not so much from the fact that railroads are common carriers or *quasi*-public corporations as from the high degree of care imposed upon them on account of the dangerous agencies and implements employed and the great probability that serious and in many instances fatal injuries are almost certain to result in case (44) of collision."

Considering the present case in the light of these decisions, it is clear, we think, that the court would not have been justified in directing a nonsuit, there being facts in evidence tending to show that for a week or more the defendant's road had been left with a limb or snag deep in the ground at one end and leaning over towards the railroad track in such manner that it day by day scraped along the sides of the engine and cars and where it was liable, at any time, to cause an injury of some sort to the train or its employees. *Hudson v. R. R.*, 142 N. C., 198; *Drum v. Miller*, 135 N. C., 204. Again, a nonsuit would have been improper because of facts in evidence tending to show that, after the intestate was knocked off the engine and was prone upon the track, the train, running at only 3 or 4 miles an hour, continued to move along the track for 70 or 75 feet before the fatal injury was received, and meantime persons on the train and off endeavored in every way to attract the attention of the engineer and failed to do it until one of them went right up to the cab, the testimony permitting the inference that he was looking out to the side and entirely inattentive to the movements of his train or the safety of the persons who were on it. In that aspect of the case the defendant company might well be held responsible by reason of the failure to avail itself of the last clear chance of avoiding the injury; this whether the intestate was or was not guilty of contributory negligence, as the term is generally used and applied. *Snipes v. Mfg. Co.*, 152 N. C., 42. It was further contended that there was error committed in modifying certain prayers for instructions by defendant, chiefly in reference to the question of contributory negligence. Request No. 2, being to the effect that a servant is required to exercise ordinary care for his own safety, to observe the machinery and appliances used in connection with his work, and to discover those dangers which a man of ordinary prudence would discover, and, if he fails in this duty and is thereby injured as an immediate result, he cannot recover damages. "Therefore the court charges you that if you find by the greater weight of the evidence that plaintiff's intestate was riding upon the rear of defendant's engine, in plain view of the obstruction upon or over the track, and if you find there was an obstruction and he failed to observe same, and further failed to avail himself of the safety appliance, called the handrod in the evidence, and you further find that by using same he could have saved himself, the court instructs you that he was guilty of contributory negligence, and you would answer second issue 'Yes.'" The court gave the instructions as prayed, with the modification, after the words, "could have saved himself," by adding: "And you find that he was negligent in regard
(45) to these omissions and his neglect contributed to the injury." In other words, the court referred it to the jury to determine whether,

upon the facts in evidence as suggested in the prayer, the intestate was negligent in failing to observe and note the obstruction and in failing to use the handrod, and whether such neglect on his part was a contributory cause of the injury.

In *Russell v. R. R.*, 118 N. C., 1098, and in cases before that time, it was declared to be the correct principle that if, on a given state of facts, two men of fair minds could come to different conclusions as to the existence of negligence, the question must be determined by the jury, and that a like principle should prevail in reference to the question of proximate cause. The position has been since repeatedly upheld with us, and is also approved by the Supreme Court of the United States as the correct rule for the trial of causes of this character. *Graves v. R. R.*, 136 N. C., 3; *Ramsbottom v. R. R.*, 138 N. C., 39; *Harvell v. Lumber Co.*, 154 N. C., 254; *Alexander v. Statesville*, 165 N. C., 528; *Grand Trunk R. R. v. Ives*, 144 U. S., 408; *Davidson v. Steamship Co.*, 205 U. S., 187.

Applying the rule to the facts in evidence, we think that his Honor was clearly right in submitting the question as to the conduct of the intestate to the decision of the jury. True, there was testimony on the part of the defendant to the effect that he was "top loader," a position of authority, and that he had entire charge of the train and its crew; but there is also the permissible view that he was a young man of 21 or 22 years of age, getting only $1.50 to $2 per day; that he had only held the position a short while, and that his duty as top loader was only to see that the logs were properly laid and secured on the cars, and that he directed the engineer only in the sense that when they were engaged in loading he signaled the engineer when to move back and forth and as the necessities of the work required; and, in any event, he was not in charge of the train at that time nor in a position to direct or control its movements. He was only out on this running board where the hands were accustomed to ride on their way to work, the train being in motion, and the duty on him, under such circumstances, to observe and note an obstruction of this character and correctly estimate its proper effect—a small stick, leaning over towards the rail—was a very different obligation from that incumbent on defendant company and its employees, charged with the especial duty of keeping the track and roadbed in a reasonably safe condition. In the latter case it would undoubtedly import menace tending to inculpate, whereas, to the intestate, it might very well be a question of debate and one that, under our law, must be referred to the jury.

On this exception there seems to be some discrepancy between the defendant's assignment of error and the case on appeal, for, in the assignment, defendant substitutes for his prayer the modifica- (46)

tion of it as contained in his Honor's charge, but the true bearing of the exception is readily ascertained from the case on appeal, showing that his Honor modified defendant's prayer for instruction, as stated.

The further exception, that his Honor prefaced this portion of his charge by stating "this is defendant's prayer for instruction," is without merit. The statement and the entire context shows that the court intended it as a modification of defendant's prayer, and the jury must have so understood it.

The prayer, in effect, requested the court to rule on the question of intestate's conduct as a matter of law, and his Honor submitted it for the consideration of the jury; and the position, as we have stated, is in accord with our decisions. The court was further requested to charge the jury that, "if they found that defendant had provided a handrail, conveniently located for the use and safety of persons riding upon the running board at the rear of the tender, and that intestate was riding upon said running board while the engine was in motion and was standing up in easy reach of said handrail, with his hands in the bib of his overalls or in front of him, and he stood so at the time of his fall, this within itself would be contributory negligence, and they should answer the second issue 'Yes.'"

The court gave this and another prayer substantially similar, adding thereto that under the circumstances suggested the jury would answer the second issue "Yes," provided they found further that the failure to use this handrail "proximately contributed to the injury."

It is the accepted position, in actions of this kind, that on the two issues of negligence and contributory negligence the negligent conduct of defendant or of the claimant has no controlling significance unless it has been the contributory and proximate cause of the injury, or one of them.

In a case at the present term, *McNeill v. R. R.*, 167 N. C., 390, the charge is approved to the effect "That in order to enable you to answer the first issue (that as to defendant's negligence) 'Yes,' you must find that the train had no headlight, and that not having a headlight was the cause and the proximate cause of the injury"; and *Associate Justice Allen*, in a well sustained opinion, shows that this is an essential requirement to the proper decision of such an issue. The same principle prevails on the issue as to contributory negligence; it is a very important part of its correct definition, that it is the proximate cause of the injury.

Numerous authorities with us are in support of the position, and they hold, too, that where negligence is shown to have caused an injury, it is only in exceptional cases that the question of proximate cause can be

withdrawn from the jury. *Boney v. R. R.*, 155 N. C., 95; *Farris v. R. R.*, 151 N. C., 484; *Coley v. R. R.*, 129 N. C., 407; *Brewster* (47) *v. Elizabeth City*, 137 N. C., 392.

It is true that the testimony shows that the intestate was standing on the running board and had no hold on the handrail. It was shown, also, that another man standing by him was enabled to save himself after he saw the stick by catching hold of the handrail; but, as we have heretofore stated, the intestate had no part in directing the train and was not in a position to control its movements. He was not charged with the special duty of looking ahead for its safety, nor did he have anything to do with keeping the roadway in repair. He was just riding on the engine to his work as the others were accustomed to do, and, as we have heretofore stated, the character of the obstruction was not such as to affect him with notice of a probable injury as a conclusion of law. If he had fallen off by the ordinary jars and jolts of the train's movements, there might be more force in the position, but it is not at all a necessary conclusion that the intestate could have saved himself if he had taken hold of the rail, and, on all the facts as presented, we concur in his Honor's view that, on the issue as to contributory negligence, the question of proximate cause was for the jury.

Defendant excepted, further, that his Honor in charging the jury "failed to instruct them at any point as to the law arising on the evidence and contention of defendants that some one of certain employees pushed plaintiff's intestate from the engine and caused his death." This, in any event, was only an omission on the part of his Honor, and the proceeding could very well be sustained on the ground that, if defendant desired that such a position be referred to, he should have made a request to that effect, as he did on the other points. *Pardon v. Paschal*, 142 N. C., 538; *S. v. Worley*, 141 N. C., 764; *Simmons v. Davenport*, 140 N. C., 407. But it is not necessary to rest the matter here on this principle. From a perusal of the record it plainly appears that the principal issue between the parties on the testimony was whether the intestate was negligently knocked off by the stick or snag, or was pushed off by one of the other hands, and defendant's counsel therefore did not think it necessary to make a request on the subject.

Plaintiff's complaint was that intestate was knocked off by this stick, negligently left as an obstruction on defendants' road, and not otherwise, and there was no occasion for his Honor to make special reference to a different cause. In support of this view, it was stated on the argument for appellee, and not challenged, that counsel for plaintiff admitted in the argument before the jury that if the intestate was pushed off by one of the employees, his client had no cause of action, and this is no

doubt the reason that the capable and diligent counsel did not
(48) think it necessary to have any reference to the matter made by the judge.

The exceptions to testimony are without merit, and were very properly not insisted on in defendant's brief. *Lynch v. Mfg. Co.*, 167 N. C., 98.

After careful consideration, we are of opinion that no reversible error appears, and the judgment on the verdict must be affirmed.

No error.

Cited: Shepard v. R. R., 169 N. C., 240; *Mumpower v. R. R.*, 174 N. C., 745; *Moore v. Rawls*, 196 N. C., 128.

FOURTH NATIONAL BANK OF FAYETTEVILLE v. ADAM McARTHUR ET AL.

(Filed 13 January, 1915.)

1. Appeal and Error—Objection and Exception—Elimination of Immaterial Exceptions—Duty of Appellant.

Appellant's counsel should eliminate exceptions taken in the hurry of the trial from their case on appeal, which upon due deliberation in making up the case appear to them to be without merit, and retain only those upon which reliance is placed.

2. Courts—Improper Remarks—Interpretation of Statutes—Appeal and Error.

Remarks made by the judge in the course of a trial involving the genuineness of signatures of the indorsers of a note, in regard to plaintiff's calling upon the principal, who had not been introduced, to testify, is reversible error, under our statute, which forbids the court from expressing or intimating an opinion upon the evidence.

3. Evidence—Handwritings—Comparisons—Collateral Issues—Jury.

Where the genuineness of signatures of indorsers on a note is attacked in an action thereon, it is error for the court to permit witnesses, who have testified from knowledge derived from dealings with the parties that in their opinion the signatures were not genuine, to be cross-examined by the use of copies of signatures of the parties made by an expert engraver, and shown through an aperture made in an envelope detached from other writing; for an examination of this character introduces collateral questions into the controversy, multiplies the issues in point of fact, if not in form, tends to divert the minds of the jurors from the real question to be decided, and to put the witnesses to an unfair disadvantage.

4. Evidence—Handwritings—Comparisons—Standards—Interpretation of Statutes.

In controversies involving the genuineness of handwritings, our statute, by clear implication, excludes the examination of any papers but those shown to be genuine as standards or models of the true handwriting for comparison with the writings in dispute.

5. Evidence — Handwritings — Comparisons—Photographic Copies—Enlarged Copies—Testimony of Photographer—Appeal and Error.

In an action against sureties on a note, the signatures of the sureties being denied, the court permitted the introduction of photographic-microscopic reproductions of the disputed signatures, greatly enlarged, for the purpose of comparison with the genuine signatures of the indorser, which were not so enlarged, by the defendants' expert witness, without testimony of the photographer to show that the reproduction of the disputed signatures were exact. *Held:* To be reversible error, under the evidence in this case.

APPEAL by plaintiff from *Rountree, J.*, at April Term, 1914, of (49) CUMBERLAND.

This is an action upon two promissory notes of $10,000 each, dated 3 and 4 February, 1913, and due respectively at sixty and ninety days after their date. They were signed by J. Sprunt Newton as maker, and apparently indorsed by Adam McArthur, Newton's brother-in-law, and Mrs. M. C. McArthur, his mother-in-law. Judgment by default for want of an answer was taken against J. Sprunt Newton, and the other defendants filed answers denying the genuineness of the indorsements and averring that they never indorsed the said notes or authorized any one to do so for them, and out of this controversy the issue in the case arose.

It may be well for a proper understanding of the exceptions considered in this Court to state, in a summary way, the nature of the testimony introduced by the parties to support their respective contentions.

The plaintiff's evidence was of the following kind:

(1) Opinions of witnesses who testified that they were acquainted with the defendants' handwriting by virtue of having seen the defendants write, or their admitted signatures in the course of business prior to this controversy, and that from such a recollection they were able to form an opinion as to the genuineness of the indorsements in controversy.

(2) Opinions of witnesses who, by virtue of experience or special study, were either admitted or shown to be experts, and had thereby become qualified to compare admittedly genuine handwritings and those in dispute and give their opinion upon the disputed signatures.

(3) Other circumstances and inferences which the plaintiff attempted to use, such as statements from their witnesses as to alleged conversations with Adam McArthur about his obligations upon notes similar to

these in controversy, and some of these notes referred to in the conversations the plaintiff claimed to be old notes of which the notes in controversy were renewals. These conversations were denied by Adam McArthur, and the defendants contend that there were corroborating circumstances tending to show that the denial was true. Among the above stated circumstances, the plaintiff contended that there was similarity between the signatures of the defendants admitted in the cases as standards of comparison and the signatures in controversy.

(50) On the other hand, the defendants relied upon the following kind of testimony:

(1) The statements of the defendants themselves that they did not sign their names upon the notes in controversy, which was corroborated by other testimony.

(2) The opinion of witnesses, who had known the defendants for many years, and had become acquainted with the handwriting of both of the defendants in the course of business with them, that the alleged indorsements were not genuine.

(3) The opinions of experts by comparison of the signatures in dispute with admitted standards to the effect that, in their opinion, the signatures in controversy were not genuine, and these witnesses gave many reasons, facts, and circumstances tending to corroborate their opinion, and to show before the jury how they arrived at such an opinion.

(4) Other facts and circumstances which tended to show the improbability that the defendants indorsed the said notes, such as the entire lack of consideration on the part of the defendants to become liable for the $20,000 in notes sued upon, the proceeds of the notes having been paid to other parties, and evidence that some controversy had already arisen before the date of the alleged notes which tended to put the defendants upon their guard about papers coming from the source that these notes are alleged to have come, and the evidence of good character of the defendants and their witnesses, and the dissimilarity, as shown on the standards, and the signatures in controversy.

The above statement of the nature of the evidence, rather than a summary of the evidence itself which is not necessary, was taken, substantially only, from the defendants' brief, and may not be quite as strong for or favorable to the plaintiff as, perhaps, it should be. It will, however, answer our purpose, and the defendants cannot complain of it.

The jury returned a verdict for the defendants, and from the judgment thereon plaintiff appealed.

Rose & Rose for plaintiff.

Shaw & MacLean and McLean, Varser & McLean for defendants.

WALKER, J., after stating the case: There are many exceptions in the record, thirty-two, we believe. The number could easily be reduced to less formidable proportions without any sacrifice to the plaintiff, if we desired to do so; but as only two or three of them will be examined, we will not undertake the task of reduction, but may be permitted to suggest that counsel, in preparing assignments of error, would greatly simplify and facilitate the work of this Court if, after having had the time and the opportunity to carefully examine their exceptions reserved during the hurry of the trial, some of which are necessarily made inadvisedly and not upon proper or sufficient study and due deliberation, they would cull out those by a process of intelligent selection or elimination, as the case may require, and thus leave only those of real or supposed merit. This method would not only be of decided advantage to the Court by excluding immaterial matter calculated to divert attention from the main questions and relieve it of useless labor, but it would also greatly conserve the interests of the appellant by presenting his case in a more solid and compact form. We respectfully commend this admonition to our brethren of the bar, in the confident hope that they will heed it in the future preparation of appeals. (51)

The three exceptions we will consider are these:

1. The alleged expression of opinion by his Honor, when asking the plaintiff's counsel why they did not call J. Sprunt Newton.

2. The testimony of the witness O. A. Lester as to imitations of the genuine signatures of Adam McArthur made by him, he being an expert engraver, which were used and submitted to the jury, with his explanation and illustration of them, to show that the signature of Adam McArthur was easily simulated, and also similar imitations of Mrs. McArthur's genuine signature, which were permitted to be used for the purpose of disproving the genuineness of her signature to the notes in dispute. Certain of these imitations by the engraver were handed to some of plaintiff's witnesses, among others, A. L. McGowan and S. W. Cooper, D. L. Fort and R. M. Nixon, who had testified to the signatures of the two McArthurs as being genuine. They were shown to the witnesses in an envelope, with a section of the same cut out in the lower right-hand corner, sufficient only for the purpose of exhibiting the signature itself, and not the remainder of the paper. The witnesses were then asked for their opinions as to the genuineness of those signatures, and the court allowed them to be cross-examined in regard thereto, with a view of contradicting or at least weakening their former testimony.

3. The introduction of certain enlarged photographs of the disputed signatures—known as photographic-microscopic reproductions of the same, magnified 154 times by the process of photography—for the pur-

pose of enabling David N. Carvalho and O. A. Lester to compare or contrast them with the admittedly genuine signatures, which had not been so photographed and enlarged, and thereby show the discrepancies between the two, and otherwise to explain and illustrate their testimony as handwriting experts.

There was a vast deal of testimony in the case, and, as we have stated, numerous other exceptions, some of merit, and some having none, but the foregoing synopsis of three points will suffice for a clear apprehension of the case, so far as we will discuss it.

(52) First. We are of the opinion that the remark of the learned and unusually careful judge, in regard to calling J. Sprunt Newton, should not have been made, and was calculated, as an intimation, if not a direct expression, of opinion upon the facts, to prejudice the plaintiff, and it is forbidden by the statute, which provides: "No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion as to 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." There have been numerous decisions upon this statute, and this Court has shown a fixed purpose to enforce it rigidly as it is written. There must be no indication of the judge's opinion upon the facts, to the hurt of either party, either directly or indirectly, by words or conduct. The judges should be punctilious to avoid it, and to obey the statutory injunction strictly. We are absolutely sure that they fully desire to do so, and their occasional expressions which have come before this Court for review and held to be violations of the statute have evidently been inadvertent, but none the less harmful. The evil impression, when once made upon the jury, becomes well-nigh ineradicable. *Judge Manly,* who was one of the most eminent and just of our judges, said in *S. v. Dick,* 60 N. C., 440: "He (the presiding judge) endeavored to obviate the effect of his opinion by announcing in distinct terms the jury's independence of him; but this was not practicable for him to do. The opinion had been expressed and was incapable of being recalled. The object (of the statute) is not to inform the jury of their province, but to guard them against any invasion of it. The division of our courts of record into two departments—the one for the judging of the law, the other for the judging of the facts—is a matter lying on the surface of our judicature, and is known to everybody. It was not information on this subject the Legislature intended to furnish, but their purpose was to lay down an inflexible rule of practice, that the judge of the law should not undertake to decide the facts. If he cannot do so directly, he cannot indirectly; if not explicitly, he cannot by

innuendo. What we take to be the inadvertence of the judge, therefore, was not cured of its illicit character by the information which he immediately conveyed. The error is one of the casualties which may happen to the most circumspect in the progress of a trial on the circuit. When once committed, however, it was irrevocable, and the prisoner was entitled to have his case tried by another jury." And to the same effect did *Justice Hoke* speak in *S. v. Cook,* 162 N. C., 586, *citing and approving S. v. Dick, supra:* "The learned and usually careful judge was evidently conscious that he had probably and by inadvertence prejudiced the prisoner's case, for he added: 'But the court has no right to express an opinion about the case,' but the forbidden impression had already (53) been made, and as to the vital portion of the prisoner's plea, and on authority, the attempted correction by his Honor must be held inefficient for the purpose." So, in *S. v. Owenby,* 146 N. C., 677, we said: "The slightest intimation from a judge as to the strength of the evidence or as to the credibility of a witness will always have great weight with the jury, and therefore we must be careful to see that neither party is unduly prejudiced by an expression from the bench which is likely to prevent a fair and impartial trial." And again in the same case: "We know that his Honor unguardedly commented upon the testimony of the witnesses, but when the prejudicial remark is made inadvertently, it invalidates the verdict as much so as if used intentionally. The probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has thus been impaired is entitled to another trial." Like views and cautionary requests to the judges were stated in *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 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 opinion of the case." The case of *Perry v. Perry,* 144 N. C., 328, repeats this injunction to observe the mandate of the statute, for it is there said: "Any remarks by the presiding judge, made in the presence of the jury, which have a tendency to prejudice their minds against the unsuccessful party, will afford ground for a reversal of the judgment." It is very strongly and urgently reiterated in *Park v. Exum,* 156 N. C., 228, as follows: "The Court has always been swift to enforce obedience to our law which forbids a presiding judge to express an opinion on the disputed facts of the trial, and under numerous decisions construing the statute, we must hold

this remark of his Honor, in the presence of the jury and before the verdict, to be reversible error."

We have not cited these cases for the purpose of adjudging that plaintiff can avail itself of what was said by the judge during the trial of this case, but to again emphasize the imperative necessity of keeping the statute steadily in mind and freeing trials of an adverse or injurious intimation of opinion, to the end that there may be such a fair and impartial trial as is guaranteed by the Constitution and enforced by the statute. Many more cases could be cited to illustrate the great importance of this matter, but we omit any reference to them for the obvious reason that those mentioned are quite sufficient for the purpose. It is true, we
(54) have held that where, by the nature of the case, a party is called upon to prove or disprove a fact material to his success, and the witness who, if anybody, can testify to it, is accessible to him, the failure to produce and examine him is a proper subject of comment before the jury (*Powell v. Strickland,* 163 N. C., 393; *Goodman v. Sapp,* 102 N. C., 477); but this, of course, meant comment of counsel and not of the judge, whose slightest intimation as to whether a fact has been found or not will have the greatest weight with the jury. It is not necessary to decide whether plaintiff was prompt and diligent enough in the protection of its rights to now take advantage of this slip of the judge, as we will order a new trial upon another point. It may be that he has, under the circumstances; but we leave the question undecided.

Second. Our opinion is that there was error in permitting the witness of the plaintiff to be cross-examined in regard to the signatures which were written or engraved by Mr. Lester and exhibited to them through the aperture made in the envelope, without showing the rest of the paper in which the signature was written, it being called in this case, rather facetiously, though not inappropriately, the "cat-hole test." These papers should not have been admitted at all. They tended to introduce collateral questions; to multiply the issues, in fact, though perhaps not in form; to divert the minds of the jurors from the real and only question to be decided; to confuse them in their deliberations and to put the witness to an unfair disadvantage and to entrap him unwarily, and also to take the plaintiff by surprise and deprive him of a fair opportunity to know the general nature of the evidence, so that he may prepare to meet it. It tends more to muddy the waters, like the cuttle-fish, than to advance the purpose for which all judicial procedure is adopted, and that is, to conduct the trial so as to establish the truth and to adjudicate rights according to the pertinent and determinative facts, and always to adhere closely to the issue upon which the decision should turn. It was well said in *Hardy v. Harbin,* 87 U. S. (22 L. Ed.), 378, S. C. Fed. Cases,

No. 6059, that, taken at its best, evidence of experts by comparison of handwriting is very unreliable. And in *Adams v. Field,* 21 Vt., 256: "Those having much experience in the trial of questions depending upon the genuineness of handwriting will not require to be reminded that there is nothing in the whole range of the law of evidence more unreliable, or where courts and juries are more liable to be imposed upon." Expert testimony is permissible in such cases, but it is not always the best proof of which the matter is susceptible, and its efficiency and probative force is sometimes easily magnified, and by it the truth is deftly concealed. It therefore follows that all proper precautions should be taken to prevent impositions upon the court and jury. *Hoag v. Wright,* 174 N. Y., 36; *U. S. v. Pendergast,* 32 Fed., 198.

We may remark *imprimis,* and for the purpose of showing the (55) application of the authorities hereinafter cited, that it was not competent to submit specimens of the admittedly genuine and the disputed papers to the jury for their independent examination, before the passage of our recent statute. The old and strict rule had been somewhat relaxed before then, by allowing the witness to hand the papers to the jury—the standards and the questioned documents—and explain the similarities and the dissimilarities to them, so as to illustrate his own testimony and the reasons for his opinion. *Fuller v. Fox,* 101 N. C., 119; *Martin v. Knight,* 147 N. C., 564; *Nicholson v. Lumber Co.,* 156 N. C., 59; *Thomas v. State,* 18 Texas App., 213. But this was the extreme limit, beyond which the party was not allowed to go. The statute changes the rule, but is so carefully and explicitly worded as to exclude by clear implication the examination of any papers but those admitted to be genuine, as standards or models of the true handwriting, and the writings in dispute. It provides: "In all trials in this State, when it may otherwise be competent and relevant to compare handwritings, a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of the witnesses respecting the same may be submitted to the court and the jury as evidence of the genuineness or otherwise of the writing in dispute." Before the enactment of this law, this Court held, in *Tunstall v. Cobb,* 109 N. C., 316, and other cases, that the investigation must be restricted to the writings that are genuine and those alleged to be spurious, and that other writings, not of this class, should be excluded in making the comparison. We are aware that there has been some conflict of authority upon this question, but in the midst of all the differing notions about it, we prefer, as we have the choice, not only to abide by the language of our statute as being restrictive in its nature, but to adopt what is said in Rogers on Expert

Testimony (2 Ed.), p. 342, sec. 144, which is as follows: "The question has been raised whether it is competent on cross-examination to test the knowledge of the witness by showing him real and fictitious signatures and asking him to say which of them are genuine. In those states where a comparison is only allowed to be made with writings which are admitted to be genuine, it is evident that such a comparison should not be allowed except both parties are agreed which of the signatures are real and which false, for unless so agreed, side issues are raised which complicate the case. The rule which excludes writings not admittedly genuine applies with as much force to the cross-examination as to the direct examination. To admit such writings would lead, as well in the one case as in the other, to an indefinite number of collateral issues, and would operate as a surprise to the opposite party, who would not know
(56) what writings were to be produced, and therefore could not be prepared to meet them," citing *Howard v. Patrick,* 43 Mich., 121; *Rose v. First National Bank of Springfield,* 91 Mo., 399; *Massey v. Bank,* 104 Ill., 327; *Hilsley v. Palmer,* 32 Hun., 472 (1884); *Van Wyck v. McIntosh,* 14 N. Y., 439, which support the text. See, also, *Dietz v. Fourth National Bank,* 69 Mich., 287. The case of *Hilsley v. Palmer, supra,* is an interesting one and decisive of this one, if we follow it as authority and adopt its conclusions, and we do not see why we should not, as it is of a very persuasive character, by reason of its clear statement and strong reasoning.

The New York Court of Appeals has considered this question in at least one famous and hotly contested case, *People v. Albert T. Patrick,* 182 N. Y., 175, in which, with its usual convincing logic, it demonstrates the unfairness of this kind of examination when applied to an opinion witness, that is, one who testifies from actual knowledge of the handwriting in question, or his familiarity with it acquired by business intercourse or other association with its supposed author, and concludes that "it was obviously an unfair test," and then says: "It is to be observed that Harmon was called upon to testify, by reason of his competency to form an opinion from long acquaintance with the handwriting of the deceased, and not by reason of his being a professional expert in handwriting or penmanship. I think the question is distinguishable, upon the facts, from that passed upon in *Hoag v. Wright,* 174 N. Y., 36." The case of *Hoag v. Wright, supra,* was distinguished from *People v. Patrick, supra,* because in the former the witness was an acknowledged expert in handwriting, and we suppose was, therefore, thought to be able to take care of himself, and to be better acquainted with the "tricks of the trade." The law is well stated in *Andrews v. Hayden's Admr.,* 88 Ky., 455, 459: "The admissions of these spurious signatures, prepared by

an experienced expert, for the purpose of being presented to the witnesses for the plaintiff, was manifestly wrong. They were executd with such skill as to deceive any ordinary observer, or those having no other experience than their familiarity with their neighbor and his handwriting. Such writings should have been excluded because tending to obstruct the proper administration of the law, and deceiving, by the skill in their execution, the minds of honest men. It was neither a just nor legal test, and threw no light on the issue presented." A strong case favoring this view is *Washington Savings Bank v. Washington,* 76 Vt., 331, 336, where the Court held that, in cross-examination, it was competent for the defendant, for the purpose of testing the correctness of the witness' judgment, to show him signatures of the defendant conceded or proved to be genuine; but this was the limit of comparison.

The defendant examined the witness as though he were an ex- (57) pert, when he was not. His testimony was directly upon the question whether or not the signature upon the note in suit was genuine. But if the witness had been an expert the rule required that a standard of comparison should be established before he could be examined by the use of signatures made for the purpose of the trial. It appears that the signature upon another note in evidence was conceded to be the defendant's, but the exceptions do not show that it was used in the cross-examination. The witness was required to select from the three papers the genuine signatures of the defendant, and then the papers went to the jury. It was error to permit this course of examination and to allow the papers to be submitted to the jury. *Sanderson v. Osgood,* 52 Vt., 309; *Rowell v. Fuller,* 59 Vt., 688; *Costello v. Crowell,* 133 Mass., 352; Abbott's Trial Ev. (2 Ed.), 488, 489.

Speaking of collateral writings, the Court, in *S. v. Minton,* 116 Mo., 605, 614, said: "They were no part of the record in the case, not admitted to be in the handwriting of either one of the defendants, and clearly inadmissible for the purpose of comparison."

While we have noted that there is some conflict, we yet think the weight of authority, and the rule of reason, is in favor of the plaintiff's contention and against the court's ruling. We add to the authorities already cited the following: *Thomas v. State,* 18 Texas App., 213, approved by repeated decisions in that Court; Wigmore on Evidence, secs. 1996, 2001, and 2002; *King v. Donahue,* 110 Mass., 155; *Sanderson v. Osgood,* 52 Vt., 309; *U. S. v. Chamberlain,* 12 Blatchford, 390 (25 Fed. Cases, No. 14, 778); *Gannt v. Harkness,* 53 Kan., 405; *Van Wyck v. McIntosh,* 14 N. Y., 439; *Bank v. Hyland,* 53 Hunn., 108 (6 N. Y. Sup., 78); *Rose v. Bank,* 91 Mo., 399. And analogous cases are: *S. v. Griswold,* 67 Conn., 290; *Bacon v. Williams,* 13 Gray (Mass.), 525;

Kirksey v. Kirksey, 41 Ala., 636; *Howard v. Patrick,* 43 Mich., 128; *People v. Murphy,* 135 N. Y., 455; *Fogg v. Dennis,* 3 Humph., 48. In *Rose v. Bank, supra,* the Court said: "The rule which includes extrinsic papers and signatures is substantially the same in the direct and cross-examination. Papers not relevant as evidence to the other issues are excluded mainly on the ground that to admit such documents would lead to an indefinite number of collateral issues, and would operate as a surprise upon the other party, who would not know what documents were to be produced. The reason of the rule applies to the cross-examination with as much force as to the direct examination. The signatures should have been excluded, whether used to test the witness as an expert or to test his knowledge of the handwriting of the plaintiff." Wigmore on Ev., at sections 1996, and 2001, 2002, subsec. 2, says: "The specimens, to afford a fairly trustworthy inference, must of course be genuine. (58) But, furthermore, the process of proving their genuineness may result (as in the case of the expert's use of them) in a multiplicity and confusion of issues. The specimens submitted to the jury must be genuine." 2 Elliott on Ev., sec. 1105, says: "In those jurisdictions where there are no statutes regulating the admission of opinions as to a comparison of handwriting three distinct rules seem to prevail. In a few jurisdictions the rule is that the opinions of experts based on any comparison are improper; in other jurisdictions the rule is that opinions are admissible in case the writings to be compared are in evidence for another purpose and admitted to be genuine; and the third rule is that opinions of experts are admissible as in the rule immediately preceding and, in addition, on writings whose genuineness has been proved on the trial for the express purpose of comparison. The reason given for holding that the only papers that can be used in such an examination of an expert are those which have been brought into the case for another purpose is that such a limitation is necessary in order to avoid the evil of collateral issues, the danger of fraud in selecting specimens, and the danger of misleading the jury." It is perfectly clear that evidence of this kind may be liable to abuse, and so manipulated or used as to give the jury a false impression as to the real value of a witness' testimony. It is dangerous, to say the least of it, and may tend more to suppress than to disclose the truth. The imitation may be made so perfect as to mislead a trained expert, and it seems from the books that this has sometimes been done. How, then, can a mere opinion witness be expected to stand the ordeal of such an examination, without the benefit even of a tithe of the expert's study and experience, if the latter fails? It shows the necessity of confining the examination to the genuine specimens and the disputed writings.

The above authorities, or some of them, also hold that it is incompetent to introduce such imitations of the genuine signature for the purpose of showing how easily it may be forced or counterfeited. *Thomas v. State,* 18 Texas App., 213. And in *Hickory v. U. S.,* 151 U. S., 306, the Court said: "In the absence of statute, papers irrelevant to the issues on the record were held not receivable in evidence at the trial for the mere purpose of enabling the jury or witnesses to institute a comparison of hands. *Bromage v. Rice,* 7 Car. and P., 548; *Doe v. Newton,* 5 Ad. and El., 514; *Griffiths v. Ivory,* 11 Ad. and El., 322; 1 Greenleaf Ev., sec. 580. The danger of fraud or surprise and the multiplication of collateral issues were deemed insuperable objections, although not applicable to papers already in the cause, in respect of which, also, comparison by the jury could not be avoided."

Third. The enlarged photographs of the disputed writings should not have been used, at least without proving, by the man who made them, how and under what conditions they were taken by him, so as to let the jury finally decide, from the facts, whether they are exact (59) reproductions. It was held in *Bank v. Wisdom,* 11 Ky., 148, that such enlargements of the signatures should be authenticated by the photographer. In *Tome v. Parkersburg R. R. Co.,* 39 Ind., 36, it is said, with reference to this subject: "The testimony of the photographer comes within the same principle as that of Paine. It was offered to establish the forgery of the certificates in controversy, by comparing them with copies (obtained by photographic processes, either magnified or of natural size) of certain signatures assumed or admitted to be genuine, and pointing out the differences between the supposed genuine and the disputed signatures. As a general rule, in proportion as the media of evidence are multiplied, the chances of error or mistake are increased. Photographers do not always produce exact facsimiles of the objects delineated, and however indebted we may be to that beautiful science for much that is useful as well as ornamental, it is at least a mimetic art, which furnishes only secondary impressions of the original, that vary according to the lights and shadows which prevail whilst being taken." This principle has been sanctioned by the following authorities: *Hynes v. McDermott,* 82 N. Y., 41; *Oil Co. v. Bank,* 34 Texas, 555; *Railway Co. v. Bank,* 56 Ohio St., 385; *Bank v. F. S. S. and G. S. F. R. Co.,* 137 N. Y., 242; *Houston v. Blythe,* 60 Texas, 512; *Eborn v. Zempleman,* 47 Texas, 513; *Howard v. Bank,* 189 Ill., 577; *Smith v. Martin,* 135 Cal., 251; *Healy v. Bank,* 160 Ill. App., 637; *Erb v. G. R. Railway Co.,* 42 U. C. Q. B., 42; *B. and O. Railway Co. v. Wilkins,* 44 Md., 37; *Harrison and Brown, Trustees, v. A. and E. R. R. R. Co.,* 50 Md., 513; *W. M. R. R. Co. v. Bank,* 60 Md., 42; *Burrows v. Klunk,* 70 Md., 460;

Barabas v. Kabat, 86 Md., 34; *Lamm v. Homestead Asso. Co.,* 49 Md., 241; *Ins. Co. v. Swain,* 100 Md., 575; *Moses v. Bank,* 111 U. S., 169.

The Court said in *Hynes v. McDermott, supra:* "It would be carrying the matter much farther to permit an expert to compare photographic copies of signatures, and therefrom to testify as to the genuineness of a disputed signature. We may recognize that the photographic process is ruled by general laws that are uniform in their operation, and that almost without exception a likeness is brought forth of the object set before the camera. Still, somewhat for exact likeness will depend upon the adjustment of the machinery, upon the atmospheric conditions, and the skill of the manipulator. And in so delicate a matter as the reaching of judicial results by the comparison of writings through the testimony of experts, it ought to be required that the witness should exercise his acumen upon the thing itself which is to be the basis of his judgment; and still more, that the thing itself should be at hand, to be put under the eye of other witnesses for the trial upon it of their skill. The certainty of expert testimony in these cases is not so well assured as that we
(60) can afford to let in the hazard of errors or differences in copying, though it be done by howsoever a scientific process. Besides, as before said, there was no proof here of the manner and exactness of the photographic method used. It was right not to receive Loader's evidence as that of an expert." The courts that have allowed this kind of evidence have generally held that both the admittedly genuine signature and the one in dispute shall be alike photographed and the testimony of the photographer taken as to the accuracy of the method pursued by him and the results obtained. *U. S. v. Ortez,* 176 U. S., 422, and other cases, *supra.*

It is not necessary now to say more upon this question, as the deficiencies in the proof may be easily supplied. All we decide is that the photographic copies were not admissible in the then state of the evidence, and no more.

There are other errors assigned, which seem to have merit in them, but we will refrain from any further reference to them, as they may not occur again. For those already indicated, a new trial is ordered.

New trial.

Cited: Harrison v. Dill, 169 N. C., 544; *Stephenson v. Raleigh,* 178 N. C., 169; *In re Hinton,* 180 N. C., 213; *Newton v. Newton,* 182 N. C., 55; *Morris v. Kramer,* 182 N. C., 88; *S. v. Hart,* 186 N. C., 587; *S. v. Bryant,* 189 N. C., 114; *S. v. Sullivan,* 193 N. C., 755; *S. v. Rhinehart,* 209 N. C., 153.

WAYNESVILLE TRANSPORTATION COMPANY v. WAYNESVILLE LUMBER COMPANY.

(Filed 13 January, 1915.)

Appeal and Error—Unsettled Case—Docketing Case—Motions—Certiorari —Agreements Extending Time for Service of Cases.

Where the case and countercase or exceptions on appeal have been served within the time agreed upon in writing, it is the duty of the appellant to "immediately" request the judge to settle the case as required by Revisal, sec. 591; and should the judge not settle the case in time for filing in the Supreme Court, the appellant should docket the record proper and move for a *certiorari*, or the appellee, upon motion, may have the appeal dismissed under Rule 17. The practice among attorneys of extending by consent the time for service of the case on appeal beyond that allowed by the statute is not commended.

MOTION to docket and dismiss, under Rule 17, the plaintiff's appeal.

No counsel for plaintiff.
John M. Queen and Hannah & Leatherwood for defendant.

CLARK, C. J. This case was tried at July Term, 1914, of HAYWOOD. By agreement, the time was extended for serving the case and countercase on appeal, which is a bad custom, and not to be encouraged. The plaintiff appellant served its case on defendant 9 September, 1914, and the defendant served its countercase on the appellant 9 November, 1914, both being within the time of the extension agreed upon in (61) writing. Neither case was accepted by the other, and the transcript not being docketed here, the appellant now moves, on 10 December, to docket and dismiss under Rule 17.

This he was entitled to do. If the appellant was not in default for the delay in settling the case on appeal, still he was required to docket the record proper at the time required by the rule, and should have asked for *certiorari* for the case on appeal, provided he showed that on receipt of the countercase he had "immediately" requested the judge to settle the case, as required by Revisal, 591, and that the appellant was in no wise to be blamed for the delay in doing so. This has been repeatedly held by this Court. *Hawkins v. Tel. Co.*, 166 N. C., 213, is one of the most recent cases, and refers to numerous others in which the matter has been discussed and fully settled in every aspect, quoting *Vivian v. Mitchell*, 144 N. C., 472, in which the Court cited, among other cases, *Harrison v. Hoff*, 102 N. C., 25; *Jones v. Asheville*, 114 N. C., 620; *Paine v. Cureton, ibid.*, 606; *Mortgage Co. v. Long*, 116 N. C., 77; *Barber v. Justice*, 138 N. C., 20; *Craddock v. Barnes*, 140 N. C., 427; *Cozart v. Assurance*

Co., 142 N. C., 522. And the Court added in *Vivian v. Mitchell, supra:* "The decisions to this effect have been uniform and so oft repeated that of late years the Court has usually contented itself by following the precedents, without opinion, by a *per curiam* order."

Revisal, 591, provides that if the appellant does not accept the appellee's countercase he "shall *immediately* request the judge to fix the time and place for settling the case before him." *Stroud v. Tel. Co.*, 133 N. C., 253. It does not appear that the appellant did this. It is also true that the appellant might contend that in such event his case as amended by the defendant's countercase should be taken as the case on appeal. But in either of these cases it is none the less necessary that the appellant should docket the record proper and apply for a *certiorari*, and in the latter instance it was his duty to send up his case as amended by the appellee's case.

In *Hewitt v. Beck*, 152 N. C., 757, the Court said that when the appellant seeks to excuse himself because there has been delay in settling the case, without any fault on his part, the Court has "uniformly held that he must nevertheless docket his transcript of the record proper, in proper time, to get a foothold in this Court." In *Burrell v. Hughes*, 120 N. C., 277, it is said, citing many cases: "There are some matters which should be deemed settled, and this is one of them." That case has been often cited since, see Anno. Ed.

Motion allowed.

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J. M. McCRACKEN ET AL., TAXPAYERS, ETC., v. GREENSBORO, NORTHERN AND ATLANTIC RAILWAY COMPANY AND THE BOARD OF COMMISSIONERS OF ALAMANCE COUNTY ET AL.

(Filed 13 January, 1915.)

1. Railroads—Bond Issues—Township Subscriptions—Principal and Agent—County Commissioners—Conditional Subscription — Unauthorized Acts.

Under a statute authorizing the submission to the voters of townships, etc., along the line of a proposed railroad, the proposition to subscribe in bonds to the undertaking, declaring the county commissioners to be the agents of the townships for the purposes of the act, which was accordingly done, but upon conditions expressed in writing between the railroad company and a trust company, advertised before the election in connection with the proposition to subscribe, that the bonds should be held by the trust company and delivered to the board of county commissioners for cancellation should the railroad not be in operation to a stated extent in three years, between certain points on another railroad or railroads: *It is held*, that the condition upon which the issuance of the bonds was ap-

proved by the voters became binding between the parties thereto, and though the county commissioners were acting as the corporate and governmental agents of the voters, they were without authority to alter, in any substantial particular, the proposition as submitted and approved, and therefore their act in further extending the time for the completion of the road beyond that specified was ineffectual.

2. Railroads—Bond Issues—Township Subscriptions—Contracts—Estoppel.

Where there is nothing in a statute authorizing counties, townships, etc., to submit to the qualified voters therein the proposition of subscribing to a proposed railroad, which prohibits the vote being taken upon certain lawful conditions, not expressed in the statute, and the railroad company had theretofore entered into a written agreement with a trustee that the bonds should be held by it and delivered upon the stated conditions, which were of importance in voting upon the question proposed, the railroad company, having agreed to the conditions contained in the contract, is estopped to question their validity.

3. Railroads—Counties and Towns—Bond Issues—Conditional Subscription—Contracts—Equity—Time of the Substance—Conditions Precedent—Enforcement.

Where a statute authorizes the submission to the voters of townships along the line of a proposed railroad the question of subscribing thereto, and creates the board of county commissioners agents of the townships for the purpose, and the voters have approved the proposition upon condition, among other things, that the proposed railroad should be in operation within three years, the period stated is of the substance of the contract, and will be strictly enforced whether regarded as a condition precedent or subsequent, without power of the county commissioners to change or modify it; and the principles of equity relating to relief against forfeitures or penalties have no application; and *it is further held*, the condition provided in this case was a condition precedent, where strict performance may be insisted on.

4. Contracts—Conditions—Part Performance—Equity—Money Expended.

Under the facts of this case, *it is held* that the defendant railroad company is not entitled to consideration in equity upon the grounds that it had expended money upon a proposed railroad to which certain townships had voted to subscribe, upon certain conditions, which the defendant had failed to perform, among them, that the road should be operated from certain points within three years.

APPEAL by plaintiff from *Rountree, J.*, at August Term, 1914, (63) of ALAMANCE.

Civil action, heard on demurrer to complaint. A sufficient preliminary statement of the facts, as they appear in the complaint, is very well set forth in one of the briefs, as follows:

"On 5 August, 1912, a petition was presented to the board of commissioners of Alamance County on the part of each of those townships of said county named in paragraph 2 (record, p. 4) of the complaint in this action—said petitions praying orders for elections to be held in each of

said townships on the question of subscribing to the preferred capital stock of the Greensboro, Northern and Atlantic Railway Company, as provided for in chapter 770 of the Public-Local Laws of 1911 and the laws amendatory thereof. The elections were duly ordered and held; the aforesaid townships each voted in favor of a subscription; and bonds, bearing date 8 October, 1912, were issued by the county commissioners as provided by the aforesaid chapter of the Public-Local Laws of North Carolina.

"Subsequent to 5 August, 1912, the date of the orders for the elections, but prior to 17 September, 1912, the date on which the elections were held, viz., on 8 August, 1912, an agreement, set forth in the sixth paragraph of the complaint herein (record, pp. 11-16), was voluntarily entered into between the railway company and the Greensboro Loan and Trust Company. This agreement provides, among other things, that in consideration of the qualified voters of these several townships voting in favor of a subscription, the railway company agrees that the bonds therefor, when issued, shall be delivered to the trust company to be held in trust, upon the condition that said bonds shall not be delivered to the railway company, or to anyone else for it, until a railway from Greensboro, N. C., through Alamance County, to some connecting point on the Seaboard Air Line Railway, or the Norfolk and Southern Railroad, or both, is completed by this company or its successors, and there are in operation over such line of railway trains for the transportation of passengers and freight; and upon the further condition that unless a railway is so constructed and in operation within three years of the issuance of said bonds, the trust company shall deliver the bonds to the commissioners to be destroyed, and all the rights and equities of the rail-
(64) way company in said bonds shall cease. This agreement was widely published prior to the election in all the election districts. The bonds themselves contain no reference to the agreement, but, when issued, they were delivered to the trust company by the commissioners and are now held by it.

"After the lapse of about twenty months of the thirty-six months time limited in said agreement for the completion of said railway, the railway company presented to the commissioners a petition, as set forth in the seventh paragraph of the complaint (record, pp. 16-20), alleging that it would be impossible to complete the railway within the time limited, and praying that the said time be enlarged by an additional two years. This petition was granted. Thereupon plaintiff brought this action and alleged that the commissioners were without authority to grant such an extension of time, and asked that the order to that effect be declared void, and that the trust company be enjoined from making any other dis-

position of said bonds than might be made under the aforesaid agreement between it and the railway company. Defendant railway company demurred to the complaint. Demurrer sustained and judgment accordingly. Plaintiff excepted and appealed."

W. S. Coulter and J. R. Hoffman for plaintiff.
Long & Long and King & Kimball for defendant.

Hoke, J. From a perusal of the facts stated in the complaint, it clearly appears that this question of subscription was submitted to the voters of these townships and approved by them as a conditional proposition, and, in order to make the same definite and put it in a form that would render it enforceable, the railroad, some time prior to the election and in reference thereto, entered into an agreement with the Greensboro Loan and Trust Company, "as trustees for the various townships," among other things, that if subscriptions should be approved at the approaching election, the bonds should be prepared and left with the trust company, among other stipulations, on condition:

"First. That the said bonds shall not be delivered to the Greensboro, Northern and Atlantic Railway Company, or anyone else for it, unless and until there is constructed by it, or by its successor or successors, or its assigns, so much of its projected or proposed lines of railway as shall constitute and include a line from a point within the city of Greensboro, North Carolina, in an easterly direction through the county of Guilford to the Alamance County line, and thence through the county of Alamance to a point necessary to connect, and which does connect, with the Seaboard Air Line Railway Company, and the Norfolk and Southern Railroad Company's line or lines, or either of them, or with the subsidiary line or lines of said corporations, or either of them.

"Second. That in the event the said portions of the lines of (65) railway of the party of the first part is not constructed by it or its successor or successors or assigns, within three (3) years from the date of the issuance of said bonds as indicated and set forth in condition first, as above set out and numbered, that then in that event it is agreed by the party of the first part that the party of the second part (the Greensboro Loan and Trust Company) shall, and it agrees that it will, in that event, deliver all of said bonds so issued by the county of Alamance for the several townships in said county, to the board of commissioners of Alamance County, in order that they may all be destroyed; and it is further agreed by the party of the first part that in the event of the failure to construct the aforesaid lines of railway within three (3) years from said date of the issuance of said bonds, that all rights and equities which the party of the first part may have in said bonds shall cease.

"Third. That said bonds shall not be delivered by the party of the second part to the party of the first part, or to anyone for it, unless and until the party of the first part, its successor, successors, or assigns, construct said lines of railroad as agreed in Condition No. 1 (first), as above set forth, and has in operation over said line of railway within three (3) years trains for the transportation of passengers and freight." And the complaint further states: "That said contract was duly and widely published in all of the aforesaid townships before the date of said election." And on these facts we are of opinion that the board of county commissioners is without power to alter the contract and grant defendant company the two years additional time. It is true that, under section 16 of the act incorporating the company, chapter 770, Public-Local Laws 1911, all the counties, townships, cities, and towns along the line of the proposed road are authorized to subscribe to the undertaking, on approval of a majority of the qualified voters, etc., and that the board of county commissioners are declared to be the corporate agents of the townships for the purposes of the act, etc.; and we incline to the opinion that the act intended, as to these townships, to vest in the county commissioners the ordinary powers of governmental agents in the premises; but, under our Constitution and by the express provisions of the statute, this subscription is only valid on approval of the qualified voters of the respective municipal bodies specified, and, the question having been submitted and approved by them in a conditional form, definitely set out in a contract and formally assented to by the railroad company, it must, as between the parties thereto, be taken as a binding agreement, and the county commissioners, even though acting as corporate and governmental agents, are without power to alter the proposition, as submitted and approved, in any substantial particular. The position as presented has not been directly passed upon in this jurisdiction, but it has been
(66) recognized as sound in principle by the Supreme Court of the United States in *Quinlan v. Green Co.* (Ky.), 205 U. S., 450; *Citizens Savings and Loan Asso. v. Perry Co.*, 156 U. S., 692, and other cases, and seems to have been directly approved in *West Va. and P. R. R. Co. v. Harrison County*, 47 W. Va., 273, and *Clark v. Town of Rosedale*, 70 Miss., 542, both of them courts of recognized ability and learning. See, also, Jones on R. R. Securities, secs. 267, 268.

It is urged for defendant that the county commissioners, under their power as corporate agents, have the right to modify the contract made by them when it clearly is promotive of the interests of the community concerned, and several cases were cited where such a modification had been upheld, among others, *The County of Randolph v. Post*, 93 U. S., 502; but an examination of these authorities will disclose, we think, that

the agreement is allowed to prevail only when the municipal officers have power of themselves to make the subscriptions or where the vote of the municipality being in general terms for the subscription, the corporate officers were intrusted with making the contract designed to carry the vote into effect. But in the case before us, as we have seen, the voters have expressed their approval on a definite proposition as contained in a contract which they have made through the Loan and Trust Company as their agents and representatives for the purpose, and which specified that the bonds were not to be delivered until the road was completed, and that, unless same was completed within three years, they were to be returned and canceled and all rights and equities of the road should cease.

The County of Randolph v. Post, supra, was the case of an executed contract, where the road had been completed and in operation and the county was endeavoring to avoid its obligations on grounds, many of them, highly technical, and where the county authorities, as stated, had been intrusted with the general power of making the contracts in the premises. In that case, too, it appeared that the county officers charged with the duty had declared that the road was completed; had delivered the bonds and had received the stock of the railroad company in return therefor, and this was held to be an estoppel on the municipality. The case has very little similarity to that presented here.

It is further contended that, as the statute contained no provision for submitting the proposition in its conditional form, that a stipulation of the kind relied upon should be considered and treated as void.

In many of the decisions where the vote was for a conditional subscription the statute or resolution contained provision to that effect; but there is nothing, in itself, illegal in taking the sense of the voters upon the proposition in that form. There is nothing in the statute that forbids it, and assuredly the railroad company, having signified their assent in a definite contract, formally executed, and by which they (67) have obtained the township subscription, will not be heard to assail it on any such ground. They may not accept the benefits and repudiate the burdens of their contract, and are estopped to assail the validity of the stipulations. *Sprunt v. May,* 156 N. C., 388; *Hutchins v. Bank,* 128 N. C., 72.

Again, it is insisted that this provision is in the nature of a forfeiture, and that the courts are inclined against the specific performance of such a stipulation, and that the county commissioners, under their power as corporate agents, should be permitted to modify it as to nonessentials, and that, on the facts in evidence, time should be considered a nonessential, within the meaning of the principle.

It is true that our Court has frequently expressed its approval of the principle that, in ordinary business contracts, in which the consideration has wholly or in part passed, conditions subsequent which look to the forfeiture of rights and covenants for liquidated damages, which are in their effect but penalties, will be construed with some strictness, and, in the exercise of its equitable powers, that it will, at times, relieve against forfeiture in the one case and will adjust the conflicting interests in disregard of the penalty in the other. But the principle does not obtain in the case of conditions precedent where strict performance may be insisted on. *Lodge v. Smith,* 147 N. C., 244; 1 Pomeroy Eq. Jurisdiction (3d Ed.), sec. 455.

This contract, in effect, provides that the bonds shall not be delivered or become binding obligations of the township unless the road is completed within three years, and, in that aspect, may be regarded as a condition precedent; but, whether the one or the other, in contracts of this character, there is high authority for the position that time is of the substance, and that the contract in that respect may not be altered by the commissioners, who are only the agents to carry its terms into effect, with power to modify, perhaps, in matters nonessential. The provision allowing three years seems to be a reasonable one, and if, in the face of this very definite stipulation as to time, it can be extended to two years, at the end of that time it may be changed again, and the voters and residents of the community are, in the meantime, shut off from making effective effort in other directions.

Speaking to this question of time, in the 47 W. Va., *supra, Judge Brannon,* delivering the opinion, said: "Time is the essence of the contract. If the county had given a few months or a year, we might say it was not so intended; but, giving nearly three years, we may more readily say that both sides so regarded it. Look at the strong language—an express proviso that if the road should not be ready for ties by 1 January, 1887, the subscription should be forfeited. Time is often nonessential, where no one suffers by delay, as in many purchases of land; but
(68) the very nature of this case forces the conclusion that time was all important to the county, as we cannot suppose that it intended to handcuff itself for an indefinite term against efforts to get elsewhere the benefit it had in view, should this company fail to perform the work." *Ballard v. Ballard,* 25 W. Va., 470. "Where the condition requires the railroad to be begun or finished before a certain date, it is held that time is of the essence of the contract, and the subscriber may be discharged from liability by a failure to comply with the condition." 1 Elliott R. R., secs. 116, 117. Where a town agreed to issue its bonds on "performance of certain conditions by a railroad company—as that it should

construct its road from a certain point to a certain point within a certain time—if the company does not perform the condition within the time it cannot, though prevented by floods, compel the issue of the bonds, though it afterwards completes the line. 1 Wood R. R., sec. 119, citing *R. R. v. Thompson,* 24 Kan., 170. Subscription, "provided the town of F. is made a point, and said road is put under contract in one year from 1 September, 1853." Held, putting the road under contract was a condition precedent to right of company to recover, though the road was finished and running by 1 September, 1858; *Judge Dillon* saying the letting to contract as stipulated might have hastened completion. *R. R. v. Boestler,* 15 Iowa, 555.

In the present contract the parties have not only made the express stipulation that if the road is not completed to a certain point in three years the bonds will be surrendered and destroyed, and that all rights and equities under the contract shall cease, but have added yet another with regard to time: That the bonds shall not be delivered *unless* and until the railroad shall construct its lines as above set forth and has in operation over said line, within three years, trains for the transportation of passengers and freight.

We are not inadvertent to an allegation made by the railroad in its application for extension, that they have already spent many thousands of dollars in making surveys to ascertain the desirable route. Even if this be accepted as a fact in plaintiff's pleadings, because annexed thereto as an exhibit, it is a very indefinite statement on which to find an equity by reason of moneys expended. A perusal of the allegation will show that the railroad company in the twenty months already expired have not even yet located their line and are not in any attitude to invoke consideration of the Court on the ground of diligence or of any defense of large expenditure.

On the facts in evidence, we are of opinion that there is error in allowing the county commissioners to extend the time, and the judgment to that effect is

Reversed.

Cited: Highway Com. v. Construction Co., 170 N. C., 514; *Comrs. of Johnston v. State Treasurer,* 174 N. C., 147; *Gibbs v. Drainage Comrs.* (dissenting opinion), 175 N. C., 10; *Comrs. of Bladen v. Boring,* 175 N. C., 112; *Morris v. Basnight,* 179 N. C., 302; *Hall v. Giessell,* 179 N. C., 660; *Edgerton v. Taylor,* 184 N. C., 578; *School Committee v. Board of Education,* 186 N. C., 646; *Comrs. of McDowell v. Bond Co.,* 194 N. C., 139; *Indemnity Co. v. Perry,* 198 N. C., 289; *Morris v. Y. & B. Corp.,* 198 N. C., 715.

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SMATHERS v. TOXAWAY HOTEL COMPANY.*

(Filed 13 January, 1915.)

1. Bills and Notes—Due Course—Presumptions—Interpretation of Statutes.

One who acquires a negotiable instrument, regular upon its face, for value before maturity, is *prima facie* taken to be a holder in due course, nothing else appearing. Revisal, sec. 2201.

2. Bills and Notes—Infirmities in Instrument—Holder—Burden of Proof—Notice—Bad Faith—Interpretation of Statutes.

When it is alleged and shown in an action upon a note brought by the holder, claiming to have acquired it in due course, that the instrument had been procured by fraud between the original parties, the burden is then upon him to show that he had acquired it *bona fide*, without notice of any infirmity in the instrument or defect in the title of the person who negotiated it to him (Revisal, sec. 2206), the notice required to invalidate his title being "actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Revisal, sec. 2205.

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

Where fraud between the original parties to a negotiable instrument has been alleged and shown, and one claiming to be a holder in due course brings his action thereon, it is not error for the trial judge to refuse to instruct the jury, when the plaintiff's evidence, uncontradicted, tends to show that he acquired it in due course without knowledge or notice of the defect, that there was no evidence of such knowledge or implicative facts, for the statute casts the burden, in such instances, on the plaintiff, and the jury, the triers of the facts, may not find them to be as testified; but the plaintiff is entitled to an instruction that the jury should answer the issue in his favor if they find the facts to be as testified, when, as in this case, no adverse inferences may be drawn from the testimony.

4. Bills and Notes—Collateral Notes—Value—Pre-existing Debt.

Notes taken as collateral for a valid preëxisting debt are acquired for value within the meaning of the negotiable instrument law.

APPEAL by Frank & Co., interveners, from *Harding, J.*, at February Term, 1914, of BUNCOMBE.

W. R. Whitson and J. C. Martin for plaintiff.
Bourne, Parker & Morrison and T. F. Davidson for interveners.

WALKER, J. There are several of the exceptions in this record which are common to both this appeal and that of McMichael, which make it necessary to discuss only the assignment of error relating to the question,

*See *Smathers v. Hotel Co.*, 167 N. C., 469.

whether the court should have given the instruction requested by the interveners, Frank & Co., that if the jury believe the evidence, they will find that they are innocent purchasers for value and without notice of any fraud in the transaction connected therewith, or, in (70) other words, that they are holders in due course, notwithstanding any infirmity in the instruments or any defect in the title of the person who negotiated them. There can be no doubt that Frank & Co. acquired their title to the instruments by indorsement before they were due, and that each of them was, all that time, complete and regular on its face and had not been previously dishonored, so that the only requisite to an unimpeachable title to the notes, under Revisal, ch. 54, sec. 2201, is that, at the time they were negotiated, Frank & Co. had no notice of "any infirmity in the instruments or any defect in the title of the person who negotiated them." Revisal, sec. 2208, provides, in part, that every holder is deemed *prima facie* to be a holder in due course, but when it is shown that the title of any person, who has negotiated the instrument, was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title in due course. The interveners started out with *prima facie* evidence that they were holders in due course, but when it was found that the notes had been executed in fraud of creditors, the burden shifted to them and they were bound to prove that they acquired the title as holders in due course, or from some person who held the notes as such. It has been held to be insufficient to show merely that the holder purchased the note before its maturity and paid value for it; but to entitle him to recover upon it, under Revisal, sec. 2206, as a holder in due course, he must go further and show that he acquired it *bona fide* and without notice of any infirmity in the instrument or defect in the title of the person who negotiated it to him. In order to constitute such notice, it is further provided by Revisal, sec. 2205, that the holder, claiming the right of recovery upon it, "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." Norton on Bills and Notes, 334, speaking of the burden of proof when there is an infirmity in the note or a defect in the title, says: "The burden is cast upon the plaintiff to show that he took the paper for value and in good faith. Some of the cases declare that the holder need not show that he had lack of notice, but need only show value, because the burden of showing notice is upon the party who seeks to impeach the title. But the other courts maintain, and properly, that in addition to proving value the holder should prove that he bought the note in good faith, and should show that he had no knowledge of or notice of the fraud. If value and notice are disputed as facts, they must be passed

upon by the jury." So in *Tatum v. Haslar,* 23 Q. B. Div. (1889), p. 345, the Court says: "When fraud is shown, the burden of proof is on the holder to prove both that value has been given and that it has been given in good faith, without notice of the fraud." And in *Vosburgh v.*
(71) *Diefendorf,* 119 N. Y., 357: "Where the maker of negotiable paper shows that it has been obtained from him by fraud, a subsequent transferee must, before he is entitled to recover thereon, show that he is a *bona fide* purchaser or that he derived his title from such a purchaser. It is not sufficient to show simply that he purchased before maturity and paid value; he must show that he had no knowledge or notice of the fraud." See, also, *Giberson v. Jolly,* 120 Ind., 301; *National Bank v. Diefendorf,* 123 N. Y., 191. The above cases are cited with approval in *Bank v. Fountain,* 148 N. C., 590, and are fairly illustrative of the prevailing doctrine. See, also, *Cox v. Wall,* 132 N. C., 730; *Morgan v. Bostic, ibid.,* 743; *Bank v. Hollingsworth,* 135 N. C., 556; *Crockett v. Bray,* 151 N. C., 615. The question now arises whether Frank & Co. had actual knowledge of the fraud, or of any such facts as constituted bad faith in taking the notes. With respect to this feature of the case, they asked the court to instruct the jury that there was no evidence of any such knowledge or implicative facts. But it would have been error, upon the evidence as it now appears, for the judge to have so charged. There being an infirmity in the notes, and the hotel company not having a good title to them, as it participated in the fraud, and was the principal offender, the burden was cast upon Frank & Co. to prove that they had acquired them without the guilty knowledge, and they were not entitled to such a peremptory instruction. It must be a very plain and conclusive case to justify such an instruction in favor of the party having the burden of proof, as the credibility of the evidence adduced in support of his claim that he is a holder in due course is for the jury to decide. If they do not believe the evidence, he has failed to discharge the burden resting upon him by the terms of the statute, and the verdict should therefore be against him, unless there is other evidence or circumstances sufficient for that purpose, and whether there is, the jury at last must also decide. But the interveners, Frank & Co., were entitled to the other instruction, which was based upon the credibility of the evidence, and permitted the jury to pass upon it. Even when there is an infirmity in the instrument or defect in the title thereto, if the holder makes a full and fair disclosure of the facts and in no reasonable view of the evidence does it appear that he had the guilty knowledge described in the statute, and there is no circumstance, or other evidence in the case, contradicting it, or from which an adverse inference might be drawn, such an instruction as that requested should

be given. We so held in *Bank v. Fountain, supra,* where it was said by *Justice Hoke,* when dealing with a like question: "The fraud having been established, or having been alleged, and evidence offered to sustain it, the circumstances and *bona fides* of plaintiff's purchase were the material questions in the controversy; and both the issue and the credibility of the evidence offered tending to establish the position (72) of either party in reference to it was for the jury and not for the court," citing *S. v. Hill,* 141 N. C., 769; *S. v. Riley,* 113 N. C., 648. Again it is said: "As heretofore stated, when fraud is proved or there is evidence tending to establish it, the burden is on the plaintiff to show that he is a *bona fide* purchaser for value, before maturity and without notice, and the evidence must be considered as affected by that burden. If, when all the facts attendant upon the transaction are shown, there is no fair or reasonable inference to the contrary permissible, the judge could charge the jury, if they believed the evidence, to find for the plaintiff, the burden in such case having been clearly rebutted. But the issue itself and the credibility of material evidence relevant to the inquiry is for the jury, and it constitutes reversible error for the court to decide the question and withdraw its consideration from the jury." The Court there adverts to the unsoundness of the rule, as stated in Daniel on Neg. Instr., sec. 819, as to the burden of proof, and says it is not in accordance with our enactment upon the subject.

It would be useless to prolong the discussion of the law applicable to cases of this kind, as it is fully set forth in *Bank v. Fountain, supra,* with proper reference to the authorities, which case has been later and frequently approved by this Court. *Mfg. Co. v. Summers,* 143 N. C., 102; *Bank v. Griffin,* 153 N. C., 72; *Myers v. Petty, ibid.,* 462; *Park v. Exum,* 156 N. C., 228. The case of *Bank v. Griffin, supra,* is clearly in point, and shows that the interveners were entitled to have the jury instructed as they requested, provided the state of the evidence warranted it, and we think it did. It tended to show, if believed, that Frank & Co. took the notes as collaterals for a preëxisting and *bona fide* indebtedness of the Toxaway Hotel Company to them for a larger amount, which, of course, is a valuable consideration. Revisal, secs. 2173, 2175; *Brooks v. Sullivan,* 129 N. C., 190; *Mfg. Co. v. Summers, supra.* Frank & Co. were then holders for value. Did they buy in good faith and without notice of the plaintiff's equity, or of any infirmity in the instruments, or of any defect in their indorser's title thereto? E. W. Frank positively testifies that they did, and gives in detail all the circumstances connected with the transfer of the notes, in an apparently full, fair, and candid manner and without any noticeable concealment or suppression of the facts. If he told the truth, the conclusion is inevita-

ble that they bought for value and without notice of any infirmity or defect, and also in good faith. The only remaining inquiry, therefore, is, Did he tell the truth? And the court should have left that question to the jury, with instructions as to the evidence and *quantum* of proof, and as to such other matters as would be pertinent and proper for them to consider, upon these questions of value, notice, and the burden of
(73) proof. Norton on Bills and Notes, pp. 318, 319, states the rule with substantial accuracy, and which we adopt with slight qualification, to be noted hereafter. After showing (at pp. 292, 310, and 311) that where an infirmity or defect has been shown, the burden is upon the holder (whether plaintiff or defendant or intervener) to prove that he holds *bona fide,* for value and without notice, he says: "The reason for this rule is that where there is fraud it is but reasonable to suppose that he who is guilty of it will part with the instrument for the purpose of enabling some third party to recover upon it. Such presumption operates against the holder and devolves upon him the duty of showing value and lack of notice in rebuttal of the duress or fraud, in order to maintain his action. In the cases of illegality the rule is the same, and for the same reason. The burden is cast upon the plaintiff to show that he took the paper for value and in good faith. Some of the cases declare that the holder need not show he had lack of notice, but need only show value, because the burden of showing notice is upon the party who seeks to impeach the title. But the other courts maintain, and properly, that, in addition to proving value, the holder should prove that he bought the note in good faith, and should show that he had no knowledge or notice of the fraud. He should show, also, that he paid value for the note; and if value and notice are disputed as facts, they must be passed upon by the jury. Hence, it follows that it is not necessary for the defendant, as in case of lack or failure of consideration, to show that the plaintiff did not pay value or that he had notice of the facts of the defense, but these facts must appear affirmatively on the plaintiff's (holder's) part. It is probable that this rule does not mean that the plaintiff (holder) must prove a direct negative, but that, as a part of the direct case, he must show the facts of the transaction constituting the transfer, and then, if there is nothing in the transaction itself to show bad faith, and there is no proof from other sources of want of good faith, or actual or constructive notice of the defense, the plaintiff (or holder) must prevail," provided, as we will add, the jury believe the evidence; for, as the "burden of proof," under the statute, is upon the holder, intervener in this case, when the "infirmity in the instrument or defect in the title" is shown, if he fails to satisfy the jury of his being a holder in due course, the burden has not been discharged by him, but still remains. A *prima facie* case is made

out by him, in the beginning, when he produces the note, proves its execution and its indorsement to him (*Bank v. Fountain, supra,* and *Tyson v. Joyner,* 139 N. C., 69), but this *prima facie* case vanishes when the infirmity in the instrument or defect in the title appears. It is not transferred to the maker of the note, for he stands in a better position by the express terms of the statute, which casts the *burden of proof* upon the holder to show that he is an innocent purchaser for value. The instruction, therefore, should have been given in response (74) to the intervener's prayer therefor. It may also be remarked that the charge seems to have been based upon the rule of *Lord Tenterden,* instead of that of *Lord Denman,* which has been written into our statute, Revisal, sec. 2208. See appeal of McMichael, at this term. It is not enough that facts should appear calculated to arouse suspicion in the mind of a prudent man, or to excite inquiry, but there must be either knowledge of the infirmity or defect, or, in this case, the fraud, or knowledge of such facts as will evince bad faith on the part of the intervener, or holder, in taking the note, for the statute so provides.

If a statement of the law be found in any former decision of this Court which would seem to militate against the view herein expressed, it was inadvertently made, attention not having been directed at the time to the exact terms of the statute, or it was due, perhaps, to the wrong citation of the doctrine in *Bank v. Burgwyn,* 110 N. C., 267, as stated in Daniel on Neg. Instruments, sec. 819, which was virtually repudiated in *Bank v. Fountain, supra,* as being in conflict with our enactment upon the question, the Court there saying that "the law, as expressed by Mr. Daniel, has been subjected to adverse comment in the decisions upon this subject, which we have adopted as law by our statute, and there is doubt if, since its passage, what is said by Mr. Daniel can be regarded as correctly stating the rule, under our statutory provision, in reference to the burden of proof," and the Court then immediately proceeds to lay down and apply the opposite rule, placing the burden upon the holder. If the burden is upon the plaintiffs, as creditors, who attack the validity of the notes, the case, as it appears in this record, would be still stronger against them.

It was suggested that there were contradictions in the testimony of E. M. Frank, but we have failed to discover them, or, at most, any material one. His deposition, on the contrary, appears now to be consistent, credible, and believable, and free, so far as we can see, from any reasonable ground of suspicion. The jury, though, must be the final arbiters of its credibility.

The case is remanded, with directions to call another jury for the trial of the issue involving the validity of the notes held by these interveners.

New trial.

Cited: Moon v. Simpson, 170 N. C., 337; *Discount Co. v. Baker,* 176 N. C., 547; *Bank v. Pack,* 178 N. C., 391; *Holleman v. Trust Co.,* 185 N. C., 52, 53; *Bank v. Sherron,* 186 N. C., 299; *Bank v. Webster,* 188 N. C., 376; *Tire Co. v. Lester,* 190 N. C., 415; *Whitman v. York,* 192 N. C., 90; *Clark v. Laurel Park Estates,* 196 N. C., 638; *Building & Loan Asso. v. Swaim,* 198 N. C., 16.

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(75)

A. J. PATTERSON AND HER HUSBAND, J. D. PATTERSON, v. A. J. FRANKLIN AND J. H. WILSON, EXECUTORS OF F. M. JENKINS.

(Filed 13 January, 1915.)

1. Husband and Wife—Wife's Separate Earnings—Agreement by Husband—Wife's Separate Estate—Wife's Right of Action.

Irrespective of whether the statute, chapter 109, Laws 1911, has changed the law theretofore prevailing allowing the husband the earnings of his wife and the proceeds of her labor, the husband may confer upon the wife the right to her earnings, upon which they become her separate estate, giving her a right of action to recover them in her own name.

2. Same—Parties—Judgment Against Husband.

Where the husband has conferred upon the wife the right to her earnings, he is not a necessary party in her action brought to recover them from a third party; and when he has been joined with her as a party plaintiff, he becomes only a nominal party, and judgments, arbitration, or other proceedings with parties affecting him alone cannot affect her right to recover, if she has a good cause of action in her own name.

3. Same—Estoppel in Pais—Moneys Received—Credits—Trials—Questions for Jury.

In proceedings brought by the wife to recover the value of her services rendered to her aged parent, under a valid agreement that such services would be compensated for by him, and her husband has set up this claim in an arbitration in which the wife was not a party, relating to his account as guardian of the father, and has been paid a certain sum under the arbitration purporting to be in full of his wife's demand, and has paid it over to her, though the wife was a witness in the proceeding to arbitrate, there is nothing in her conduct which could operate as an estoppel *in pais,* and the question of her recovery should be submitted to the jury, regarding the money she has received as a payment *pro tanto,* should she succeed in recovering a larger sum.

4. Parent and Child—Services Rendered by Child—Agreement to Compensate.

Services rendered by an adult child to her parent living with her are presumed to be gratuitous; but this presumption may be rebutted and overcome by proper proof that they were given and received in expecta-

tion of pay or compensation, extending to instances in which the child supported and cared for the parent under an express or implied promise that the compensation shall be provided for in the last will and testament of the recipient.

5. Same—Wills—Consideration by Devise—Breach of Contract—Quantum Valebat.

Where an adult child renders services in the care and support of her aged parent under an agreement between them that the parent should in consideration thereof devise certain lands to the child, and the services are accordingly rendered by the child until the parent voluntarily leaves the home of the child, and renders it impossible to perform his part of the contract, by conveying the lands to others, a right of action presently accrues to the child, who has performed his part of the contract, and he may recover for the reasonable value of the services rendered.

CLARK, C. J., concurring.

APPEAL by plaintiffs from *Justice, J.,* at August Term, 1914, (76) of SWAIN.

Civil action to recover for services rendered F. M. Jenkins, now deceased, and for board and lodging him for six years, four months, and nineteen days.

The action was originally instituted by A. J. Patterson against F. M. Jenkins, who was her father. Afterwards, and over protest of plaintiff and also of himself, J. D. Patterson, the husband, was made party coplaintiff. F. M. Jenkins, having died, his executors were made parties and the action proceeded with against them as executors.

The suit was for services rendered and board and lodging of F. M. Jenkins for six years and over, at about $20 per month, and there was evidence of plaintiff tending to show that, on 14 January, 1906, F. M. Jenkins, having tried some of his other children, came to the house of *feme* plaintiff, who was his daughter, and they made arrangement that if she would give him a home and care and provide for him, he would leave her all of his property; that the husband assented, and it was a part of the agreement that the compensation was to belong to the wife; that, under the agreement, F. M. Jenkins stayed at plaintiff's home for six years, four months, and nineteen days, when he became dissatisfied and left, living thereafter with some of the others until he died, not long thereafter, a year or more; that the father, F. M. Jenkins, was an old man, needing much attention, and for the last year and more of his stay was almost helpless, and that an average charge of $20 per month was very reasonable; that some time after leaving plaintiff's house F. M. Jenkins conveyed a portion of his real estate to his wife, and, later, had given about one-third of the money he then had to some other relation, and, in his will, had left the bulk of his property to others, giving only

a nominal amount to plaintiff A. J. Patterson; that during the very latest part of his stay with plaintiff J. D. Patterson, the husband, in consultation with some of the other near relatives and heirs at law, had qualified and acted as guardian of F. M. Jenkins; that said Patterson was removed a short while after Jenkins left, and, there being a dispute as to a proper settlement of the guardianship matters, J. D. Patterson and F. M. Jenkins referred the matters in dispute between them to three arbitrators, who heard evidence and made an award, in effect, that Patterson owed and should pay to F. M. Jenkins $389.87 as a settlement of guardian account and should turn over to said Jenkins a certain deed of trust which was a subject of difference between them.

(77) In the hearing before the arbitrators J. D. Patterson presented a bill for board and lodging which his wife had claimed of him as guardian, to the amount of $1,117.50, and on which he had paid her $586.52, leaving a balance due her on account of $530.98. The arbitrators allowed J. D. Patterson credit by reason of the claim of $196.65 and made the award as heretofore stated. That when the award was announced Mrs. Patterson paid back to her husband all of the money paid to her by him, except the $196.65, for which he had been allowed credit.

It appeared that Mrs. Patterson had been examined as a witness before the arbitrators, but all the evidence tended to show that she was not a party to said proceeding, nor had she appeared therein nor authorized anyone to appear for her or submit her claim to the action to the board of arbitrators.

At the close of the evidence, or during the trial, the court having intimated an opinion adverse to plaintiffs, they submitted to a nonsuit and appealed.

Frye, Gantt & Frye for plaintiff.
A. J. Franklin and Alley & Leatherwood for defendant.

HOKE, J., after stating the case: Under the law, as it has heretofore prevailed in this State, a husband is entitled to his wife's earnings, the proceeds of her labor, where they are living together as man and wife, and we are not called on to determine whether the principle is altered or in any way affected by our recent legislation on the rights and capacities of married women, notably the statute known as the Martin Act, Laws 1911, ch. 109, by which married women are practically constituted free traders as to all their ordinary dealings, as all the authorities here and elsewhere agree that the husband may confer upon the wife the right to her earnings, and when he has done so, these earnings are then properly regarded as her separate estate, which she is entitled to recover by action in her own name. *Price v. R. R.*, 160 N. C., 450; *Syme v. Riddle*, 88

N. C., 463; *Hinckly v. Phelps,* 84 Mass., 77; *Bowman v. Ashe,* 143 Ill., 649; 21 Cyc., pp. 1385-1395.

There is no necessity, therefore, that the husband should appear as a party, the evidence tending to show that he had conferred upon the wife, in this instance, the right to earnings acquired under the contract with her father. Revisal, sec. 408, subsec. 3. The matter, however, is of no especial moment, as the husband, in any event, is only a nominal party, and neither judgments nor arbitration proceedings with parties affecting him alone should be allowed to interfere with her rights to recover, if she has a good cause of action in her own name. *Walker v. Phil.,* 195 Pa. St., 168; *Beromo v. Lumber Co.,* 129 Cal., 232; *Kelly v. Hancock,* 75 Ala., 229; 23 Cyc., 1242; *Womack v. Esty,* 201 Mo., 467, reported also in 10 L. R. A. (N. S.), pp. 140-146.

Again, while services rendered by an adult child for a parent, (78) or a parent for such a child, when living together as members of the same family, are presumed to be gratuitous, the presumption is a rebuttable one, and is overcome by proper proof that they were given and received in expectation of pay (*Winkler v. Killian,* 141 N. C., 575), and such proof has been recognized as sufficient when the services are "performed by one person for another under an express or implied promise that compensation is to be provided for in the last will and testament of the recipient," and no such provision is made. *Whetstine v. Wilson,* 104 N. C., 385; *Miller v. Lash,* 85 N. C., 52. And the same principle should prevail where, as in this case, the evidence tends to show that the child provided and cared for an aged father for six years, with the understanding that he was to leave her all of his property, and, before death, he has disabled himself from performance by conveying to others substantial portions of it. In either case the facts in evidence tend to show that the services were given and received in expectation of pay, and the specific compensation agreed upon having become impossible by the voluntary act of the father, a right of action presently accrues, and the child may recover for the reasonable value of the service rendered. Clark on Contracts (2d Ed.), p. 448. And we are unable to see that the arbitration proceedings should conclude the *feme* plaintiff or in any way affect her rights. That was a proceeding entirely between her husband and her father, growing out of her husband's accounts and obligations as guardian of the father. According to the evidence, she was not a party to that investigation, and had neither submitted her claims to this arbitration nor authorized anyone to submit them for her. It is well recognized that her being a witness before the arbitrators does not have such effect. *LeRoy v. Steamboat Co.,* 165 N. C., 109; Freeman on Judgments, sec. 189; Bigelow on Estoppel (5th Ed.), p. 135.

She is not, therefore, directly affected, and we do not find anything in her speech or conduct which calls for or permits the application of the principle of an estoppel *in pais*. The estate has not been damaged nor have its representatives been in any way misled to their pecuniary injury by anything she has said or done in the matter. *LeRoy v. Steamboat Co., supra; Boddie v. Bond,* 154 N. C., 359, and 158 N. C., 204.

From a perusal of the proceedings, it will appear that on the hearing before the arbitrators the husband represented that his wife had made a claim of him, as guardian, for $1,117.50, for services rendered the father, of which he had paid $586.52, and asked that this amount be allowed him as a voucher on his account as guardian. The arbitrators heard the testimony and only allowed him $196.65, and his wife returned to the husband the balance of the payment. This account should be deducted from her present claim, not because she is barred by the action of the

(79) arbitrators, but because she has received that much on account.

In addition, there is no mutuality of stake or obligation between the real party in interest in this action, the *feme* plaintiff, and the defendants, in reference to this award. Not being a party, if the arbitrators had allowed her claim, she could not have enforced it, and no more should she be concluded. It is perhaps the controlling feature in the law of estoppel, and, on the facts in evidence as they now appear, we are of opinion that the interests of *feme* plaintiff are not affected by the action of the arbitrators, and she is entitled to have her claim submitted to the jury.

Reversed.

CLARK, C. J., concurring: The General Assembly has by express enactment recognized and prescribed that married women are entitled to their own earnings. Laws 1913, ch. 13, provides: "The earnings of a married woman by virtue of any contract for her personal service, and any damage for personal injuries, or other torts sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried."

This seems to have been clearly provided by the Constitution, Art. X, sec. 6, which provides: "The real and personal property of any female in this State, acquired before marriage, and all property, real and personal, to which she may, after marriage, become *in any manner entitled,* shall be and remain the sole and separate estate and property of such female." But it being thought that *Price v. R. R.,* 160 N. C., 450, filed 20 November, 1912, threw some doubt upon the proposition, the General Assembly very promptly after it convened passed as one of its first statutes chapter 13, Laws 1913, above set out, thus placing the matter beyond controversy.

Cited: Cox v. Lumber Co., 175 N. C., 310; *Shore v. Holt,* 185 N. C., 313; *Hinnant v. Power Co.,* 189 N. C., 125; *Chappell v. Surety Co.,* 191 N. C., 708; *Grantham v. Grantham,* 205 N. C., 369; *Lipe v. Trust Co.,* 207 N. C., 796.

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

(Filed 16 September, 1914.)

Fixtures.

An instruction in this case to the jury that they find a certain logging road to be a fixture if they believed the evidence, is correct under the decision on a former appeal, 163 N. C., 15.

APPEAL by defendant from *Ferguson, J.,* at January Term, 1914, of PERQUIMANS.

E. G. Bond and P. W. McMullan for plaintiff.
Ward & Thompson and Charles Whedbee for defendant.

PER CURIAM. The evidence upon which his Honor instructed (80) the jury to answer the issues in favor of the plaintiff is fully set out in the former appeal in this action, reported in 163 N. C., 15.

He charged the jury if they believed the evidence to find that the logging road was a fixture, which is in accordance with the former decision, it appearing that the relation of vendor and vendee existed between the plaintiff and the defendant.

No error.

WINSLOW O'NEAL v. J. L. DUNSTON.

(Filed 16 September, 1914.)

Trials—Issues of Fact—Judgments—Costs.

This controversy presents issues of fact as to a dividing line between the lands of the parties, and the plaintiff was properly taxed with costs, the verdict establishing the line in accordance with the defendant's contention.

APPEAL by plaintiff from *Ferguson, J.,* at January Term, 1914, of CURRITUCK.

Aydlett and Simpson for plaintiff.
Ward & Thompson and Ehringhaus and Small for defendant.

PER CURIAM. The real controversy in this action is one of fact as to the true dividing line between the plaintiff and defendant, which has been decided by the jury, and we find no error upon the trial.

The verdict was in favor of the defendant, and judgment for the entire cost was awarded against the plaintiff, to which he excepted upon the ground that while he did not maintain his claim against the defendant in its entirety, he did in part.

It appears, however, that the defendant did not claim possession of any part of the land in controversy beyond the line found to be the true line, and as there is no evidence tending to prove, and no finding showing possession beyond the line, it was proper to enter judgment for cost against the plaintiff.

No error.

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(81)

W. E. GREGORY v. J. R. WALLACE.

(Filed 16 September, 1914.)

Trials—Instructions—Issues of Fact.

This case involves only an issue of fact as to the location of a boundary line between the parties from a fixed point given in the deed, and the instructions being correct, no error found.

APPEAL by plaintiff from *Ferguson, J.*, at March Term, 1914, of CURRITUCK.

Civil action, tried upon these issues:

1. Did the defendant enter and trespass on the lands of the plaintiff, as alleged? Answer: "No."

2. What damages, if any, has the plaintiff sustained thereby?

The plaintiff appealed.

Aydlett & Simpson for plaintiff.
Ward & Thompson for defendant.

PER CURIAM. The defendant admitted the ownership of the land to be in plaintiff, but denied any trespass. So that the only issue was the location of plaintiff's boundary line, and to determine the location of plaintiff's boundary line it became necessary, on the trial, to locate a certain gum on the east side of the landing field, which was the gum

described in the aforesaid deed, from which the line is to run south 45 degrees east to a navigable watercourse.

This involves exclusively a question of fact and was submitted to the jury in a charge free from error.

We have examined the six exceptions to evidence and find them to be without merit.

No error.

SELECTA TAYLOR ET AL. v. LEVI B. WILSON.

(Filed 16 September, 1914.)

Deeds and Conveyances—Consideration—Support—Trial—Instructions—Actions.

In this action to declare a deed void for the failure of the grantee to perform the conditions therein stated to support certain beneficiaries in consideration therefor, *it is held* that the issues involved are those of fact, properly submitted to the jury under a correct instruction that the support of the beneficiaries should be a reasonable and proper one, considering their station and condition in life; and further, the issues having been answered adversely to plaintiff, the question becomes immaterial as to whether the action would lie.

APPEAL by plaintiff from *Ferguson, J.*, at December Special (82) Term, of CAMDEN.

Civil action, tried upon this issue:

"Is plaintiff the owner and entitled to the immediate possession of one undivided one-fourth of the 36-acre tract of land? Answer: 'No.'"

From the judgment rendered plaintiff appealed.

G. J. Spence and Aydlett & Simpson for plaintiffs.

Ward & Thompson and R. W. Turner for defendant.

PER CURIAM. The purpose of this action is to set aside a deed from Alex. Kight and wife to defendant upon the ground that defendant failed to perform the conditions set out in the deed. Plaintiffs contend that defendant failed to provide support for Mary Kight, Margaret Kight, or Sallie Kight, as required by the terms of the deed. Defendant alleges that he has furnished a reasonably good support for all of the beneficiaries according to the terms of the deed.

Much testimony was introduced. His Honor charged the jury:

"I charge you that if he failed to provide for these beneficiaries, or either of them, a reasonable support and proper care, considering their station and condition in life, that then he failed to comply with the con-

tract which he entered into, and which, by accepting the deed, he stipulated in holding the deed that he would, and that if he failed to comply with it, he would give up all right and interest conveyed by it, the said deed, and it should be declared void."

We think the issue involved is exclusively one of fact, and that it has been submitted to the jury fairly and correctly.

It is unnecessary to consider the question as to whether plaintiff can maintain this action, as the issue of fact has been decided against her.

No error.

CONTINENTAL JEWELRY COMPANY v. W. M. JONES.

(Filed 16 September, 1914.)

Vendor and Purchaser—Trials—Fraud—Issues of Fact—Evidence—Instructions.

In this action to recover the price of certain jewelry sold and delivered, fraud in the procurement of the sale was alleged, and the controversy presented is one of facts, determined by the jury in defendant's favor, with the burden of proof properly placed upon him.

APPEAL by plaintiff from *Bond, J.*, at March Term, 1914, of EDGECOMBE.

(83) *J. M. Norfleet for plaintiff.*
W. O. Howard for defendant.

PER CURIAM. This action was brought to recover $192, the price of jewelry sold to defendant, and he admitted liability for that amount, according to the terms of the sale, unless it was found that the written contract was procured from him by the fraud of the plaintiff's agent, who sold the goods, or unless the goods had no market value or merchantable quality or did not correspond with the samples by which they were sold. The court placed the burden of showing these defensive facts upon the defendant, and submitted issues to the jury, which with the answers thereto are as follows:

"1. Did the goods delivered to defendant Jones by plaintiff have any merchantable value? Answer: 'Yes.'

"2. Did the goods delivered to defendant Jones by plaintiff correspond with sample by which they were sold? Answer: 'No.'

"3. Was the execution of contract referred to procured by fraud, as alleged? Answer: 'Yes.' "

There was evidence to sustain the findings of the jury, and the request by plaintiff for an instruction, that if the jury believed the evidence they should answer the second issue "Yes" and the third issue "No," was properly refused, as was also the motion for judgment *non obstante veredicto*. The case involves nothing more than a question of fact, and the jury having found that the contract was obtained by fraud, plaintiff is not entitled to recover. The case states that the court fully instructed the jury as to the contentions of the parties and the issues, and there was no exception to the charge.

No error.

BUCKHORN LAND AND TIMBER COMPANY v. M. M. McKAY.

(Filed 23 September, 1914.)

1. Appeal and Error—Failure to File Record—Rules of Court.

Where the record in cases on appeal to the Supreme Court has not been filed by the appellant in this Court under the requirements of Rule 4 (164 N. C., 540), it will be dismissed upon motion of the appellee, filed with proper certificates, made under Rule 17, and the party in default must abide the consequences unless unavoidable cause is shown.

2. Appeal and Error—Several Causes—Agreement of Parties—Courts.

Where there are several causes between the same parties, upon the same subject matter and involving the same exceptions, the parties may agree among themselves that one or more of them may be appealed from and the result control them all; but this rests solely upon the agreement of the parties, and is not subject to the control of the courts.

MOTION by appellant for *certiorari* and motion by appellee to (84) docket and dismiss under Rule 17.

A. A. F. Seawell for plaintiff.
J. C. Clifford for defendant.

CLARK, C. J. At May Term, 1914, of Harnett, an appeal was taken in nineteen cases from an order removing them to Chatham County for trial, upon an affidavit, found to be true by the judge, of local prejudice. These actions were brought by the same plaintiff against sundry defendants in ejectment.

At the opening of this Court, 10 a.m., 15 September, no record in any of these cases had been filed on appeal, as required by Rule 4 (164 N. C., 540), and the counsel for the plaintiff, appellee, filed proper certificates and motions to dismiss in accordance with Rule 17 (164 N. C., 544). Later in the day counsel for the several defendants, appellants, filed

records in five of these cases and an affidavit and motion for *certiorari* to bring up the case on appeal. The appeal was taken 15 May, 1914, and the appellant's case on appeal should have been served on the appellee within fifteen days thereafter. Revisal, 591.

But even if the case on appeal had been settled, this motion comes too late. The appellee has its rights and the courts will respect them. Besides, if the affidavit and motion for *certiorari* in the five cases had been filed in time, before the motion to dismiss under Rule 17, it is insufficient. The affidavit merely alleges that counsel for the defendant on 26 August applied to counsel for appellee to let one case on appeal come up and the others to abide the result; that on 2 September this request was refused; that thereupon the defendant's counsel on 8 September moved the judge to require appellee's counsel to consent to this, and on the judge's refusal to do this, defendant's counsel requested the clerk to make out and send up the transcripts on appeal.

It is not unusual, when there are several appeals at the same term involving the same exceptions, for counsel to agree that one case shall come up and that the others shall abide the result. But this is a matter of agreement between counsel, and we have no reason to suppose that the appellee's counsel was without cause in refusing to make such agreement. At any rate, it was in the discretion of counsel, which this Court has no right to control.

The judgments appealed from were taken on 15 May. The case on appeal should have been served on appellee by 30 May. It is not alleged that this was done, and even the request to agree that one case should come up, in lieu of all, was not made until 26 August. On refusal of this request, 2 September, there were still two weeks in which to make up the record, if counsel for appellee would waive the failure to serve
(85) the case on appeal earlier. Counsel could not have thought that the judge had the power to compel appellee's counsel to make an agreement which rested in his discretion. Even on 8 September, when the motion was refused, there were still seven days in which to make up these records, and even if voluminous, which could not be at this stage of the proceeding, and if appellee had waived the failure to serve the case earlier, there was still time, by employing a sufficient number of typewriters, to make out the transcripts. The appellee found time to make out and file such transcripts in nineteen cases. The appellants assigned no error, and none appears.

"An appellant cannot simply take an appeal and pay the clerk's fees for the transcript and thereafter leave the appeal to take care of itself, like a log floating down a river or corn put in the hopper of a mill. The appeal requires attention." *Paine v. Cureton,* 114 N. C., 606.

"When a man has a case in court, the best thing he can do is to attend to it." *Pepper v. Clegg,* 132 N. C., 315; *McClintock v. Ins. Co.,* 149 N. C., 35.

Rules of Court are necessary for the orderly dispatch of business, and when not complied with, the party in default must abide the consequences, unless unavoidable cause is shown. In *Burrell v. Hughes,* 120 N. C., 277, it is said, citing many cases: "There are some matters which should be deemed settled, and this is one of them."

Though the rules of Court are necessary, it is true that there is no sanctity attached to them, and it is not claimed that they are the best of all possible rules. The Court changes them, to take effect thereafter, when experience has shown that the change should be made. But as long as they are the rules of the Court, they must be impartially administered, and always without exception, save for good cause shown; and none has been shown in this case. This matter has been repeatedly decided, and especially has it been discussed in late years in *Craddock v. Barnes,* 140 N. C., 427; *Cozart v. Assurance Co.,* 142 N. C., 522; *Vivian v. Mitchell,* 144 N. C., 472, citing numerous cases, and there have been many cases since.

The whole subject was gone over again and the determination of the Court to adhere to this rule reasserted at last term in *Hawkins v. Tel. Co.,* 166 N. C., 213.

If exceptions were to be made to this, or any other rule, except for good cause shown, a large part of the time of this Court would be taken up in considering such matters, which time should be devoted to the discussion and decision of cases upon their merits.

The motion of appellant to docket records and for *certiorari* is denied. The motion made in apt time by appellee to docket and dismiss under Rule 17 is allowed.

Dismissed.

(86)

ROPER LUMBER COMPANY v. W. N. McGOWAN ET AL.

(Filed 14 October, 1914.)

Deeds and Conveyances—Interpretation—Color of Title—Description—Naming Tract—Identification.

Where the description of lands in a deed, relied on for color of title, gives course and distance by specific calls, and refers to the land conveyed as the "Hancy Jones land," and there is evidence tending to identify the *locus in quo* within the boundaries named, the name given to the land in the deed will be considered only as identifying the tract, and its different location will not be controlling. The charge of the court in this case is approved. *Locklear v. Savage,* 159 N. C., 236.

APPEAL by plaintiff from *Whedbee, J.*, at November Term, 1913, of CRAVEN.

Civil action to restrain the cutting of timber, tried as to title and trespass, before his Honor, H. W. Whedbee, judge, and a jury, at November Term, 1913, of the Superior Court of Craven County.

The jury rendered the following verdict:

1. Is the plaintiff the owner and entitled to the possession of the lands described in the complaint? Answer: "No."

2. If so, have the defendants trespassed upon the same? Answer: "No."

3. What damage is plaintiff entitled to recover of the defendants? Answer: "Nothing."

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

Moore & Dunn for plaintiff.

Dortch & Barham and W. D. McIver for defendants.

PER CURIAM. On careful examination of the record we fail to find any reversible error. The plaintiff offered in evidence grants from the State and *mesne* conveyances from the grantees to plaintiff and evidence tending to show that his claim of title covered the land in dispute. Defendants offered in evidence deeds from John C. Wynn *et al.*, bearing date in 1900, 1901, 1903, and 1904, for a tract of land on south side of Neuse River and east side of Slocumb's Creek, describing the same by specific metes and bounds and referring to the land also as the "Hancy Jones land," and introduced evidence tending to show the location of the calls in his deeds; that the same covered the land in controversy and that defendant had been in the open, continuous possession of the land up to the line of his deeds, asserting ownership since the date of said deeds and for some years prior thereto. The summons in the cause is dated in March, 1912. The land in dispute was situate on the northern
(87) side of Duck Creek and, on evidence to the effect that the correct boundary of the Hancy Jones tract, as formerly known and described, had never included any land north of said Duck Creek, it was insisted for plaintiff that defendant was without color of title for the land in dispute, as his own deeds referred to the land conveyed therein as the "Hancy Jones land"; but, according to the testimony, the northern line of defendant's deed, by specific call of course and distance, and by correct location, covered the *locus in quo*, and in such case our decisions are to the effect that the course and distance shall control, and the additional reference to the land conveyed as the "Hancy Jones land" shall be

considered only as identifying the tract. *Johnston v. Case,* 131 N. C., 491; *Midgett v. Twiford,* 120 N. C., 4.

It was further contended for plaintiff that the character of defendant's occupation was not such as to ripen title by adverse possession, but a perusal of the record will not sustain this position.

In the careful and comprehensive charge his Honor fully and correctly stated the rules established by our decisions on this subject, notably that of *Locklear v. Savage,* 159 N. C., 236. Under this intelligent direction the jury have rendered their verdict in favor of defendants, and we find no reason for disturbing the conclusion they have reached.

There is no error, and the judgment on the verdict must be affirmed.

No error.

Cited: Potter v. Bonner, 174 N. C., 21; *Alexander v. Cedar Works,* 177 N. C., 146.

MAMIE W. BAKER v. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY.

(Filed 14 October, 1914.)

Insurance, Life—Defense—Suicide—Trials—Burden of Proof—Nonsuit.

Where an insurance company interposes the defense of suicide of the insured to avoid recovery by the plaintiff in his action on a life insurance policy, the burden of proof is on the defendant to show, by the greater weight of the evidence, the fact of suicide, and a nonsuit upon the evidence will not be allowed.

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

Action to recover upon a life policy of insurance, and the defense relied on is that the deceased committed suicide.

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

T. D. Warren and A. D. Ward, Abernethy & Davis for plaintiff.

Guion & Guion, Munford Hunton, Williams & Anderson for defendant.

PER CURIAM. This is a second appeal in the same action, the (88) first being reported in 163 N. C., 175.

The only issue in controversy upon the second trial was the following: "Did the insured die by his own hand or act with intent to commit sui-

cide?" which was answered in favor of the plaintiff, and the only exceptions seriously debated are to the charge of his Honor instructing the jury that the burden was upon the defendant to prove by the greater weight of the evidence that the deceased committed suicide, and to the refusal to charge the jury to answer the issue "Yes" if they believed the evidence.

In our opinion, there is no error in either ruling. When an insurance company seeks to avoid payment of a policy on account of suicide, the burden of the issue is on the defendant (*Thaxton v. Ins. Co.*, 143 N. C., 34); and "the weight of the evidence must be with the party who has the burden of proof, or else he cannot succeed." *Chaffin v. Mfg. Co.*, 135 N. C., 95.

The evidence as to suicide was circumstantial, and while sufficient to justify an answer to the issue in favor of the defendant, it was not conclusive, and the inference of an accidental killing could be accepted.

If so, it was for the jury, and not his Honor, to draw the inference, and to have given the peremptory instruction requested would have been an invasion of the province of the jury.

No error.

Cited: Parker v. Ins. Co., 188 N. C., 405.

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

(Filed 21 October, 1914.)

Appeal and Error—Insufficient Findings.

In this case *it is held* that the findings of fact of the reference are not sufficiently explicit, and the case is remanded, that additional findings be made.

APPEAL by plaintiffs from *Cooke, J.*, at June Term, 1914, of WAKE.

A. B. Andrews, Jr., for plaintiffs.
Armistead Jones for defendant.

PER CURIAM. It appearing to the Court that the second and third findings of fact made by the referee are not sufficiently explicit to enable the Court to determine whether the sum of $1,503.40 is derived
(89) from the cancellations and reinsurances placed by the plaintiffs

with companies in their office, within the meaning of the language used in the contract between the plaintiffs and the defendant, and there being a dispute as to whether there is any evidence to support the finding that the plaintiffs have returned the amount to the American Union Fire Insurance Company, it is ordered that the case be remanded, to the end that additional evidence may be heard, if so desired, and additional findings of fact be made.

Remanded.

JAMES BAREFOOT ET AL. v. J. B. LEE.

(Filed 28 October, 1914.)

1. Appeal and Error—Admissions.

The parties on appeal are bound by the statement made by the trial judge appearing of record as to their admissions on the trial in the court below; and objection thereto comes too late after verdict.

2. Usury—Principal and Agent—Amount of Money Received.

In an action to recover a certain sum of money alleged to be due the plaintiff by reason of an usurious rate of interest charged him for a loan of money by the defendant, it appears that this money was received by the attorney of the plaintiff, out of which he paid an indebtedness of the plaintiff to another, and it does not appear how the balance of the money was used or applied. *Held:* It is the amount of money received by plaintiff's agent from the defendant that controls the question of usury, and as the defendant in this case appears to have paid over to the plaintiff's agent such an amount as frees the transaction from the taint of usury, a recovery was properly denied.

3. Appeal and Error—Indefinite Exceptions.

An exception of appellant to three distinct instructions given by the trial judge to the jury is not sufficiently specific for consideration on appeal.

4. Issues, Sufficiency of.

The issues submitted to the jury in this case are *held* sufficient under which to decide all controverted questions and to give each of the parties an opportunity to present his case in every aspect, and no error is found in rejecting other issues tendered by the appellant.

5. Trials—Evidence—Female Witnesses—Credibility—Appeal and Error.

A statement made by the judge to the jury in this case, that a woman as a witness is not entitled "to more credit than a man," *is held* to be without error.

APPEAL by plaintiffs from *Lyon, J.*, at October Term, 1913, of CUMBERLAND.

(90) *E. G. Davis and R. L. Godwin for plaintiff.*
Clifford & Townsend for defendant.

PER CURIAM. This action was brought to recover $772.54, double the amount of excessive and unlawful interest alleged to have been paid to defendant, as usury, upon an indebtedness of the former to the latter, evidenced by a note and mortgage to secure the same. The note was given for $1,528.25, whereas plaintiffs allege that they received on the loan only $1,223.48. The transaction was conducted through W. A. Stewart as attorney for the plaintiff. He received the $1,528.25 from defendant, paid off a debt due by plaintiff to J. C. Layton amounting to $1,223.48, and it did not appear what disposition was made of the balance. The case substantially turned upon the authority of W. A. Stewart to represent the plaintiffs and bind them by his acts. It is stated in the record that plaintiffs admitted that Mr. Stewart was their attorney. Plaintiffs denied on the argument before us that this was true, but we must accept the statement of the judge on this point, nothing else appearing. We cannot settle this controversy upon their bare denial. Upon the admission, the charge of the court was clearly right, that defendant's liability, or plaintiffs' right to recover, depended not upon the amount due to Layton, but upon that received by W. A. Stewart from defendant for and in behalf of the plaintiffs. It was the actual amount loaned, regardless of the amount received by them. They must settle the difference with their attorney, who it seems had a claim against them for professional services rendered in this and perhaps other transactions. Besides, the exceptions of plaintiffs to the charge of the court were not specific enough. It was directed against three distinct instructions, separately numbered, one of which, at least, was correct in law. It must, therefore, fail. *Lumber Co. v. Moffitt,* 157 N. C., 568; *Gwaltney v. Assurance Society,* 132 N. C., 925.

If the plaintiffs wished to challenge the correctness of the statement that they had made the admission as to Mr. Stewart's attorneyship, they should have called it to the attention of the court at the proper time. It is too late, after verdict, to avail themselves of its incorrectness, as a matter of right. *Phifer v. Comrs.,* 157 N. C., 150; *Jeffress v. R. R.,* 158 N. C., 215. The judge would probably have set aside the verdict, in the exercise of his discretion, if he had found that he had inadvertently misrepresented the fact.

The issues submitted by the court to the jury were sufficient to decide all controverted questions, and gave each of the parties a fair and full opportunity to present his case in every aspect of it. When this is the case, there is no error in rejecting other issues tendered, which would manifestly be superfluous and often produce confusion. *Clark v. Guano*

Co., 144 N. C., 64; *Roberts v. Baldwin*, 155 N. C., 276; *Williams v. R. R.*, 155 N. C., 260; *Garrison v. Williams*, 159 N. C., 426.

The statement of the judge that a woman was entitled to no (91) more credit than a man was obviously correct. Her credibility must be determined by her intelligence, character, demeanor on the stand, knowledge of the facts, and other circumstances, and not by her sex.

The other exceptions are without merit.

No error.

Cited: Hardware Co. v. Buggy Co., 170 N. C., 301; *Harris v. R. R.*, 173 N. C., 112; *S. v. Love*, 187 N. C., 39; *S. v. Steele*, 190 N. C., 510; *Rawls v. Lupton*, 193 N. C., 430; *S. v. Parker*, 198 N. C., 634.

W. E. MEWBORN v. ATLANTIC COAST LINE RAILWAY COMPANY.

(Filed 21 October, 1914.)

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

G. V. Cowper for plaintiff.
Rouse & Land for defendant.

PER CURIAM. We have carefully considered the record in this case, in connection with the brief of the plaintiff's counsel, which fully covers all of the questions raised, and are of opinion that there is no error. As no new legal principle is involved, it is unnecessary to discuss the questions raised.

Affirmed.

TOM TAYLOR v. H. S. HOLDING.

(Filed 25 November, 1914.)

Contracts.

There being evidence that the defendant in this case had paid certain judgments with moneys in his hands claimed by the plaintiffs, according to a valid agreement with him, and which the jury has found to be a fact under proper instructions from the court, no error is found.

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

Civil action. Verdict and judgment for defendant. Plaintiff appealed.

N. Y. Gulley for plaintiff.

J. G. Mills and Armistead Jones & Son for defendant.

PER CURIAM. The plaintiff sues to recover a balance due and in defendant's hands upon a crop settlement for 1911 of $119.91.
(92) Some time prior to this settlement and the sale of the crop W. W. Holding had taken two judgments against plaintiff. This balance was applied to payment of those judgments by defendant paying the same to the officer holding the executions. The defendant claimed that he had paid it on the executions under agreement with and by authority of plaintiff Tom Taylor. The only assignments of error set out in the brief relate to the charge of the court. We think they are without merit. The charge covered fully the law governing this case. His Honor submitted to the jury under proper instruction and the jury found as a fact that the agreement was entered into between Tom Taylor and H. S. Holding, that in consideration of further advances, his crop, which had then been levied upon by the officer, should be sold by the landlord and applied to the judgments of Mr. Holding.

No error.

INTERNATIONAL WASTE COMPANY v. BLOOMFIELD MANUFACTURING COMPANY.

(Filed 2 December, 1914.)

Appeal and Error—Fragmentary Appeals—Appeal Dismissed—Supreme Court—Discretionary Powers.

In an action for breach of contract for failure to deliver goods sold, where upon issues raised as to a fraudulent change of the wording of the contract by the plaintiff, the jury has found for the defendant, and the court accordingly renders judgment and refers other matters of alleged damages arising out of the contract sued on to a referee, an appeal from the judgment is fragmentary, and will be dismissed; and while the Supreme Court may, in the exercise of its discretion, pass upon the points raised and dismiss the appeal, this will be done in rare and exceptional instances.

APPEAL by plaintiff from *Adams, J.*, at August Term, 1914, of IREDELL.

Civil action, tried upon these issues:

1. Did the plaintiff and defendant sign the written contract sued on? Answer: "Yes" (by consent).

2. Did the plaintiff, after said contract was signed by the defendant, fraudulently insert therein the items "clean Egyptian comber, clean Egyptian strippings, and weave-room waste"? Answer: "Yes."

The court rendered judgment as follows: "It is, therefore, considered and adjudged by the court that the plaintiff recover nothing on account of the alleged damage for the nondelivery of clean Egyptian comber, clean Egyptian strippings, and weave-room waste.

"It is further considered and adjudged that all matters of con- (93) troversy growing out of the contract aforesaid between the plaintiff and the defendant by the alleged nondelivery of other articles mentioned in the contract aforesaid be and the same are hereby referred to G. A. Morrow as referee, who will hear the evidence of the parties to the action, take and state an account, and make his findings both of law and of facts thereon, and report the same to the next term of this court."

The plaintiff moved for a new trial for errors committed by the court to be stated in the case on appeal. The motion was denied. Exception by the plaintiff. Judgment for the defendant, as set out in the record.

W. D. Turner, Jerome & Price for plaintiff.

L. C. Caldwell for defendant.

PER CURIAM. The appeal in this case is premature, and this Court has held in many cases that premature appeals will be dismissed. There are cases in which the Court in the exercise of a sound discretion has passed on the points raised by the appeal, notwithstanding it was premature, but nevertheless has dismissed the appeal.

In the case at bar we do not think it proper to exercise that discretion. It is very rare that this Court will consent to take up an appeal by piecemeal. The plaintiff should have noted its exception, as it did to the judgment of the court; made up the case on appeal, presenting its several exceptions taken on the trial, as has been done; and then, after the referee has made his report and that has been passed on and the final judgment rendered, an appeal may be taken to this Court from such final judgment.

It appears in this record that the alleged cause of action is a breach of contract in a failure upon the part of the defendant to deliver, not only the Egyptian comber, Egyptian strippings, and weave-room waste, but also to deliver the other grades of cotton set out in the contract. It

appears that the matter to be considered by the referee relating to the "other articles" mentioned in the judgment has not been determined.

The cause will be remanded, to the end that the reference be taken and a final judgment rendered, from which the appeal may be taken to this Court.

Appeal dismissed.

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(94)

N. M. PILKINGTON v. DOC. WELCH.

(Filed 23 December, 1914.)

Appeal and Error—Objections and Exceptions—Admissions—Immaterial Exceptions.

Where, in an action to recover land, defendant has conceded upon the trial that the issues should be answered in plaintiff's favor if the jury should find the *locus in quo* to be contained within the description of the plaintiff's paper title, exceptions to the charge of the court upon the question of adverse possession become immaterial on defendant's appeal.

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

Action to recover land, known as Tract No. 20. The plaintiff introduced State Grant No. 61 and *mesne* conveyances connecting himself with the grant.

The defendant denied that the paper title of the plaintiff covered the land in controversy.

The plaintiff contended that the beginning corner of his title was at black figure 1 on the plat, and also that if it was red figure 1, as contended by defendant, and his paper title did not cover the land in controversy, that he had shown title by adverse possession.

The only assignments of error are to parts of the charge relating to title by adverse possession.

The jury returned the following verdict:

1. Is the plaintiff the owner and entitled to the possession of the lands described in the complaint? "Yes."

2. Is the defendant in the unlawful possession of said land or any part thereof? "Yes."

3. What damage, if any, is the plaintiff entitled to recover? "$24."

4. What is the true beginning corner of Tract No. 20? "Black figure 1."

Judgment was entered in favor of the plaintiff, and the defendant appealed.

R. L. Phillips for plaintiff.
Bryson & Black for defendant.

PER CURIAM. The exceptions to the charge on adverse possession are immaterial, as it was conceded by the defendant upon the trial that all the issues should be answered in favor of the plaintiff if the location of the plaintiff's paper title was as contended by him, and the jury has so found.

No error.

FAYETTEVILLE INSURANCE AND REALTY COMPANY v. CHEROKEE LUMBER COMPANY.

(Filed 9 December, 1914.)

Appeal and Error—Trials—Questions of Fact.

No legal questions being involved, the judgment below is affirmed.

APPEAL by A. F. Young from *Lyon, J.*, at October Term, 1913, of CUMBERLAND.

R. L. Godwin for claimant.
Rose & Rose and Robinson & Lyon for receivers.

PER CURIAM. This is an appeal from an order disallowing a claim filed against an estate in the hands of a receiver.

No legal question is involved, and as the court has found the fact against the claimant, upon whom rested the burden of proof, the judgment must be

Affirmed.

W. A. CARPENTER v. TOWN OF RUTHERFORDTON.

(Filed 16 December, 1914.)

Cities and Towns—Condemnation—Streets—Damages—Evidence—Appeal and Error.

In condemnation proceedings to take lands of plaintiff by a town for street purposes, evidence as to the location of the road on certain lands of plaintiff and damages thereto was excluded by the trial judge, on defendant's objection that damages to this lot had not been claimed in the exceptions, and that the record did not show this land had been condemned. It appearing that the exceptions specifically demanded damages to this lot, a new trial is ordered.

CARPENTER *v.* RUTHERFORDTON.

APPEAL by plaintiff from *Justice, J.*, at August Term, 1914, of RUTHERFORD.

This is a proceeding under the charter of Rutherfordton to condemn certain land for a public street.

On 23 May, 1911, the board of commissioners made an order condemning certain lands belonging to the plaintiff W. A. Carpenter for the purpose of constructing a street from the Rutherford Hospital to the Seaboard Air Line depot, it being provided by said order that five disinterested freeholders be summoned to meet upon the premises and assess such damages to the plaintiff as they might find due him. Said committee filed their report with the said board of town commissioners, and
(96) found no damages due plaintiff, to which report the plaintiff excepted, and a date was fixed for the hearing by the said board of the exceptions of plaintiff. On the said date, to wit, on 19 June, 1911, the board heard and considered said exceptions, and on said date an order was made confirming said report. The plaintiff appealed to the Superior Court.

The exceptions of said Carpenter are as follows:

1. Because the said report does not award any damages to the said W. A. Carpenter.

2. Because the report shows that the said street is to be the width of 40 feet through the entire lands of said Carpenter, and awards him no damage; in other words, the report finds that a strip of land 40 feet wide through his entire lands has no value.

3. In addition to the land taken of the width of 40 feet and ..... feet in length, the said W. A. Carpenter is greatly damaged, for the following reasons:

First. His residence lot where he resides, and on which he has built a good house and barn at the cost of more than $2,000, extends across the old road or street, and to build a new street as recommended by the freeholders will burden his land with two streets.

Second. The new street enters the land of the said W. A. Carpenter about opposite his dwelling, and so divides the lot as to destroy two nice house sites, the land on either side of the street not being sufficient depth for house sites, thereby destroying its value for practical purposes.

Third. The proposed new street will be cut off from 5 to 2 feet almost entirely through the said lot.

Fourth. On the more eastern lots of the said Carpenter he has a pasture, supplied with water, in which he keeps his cattle, and on which he has a slaughter pen; and the said new street or road, in addition to the land it requires, will destroy his pasture by diverting the water there-

from, and will render both the slaughter pen and pasture inaccessible, and therefore of no practical value.

In the Superior Court the plaintiff Carpenter claimed damages by reason of the road being constructed through his residence lot, and also through another lot, not adjoining the residence lot, known as the slaughter-pen lot, and proposed by witness J. D. Justice to show that the said newly constructed street practically destroyed the value of the slaughter-pen lot, to which defendant town objected on the ground that plaintiff had not claimed any damage to this lot in his exceptions, and also that records did not show that this slaughter-pen lot had been condemned in this proceeding; and the court so holding, objection sustained, and plaintiff excepted.

That plaintiff then asked witness Justice whether the new street runs through the slaughter-pen lot or not. Defendants objected. Objection sustained, and plaintiff excepted.

The jury returned a verdict finding that Carpenter was not (97) entitled to recover any damages, and from a judgment in favor of the defendant, he appealed.

McBrayer & McBrayer for plaintiff.
No counsel for defendant.

PER CURIAM. We have not had the benefit of an argument in behalf of the defendant, and in the absence of a plat showing the location of the street and of the lots of the plaintiff, it is difficult to pass on the exceptions to the evidence.

It appears, however, that the plaintiff set out specifically in his exceptions a demand for damages to the slaughter pen lot, and it was therefore clearly competent to prove that the street was located on this lot, and the damage caused thereby, and for the refusal to admit evidence of these facts a new trial is ordered.

New trial.

JOHN HAAR, EXECUTOR, ET AL., APPELLANTS, v. NATHAN SCHLOSS.

(Filed 5 November, 1914.)

Insufficient Parties—Appeal and Error—Practice.

It appearing that certain heirs at law should be made parties, this case is remanded, to that end.

APPEAL by plaintiffs from *Allen, J.*, at February Term, 1914, of NEW HANOVER.

Bellamy & Bellamy for plaintiff.
Herbert McClammy for defendant.

PER CURIAM. It appearing from an inspection of the record that it is necessary for the heirs at law of Mary Christ to be made parties in this action, in order that an adjudication binding upon all persons interested in the land shall be made, it is ordered that the action be remanded, to the end that said heirs be made parties.

Remanded.

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(98)

C. P. WESTON ET AL. v. JOHN L. ROPER LUMBER COMPANY.

(Filed 9 December, 1914.)

Supreme Court—Rehearing—Petition Dismissed.

This petition to rehear having been fully and carefully considered, and it appearing that the errors assigned have already been passed upon in well considered opinions of this Court, and no new fact has been called to the attention of the Court, or new case or authority cited, or new position assumed, the petition is dismissed.

PETITION by defendant to rehear the above entitled case, which is reported in 163 N. C., 78.

Ward & Thompson, Charles Whedbee, Winston & Biggs for plaintiffs.
W. B. Rodman, A. D. McLean, J. K. Wilson for defendants.

PER CURIAM. This case was before this Court at Fall Term, 1912, on appeal from a judgment of nonsuit, and a new trial granted in an opinion by *Mr. Justice Walker,* 160 N. C., 263. It was before us a second time at Fall Term, 1913, on appeal by defendant, and the case was fully considered in an opinion by the *Chief Justice,* and in the judgment of the Superior Court we found no error. 163 N. C., 78.

We have again carefully considered the case upon the defendant's petition, and find no reason to reverse our former judgment.

The grounds of error assigned in the petition are substantially the same as those argued and passed upon on the former hearing. In the brief of the learned counsel for the defendant no new fact has been called to our attention, and no new case or authority cited, and no new position assumed.

"No case should be reheard upon a petition to rehear unless it was decided hastily and some material point had been overlooked or some

direct authority was not called to the attention of the Court." *Weathers v. Borders,* 124 N. C., 610; *Lockhart v. Bell,* 90 N. C., 499; Pell's Revisal, sec. 1546, and cases cited.

"Where the grounds of error assigned in the petition are substantially the same as those argued and passed upon in a former hearing, the Court will not disturb its judgment." *Lewis v. Rountree,* 81 N. C., 20.

The petition to rehear is

Dismissed.

Cited: Jolley v. Tel. Co., 205 N. C., 109.

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(99)

LAND COMPANY v. BOSTIC & WELLS AND P. V. BOSTIC.

(Filed 16 December, 1914.)

1. Vendor and Purchaser—Sale Not Consummated—Trials—Evidence—Verdicts—Mortgages.

In an action to recover the possession of two mules, where the evidence was conflicting whether the defendant bought them on trial or on credit, the controversy presented an issue of fact, which being found in the plaintiff's favor, the title to the mules did not pass to the defendant or to his vendee; and hence there were no features of a conditional sale presented, requiring registration as to third persons.

2. Vendor and Purchaser—Evidence of Sale—Acceptance of Check—Trials—Questions for Jury.

In this action to recover the possession of certain mules, which is resisted on the ground that the defendant had purchased them on a credit, a letter written by the defendant to the plaintiff was introduced in evidence by the former, saying that it enclosed a check for $25 which was "a payment on the mules bought." *Held:* The statement in the letter is not sufficiently definite to be controlling on the question, and only afforded relevant evidence on the issue.

3. New Trial—Newly Discovered Evidence—Cumulative Evidence.

Evidence which is only cumulative and contradictory of the testimony of a witness of the opposing party to the action is not sufficient upon which to obtain a new trial for newly discovered evidence.

APPEAL by defendant from *Justice, J.,* at December Term, 1913, of RUTHERFORD.

Civil action to recover possession of a pair of mules.

Verdict and judgment for plaintiff, and defendant excepted and appealed.

M. L. Edwards, Quinn, Hamrick & McRorie for plaintiff.
S. Gallert, J. M. Carson, and McBrayer & McBrayer for defendant.

PER CURIAM. The question at issue in this case is very largely one of fact for the decision of the jury.

Plaintiffs claimed and offered evidence tending to show that plaintiff agreed to sell Bostic & Wells the pair of mules, wagon and harness for $600 if they could pay as much as $150 or $200 down and give a chattel mortgage for the remainder of the purchase money; that the mules were turned over to defendants to try, and that they had neither made the payment nor executed the mortgage.

On the other hand, the defendants contended that they, C. H. Bostic and R. L. Wells, bought the mules outright and were to pay for
(100) them as they could and within a reasonable time; that they had afterwards sold the mules to their codefendant, P. V. Bostic, for full value, and had been paid the price.

The jury have accepted plaintiff's version of the matter, and this being true, no title passed to Bostic & Wells, nor could they pass any title to the purchaser.

The facts do not present a case of a regular conditional sale requiring registration against third persons; but, if plaintiff's testimony is accepted, no title ever passed, conditional or otherwise, under the principle declared in *Millhiser v. Erdman,* 98 N. C., 292.

It was earnestly urged for defendants that on the trial due significance was not allowed to a certain letter sent by Bostic & Wells to plaintiff, inclosing a check for $25 and saying "it was a payment on the mules bought of the company." While this statement tends to confirm defendant's position rather than plaintiff's, it is not sufficiently definite to be controlling on the question, and its province is only as a piece of relevant evidence on the issue, and was so treated by his Honor. It does not come under the decisions where a creditor accepts money under a clear and definite condition that the remittance is to be in full, as in *Bank v. Justice,* 157 N. C., 373, and cases of that kind; but it is of that character which permits interpretation and comes rather under *Aydlett v. Brown,* 153 N. C., 334, and *Armstrong v. Lonon,* 149 N. C., 434, in which the effect must be referred, with other relevant testimony, to the jury.

The affidavits offered in defendant's motion for a new trial are not, in our opinion, sufficiently conclusive to justify the court in granting defendant's application. While they tend strongly to support defendant's position, it is rather because they tend to contradict a witness for plaintiff, and, apart from this, they are only in the nature of cumulative testi-

mony, and, under our decisions, are not sufficient to sustain the motion. *S. v. Starnes,* 97 N. C., 423.

After giving the matter our most careful consideration, we find no reversible error, and are of opinion that the judgment on the verdict should be affirmed.

No error.

Cited: Young v. Stewart, 191 N. C., 305; *S. v. Casey,* 201 N. C., 624.

(101)

STATE v. BEACON SUPPLY COMPANY.

(Filed 30 September, 1914.)

Cities and Towns — Health—Ordinance—Statutes—Interpretations—Presumptions.

In construing an ordinance or statute relating to public health it will be assumed that the lawmaking power intended to remedy an evil and not to restrict unnecessarily the use of property or the engaging in any lawful business, and ordinances of this character should be strictly construed to that end, giving effect, if possible, to every word and phrase. Hence, an ordinance reading, "No person shall keep hides, guano, etc., . . . to the annoyance of any citizen or the detriment of the public health within 400 feet of the dwelling house of any citizen of the city," does not make the mere keeping of the commodities named within the distance specified a violation thereof, unless it is shown that the act complained of was to the "annoyance" of a citizen "or a detriment to the public health."

APPEAL by defendants from *Connor, J.,* at May Term, 1914, of VANCE.

The defendants were prosecuted in the recorder's court of Vance County on a warrant charging the violation of a town ordinance, and from a judgment rendered on an appeal to the Superior Court appealed to this Court.

The ordinance declares, in part, that "No person shall keep hides, dried or green, filthy rags, bones, or guano, or anything else that may be adjudged a nuisance, to the annoyance of any citizen or the detriment of the public health, within 400 feet of the dwelling house of any citizen of the city."

On the evidence, the court ruled and charged the jury that, it being proved and admitted that the ordinance in question had been enacted by the city council, and that after its enactment defendants kept commercial fertilizers in the city within 400 feet of the residence of a citizen, they

should find the defendants guilty, and that the statement in the ordinance of "annoyance of a citizen and detriment to the public health" had no application to this case, and defendant excepted.

Attorney-General T. W. Bickett and Assistant Attorney-General T. H. Calvert, and J. C. Kittrell for the State.

T. T. Hicks and T. M. Pittman for defendants.

ALLEN, J. In the construction of ordinances and statutes effect must be given, if possible, to every word and phrase (38 Cyc., 1128); it must be assumed that the lawmaking power intended to remedy an evil, and not to restrict unnecessarily the use of property or the engaging in any lawful business; and statutes and ordinances restricting the use of
(102) property are strictly construed, and an intent to impose burdens on the citizens further than the general welfare demands will never be presumed. *Nance v. R. R.*, 149 N. C., 366.

"All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public; but a limitation which is unnecessary and unreasonable cannot be enforced." *S. v. Whitlock*, 149 N. C., 542.

Applying these principles to the ordinance before us, we are of opinion that his Honor was in error in holding that the defendants were guilty if they kept guano in Henderson within 400 feet of a dwelling or business house, although it annoyed no citizen and was not detrimental to health, and that the words "to annoyance of any citizen or the detriment of the public health" have no application in this case.

The language quoted is not ambiguous, and it must be presumed that it was intended for it to have some legal effect.

If referred to the clause immediately preceding, "or anything else that may be adjudged a nuisance," it is meaningless, because anything sufficiently harmful to be adjudged a nuisance necessarily implies that it is an annoyance to at least one citizen or is injurious to health; and if it should be held that it does not refer to hides, guano, and bones, an arbitrary restriction is imposed upon the use and ownership of a well recognized and useful article of trade and commerce.

This construction would convict the aldermen of Henderson of enacting an ordinance regulating the use of property when unnecessary to promote the comfort or health of the citizens and of placing a burden upon its use and ownership, a conclusion which would render the ordinance invalid, and which ought not to be adopted unless the language imperatively demands it.

It seems to us that the natural and reasonable construction is that the sentence, "to the annoyance of any citizen or the detriment of public

health," qualifies the verb "keep," and that it is the keeping to the annoyance of the citizens, etc., of hides, bones, and guano, or anything else that may be adjudged a nuisance that is condemned.

The validity of that part of the ordinance referring to anything else that may be adjudged a nuisance is not before us.

A new trial is ordered for the error pointed out.

New trial.

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(103)

STATE v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 30 September, 1914.)

Municipal Corporations—Ordinances—Railroads—Stopping Trains—Penalties—Rights and Remedies—Interpretation of Statutes.

Where a particular offense is created by a valid statute or town ordinance, which is otherwise lawful, and the penalty for its commission is prescribed, the court is confined to that particular remedy, to the exclusion of others; and where a town ordinance regulating the running of trains within its borders prescribes that "no railroad company nor engineer in charge of any train of any railroad company shall . . . block any street crossing for a longer period than ten minutes, and any engineer in charge of any train or locomotive of any railroad company violating any provisions of this section shall be fined not more than $10 for each and every offense," etc., the remedy, by the clearly expressed intent of the ordinance, is confined to imposing the penalty upon the engineer, who, having charge of the train, has committed the offense specified.

CLARK, C. J., and HOKE, J., dissenting.

APPEAL by defendant from *Bond, J.*, at May Term, 1914, of WILSON.

The defendant was charged in the recorder's court of the town of Wilson with blocking Tarboro Street crossing, in said town, for twenty minutes with a freight train, in violation of the following town ordinance: "No railroad company nor engineer in charge of any train of any railroad company shall run or operate in or through the town of Wilson any locomotive or car or train of cars at a higher rate of speed than 10 miles per hour, and every engineer in charge of any train or locomotive running through the town of Wilson shall ring the bell of such locomotive while same is being run and operated through said town; no railroad train or locomotive shall block any street crossing for a longer period than ten minutes, and any engineer in charge of any train or locomotive of any railroad company violating any of the provisions of this section shall be fined not more than $10 for each and every offense: *Provided, nevertheless,* that the rate of speed hereinbefore prescribed shall not

apply to any train running in or through the said town between the hours of 11 o'clock p.m. and 6 o'clock a.m., but all trains operating between such hours may be run and operated at a reasonable rate of speed." Defendant was adjudged guilty by the recorder, and appealed. In the Superior Court the jury rendered a special verdict, finding that a train of cars belonging to defendant blocked the said crossing, on 27 November, 1913, for more than ten minutes, and that there was an engineer in charge of the train at the time, his name being unknown to the jurors. This finding was based upon the admission of the facts by the defendant only for the purpose of the trial. No charge was made against the engineer. The jury having submitted to the court the
(104) question as to defendant's guilt in the usual form, and the presiding judge, Hon. William M. Bond, having ruled that, under the said ordinance and the findings of fact in the verdict, the defendant was not guilty, as the penal provision is confined to the engineer, the jury so found and returned their verdict of not guilty. Judgment was entered for the defendant, and the State appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

No counsel for defendant.

WALKER, J., after stating the facts: We may as well say *in limine* that our able and learned Attorney-General and assistant, in their argument before us, admitted, with their usual frankness and candor, that as the ordinance prohibited any railroad train or locomotive from blocking any street crossing for a longer period than ten minutes, and provided that any engineer in charge of any train or locomotive of any railroad company violating the provision shall be fined not more than $10, and there was an engineer in charge of the train, the ordinance, in its penal aspect, was manifestly aimed at the engineer as the sole offender and the one who should be made to suffer for doing the forbidden act. He then added: "We know of no principle of law, or any authority to which we can refer the Court, against the decision of the trial judge." In this view of the case we concur. It will hardly be contended that the town did not have the right to make the engineer solely responsible for the blocking of the crossing, if it saw fit to do so, and we think it is equally clear that the ordinance was intended to penalize the engineer alone for doing, or permitting to be done, the forbidden act. Defendant is not charged with running its trains at an excessive rate of speed, and the portion of the ordinance where that is prohibited is the only one in which the words "railroad company" are used. When requiring the ringing of the bell and forbidding the blocking of the crossing, the engineer only is men-

tioned, it being reasonably supposed by the draftsman of the ordinance and the town board that if the prohibited acts were committed, the engineer would be the one directly responsible for it, and the only one who could well prevent it, and they very wisely and justly restricted the imposition of a penalty for disobedience of the ordinance to him. It may be seriously questioned if the part of the ordinance relating to the speed of trains is not also confined to him; but we do not decide this, as it is not before us. The ordinance is too plainly worded for any doubt to be entertained as to the intention that the penal clause should be confined to the engineer. It says that very thing, in so many words, and with such directness and perspicuity as to exclude any other conclusion. The words are: "And any engineer in charge of any train or locomo- (105) tive of any railroad company violating any of the provisions of this section shall be fined not more than $10 for each and every offense."

The law of the case is as well settled as the meaning of the ordinance is obvious. It is fully considered by *Justice Connor* in *Nance v. R. R.*, 149 N. C., 366. It is there held that we cannot punish even a corporation by the unwarranted extension of the terms of a statute, and especially we cannot insert words, or imply them, for the purpose of amplifying a penal clause, so as to embrace persons or acts not within its spirit and clear intent. It is the penal clause that gives life and vigor to the enactment, and by which alone it can be enforced. It must be remembered that this was not an offense at common law, but solely the creation of this ordinance. The rule then prevails, and must be applied, that when a particular offense is created and the penalty for its commission prescribed, we are confined to that particular remedy, to the exclusion of all others. This is too familiar a rule to be doubted. But in *S. v. R. R.*, 145 N. C., 496, we followed the law as stated by *Justice Ruffin* in *S. v. Snuggs*, 85 N. C., 542, as follows: "The statute not only creates the offense, but fixes the penalty that attaches to it, and prescribes the method of enforcing it; and the rule of law is, that wherever a statute does this, no other remedy exists than the one expressly given, and no other method of enforcement can be pursued than the one prescribed. The mention of a particular mode of proceeding excludes that by indictment, and no other penalty than the one denounced can be inflicted. 1 Russell on Crimes, 49; *S. v. Loftin*, 19 N. C., 31. We are convinced that his Honor's ruling in quashing the indictment is correct, in view of the fact that the statute creates the offense, affixes the penalty, and prescribes the mode of proceeding—the mention of the particular method operating to the exclusion of every other." 1 McLain's Cr. Law, sec. 8, thus states the principle: "If the act prohibited has been previously an indictable offense, it will be presumed that the civil penalty therefor is cumulative;

but when the act creates a new offense and makes that unlawful which was lawful before, and prescribes a particular penalty and mode of procedure, that penalty alone can be enforced." We reviewed many of the authorities upon this question in *S. v. R. R., supra,* but the following extract from that case will suffice to show the decided trend of judicial thought since the early days of the law up to the present time: "In *Rex v. Wright,* 1 Burr., 543, it was held that 'An indictment lies not upon the act of Parliament which creates a new offense and prescribes a particular remedy.' *Lord Mansfield* said in that case: 'I always took it that where new created offenses are only prohibited by the general prohibitory clause of an act of Parliament, an indictment will lie; but where there is a prohibitory particular clause, specifying only particular remedies, (106) there such particular remedy must be pursued; for otherwise the defendant would be liable to a double prosecution—one upon the general prohibition and the other upon the particular specific remedy.' And when afterwards informed that the counsel for the Crown 'gave up the matter,' he replied: 'I do not wonder at all at it; I thought he would do so. I have looked into it and there is nothing in it. That case of *Crofton* (where the contrary is supposed to have been decided) has been denied many times.' In *Rex v. Robinson,* 2 Burr., 799-803, the great *Chief Justice* (*Lord Mansfield*) said: 'But where the offense was antecedently punishable by a common-law proceeding, and a statute prescribes a particular remedy by a summary proceeding, there either method may be pursued, and the prosecutor is at liberty to proceed either at common law or in the method prescribed by the statute, because there the sanction is cumulative and does not exclude the common-law punishment. 1 Salk., 45. *Stephens v. Watson* was a resolution upon these principles. In that case, keeping an ale-house without license was held to be not indictable, because it was no offense at common law, and the statute which makes it an offense has made it punishable in another manner.' And again, in the same case, when discussing the same point, he sums up, at page 805, as follows: 'The true rule of distinction seems to be that where the offense intended to be guarded against by statute was punishable before the making of such a statute prescribing a particular method of punishing it, there such particular remedy is cumulative and does not take away the former remedy; but where the statute only enacts 'that the doing any act not punishable before shall for the future be punishable in such and such a particular manner, there it is necessary that such particular method by such act prescribed must be specifically pursued, and not the common-law method of an 'indictment.' In *Castle's case,* 2 Cro. Jac., 644, it was resolved that where a statute imposes a penalty for doing a thing which was no offense before, and

provides how it shall be recovered, it shall be punished by that means and not by indictment. The offense being new, the particular mode of punishment must be pursued."

And *Justice Connor,* in *Nance v. R. R., supra,* to which we have already referred in a general way, states the rule to the same effect as to penal statutes or ordinances. He says, at p. 373:

"We have no authority to extend the law to cases not included in its terms. It is a penal law. It would be contrary to well settled rules to give this act the construction contended for, or to apply it to cases outside of its plain terms. In *Coe v. Lawrence,* 72 E. C. L. (1 Ellis and B.), 516, it was sought to recover a penalty for violating a statute. Defendant claimed that he was not within its terms. It was insisted that the court could find an intention to include him. *Lord Campbell, C. J.,* said: 'We are not justified in inserting words for the purpose of extending a penalty clause to cases not expressly comprehended in it. By put- (107) ting the correct grammatical construction on the words, we may, perhaps, induce greater care on the part of those who frame the laws.' *Lord Coleridge* said: 'I never heard that it was allowable to insert words for the purpose of extending a penal clause. And even if that were not so, it is quite wrong to alter the language of a statute for the purpose of getting at its meaning'; and of the same opinion were all the judges." And again, something which is still more to the very point: "In *S. v. Cleveland,* 157 Ind., 258, the learned justice said: 'The Court must interpret such a statute as it finds it. It cannot supply omissions by intendment.' He quotes with approval these words: 'When the penal clause is less comprehensive than the body of the act, the courts will not extend the penalties provided therein to classes of persons or things not embraced within the penal clause, even when there is a manifest omission or oversight on the part of the Legislature," citing, also, 26 A. and E. Enc., 660.

Now, in this case, the penal clause is plainly restricted to the engineer, and the company is not mentioned at all. The town council undoubtedly had the right to so provide, and if it had intended otherwise it would have been very easy to have expressed itself with perfect clearness. But the reason we find no such words is that it never intended any such thing. A penalty of $10 imposed on the real offender was deemed adequate for the purpose of prevention, or of punishment in case of a violation. We are warned, in *McClosky v. Cornwall,* 11 N. Y., 593, that in construing a statute or any ordinance we should seek for the meaning first of all in the words, and the enactment should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose of

extending its operation. See *Nance v. R. R., supra,* at p. 372, where this case is cited with approval. The natural and obvious meaning of this ordinance is that no locomotive or train of cars shall be permitted by the engineer to block a crossing more than ten minutes, and if he does permit it *he* shall pay the penalty of $10. This is not only the natural rendering of the ordinance against blocking crossings, but it is the reasonable and just one. The engineer has control of the train, his hand is on the throttle, and he commands the brakes, and he can start or stop it whenever he pleases, and should be held responsible for violating the ordinance. Why punish both, when it is evident the board that passed the ordinance thought one punishment sufficient? As said by *Justice Connor,* in *Nance v. R. R., supra,* we must construe the ordinance as we find it, and not as we may think it should be; and to use his language more exactly: "We should not be permitted to apply rules of construction to corporations, for the purpose of bringing them within penalty laws, and refuse to do so in suits against other citizens." That
(108) case we consider directly in point, as there it appeared that the words in the first part of the statute were broad and comprehensive, but the Court restricted them to that class against whom the penalty was denounced, we being then of the opinion that the penal clause of the statute restricted the prior clauses, so as to confine the entire act, in its operation, to those named in the penal clause. This is a familiar doctrine and has had frequent illustration and application in the cases. An eminent writer has said that the law delights in the life, liberty, and happiness of the subject, and deems statutes which deprive him of these, or of his property, however necessary they may be, in a sense as in derogation of his natural right or as curtailing his natural privilege; and for this and kindred reasons, as well as for the reason that every man should certainly know when he is guilty of a crime, statutes, and of course ordinances, which subject one to a punishment, or penalty, or forfeiture, or to summary process, calculated to take away his opportunity of making a full defense, or in any way depriving him of his liberty, are to be strictly construed. "Such statutes are to reach no further in meaning than their words; no person is to be made subject to them by implication; and all doubts concerning their interpretation are to preponderate in favor of the accused." 1 Bishop Statutory Crimes (Ed. 1873), 193, 194. Thus, *Lord Mansfield,* in construing 5 Eliz., ch. 4, sec. 31, against exercising a trade without serving the seven years apprenticeship, said: "The constructions made by former judges have been favorable to the qualifications of the persons attacked for exercising the trade, even where they have not *actually* served apprenticeships. They have, by a liberal interpretation, extended the qualifications for exercising the trade much be-

yond the letter of the act; and have confined the penalty and prohibition to cases precisely within the express letter"; and he further said: "I think Mr. Bishop has laid his foundations right, against extending the penal prohibition beyond the express letter of the statute. First, this is a penal law; second, it is a restraint of natural rights, and, third, it is contrary to the general right given by the common law of this kingdom." The defendant was adjudged not guilty and was discharged of the penalty. *Raynard v. Chase,* 1 Burrows, 2. *Chief Baron Pollock* said, in *Bowditch v. Balchin,* 5 Exch., 378: "When the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute." "In expounding penal statutes it is an established rule that the construction must be strict as *against* the defendant, but liberal in his *favor.*" *Gould, J.,* in *Myers v. The State,* 1 Conn., 502. "Penal statutes are construed strictly against the subject, and favorably and equitably for him." 1 Hawk P. C. (Curw. Ed.), p. 90, sec. 8. And see *S. v. Upchurch,* 31 N. C., 454, and the observations of *Lord Mansfield* in *Rex v. Parker,* 2 East P. C., 592. See, also, *United States v. New Bedford Bridge,* 1 Woodb. and M., 401. In *S. v. Upchurch, supra,* (109) *Chief Justice Ruffin* regarded it as a perfectly settled rule of construction that the interpretation of penal statutes is "to be benignant to the accused, and words in his favor should not be rejected." And it has also been said that the circumstances will be rare in which any court will so extend an enactment by construction or implication as to involve penal consequences not within the express words. Of course, all rules should be so administered as not to work an absurdity or defeat the purpose of the law, but the rule of close, or even literal, construction is generally invoked when construing a penal statute, in order to ascertain the intention and to confine its operation strictly within the limits fixed by the Legislature. It is an ancient but just and equitable doctrine which extends a penal statute beyond its words in favor of a defendant, while holding it tightly to its words against him. But whatever the rule may be, we should not be astute to include a person not within the terms of the penal clause, either by argument or construction. It should, at least, be very plain that he was intended to be embraced by it; and certainly that is not the case here, as it was clearly the intent to restrict the punishment, and in the form of a penalty, to the engineer. This is the natural and grammatical, as well as the legal, construction of the ordinance.

Where the language of a statute or ordinance is clear and its meaning unmistakable, there is no room for construction, but we merely follow the intention as thus plainly expressed. The argument drawn for incon-

venience has no application in such a case. Whether it would be better that the law should be different is a matter solely for the lawmaking body to decide, and not for us. We simply enforce the law as we find it, and according to its plainly expressed meaning. Courts will not make any interpretation contrary to the express letter of a statute, for nothing can so well explain the meaning of the makers of it as their own direct words, since language is the exponent of the intention (*index animi sermo*), and, as Coke says, that is a very bad interpretation which corrupts the text (*malidicta exposito quæ corrumpit textum*). 11 Rep., 34; Broom's Legal Maxims (6 Am. Ed.), star page 598. It is better to abide by the written word in the interpretation of all written instruments, for our views as to what should be the law, or what the public policy, may not accord with that of the legislative body.

There was no error in the ruling of the court below.

Affirmed.

CLARK, C. J., dissenting: The defendant railroad company was charged with violation of section 1, chapter 7 of the Ordinances of the town of Wilson. Said ordinance is as follows:

(110) *"Railroads and Railroad Trains.* SEC. 1. No railroad company, nor engineer in charge of any train of any railroad company, shall run or operate in, or through, the town of Wilson any locomotive or car or train of cars at a higher rate of speed than ten miles per hour; and every engineer in charge of any train or locomotive running through the town of Wilson shall ring the bell of such locomotive while same is being run and operated through said town; no railroad train or locomotive shall block any street crossing for a longer period than ten minutes, and any engineer in charge of any train or locomotive of any railroad company violating any of the provisions of this section shall be fined not more than $10 for each and every offense: *Provided, nevertheless,* that the rate of speed hereinbefore prescribed shall not apply to any train running in or through the said town between the hours of 11 o'clock p.m. and 6 o'clock a.m., but all trains operating between such hours may be run and operated at a reasonable rate of speed."

On the trial in the recorder's court the defendant was found guilty, and appealed. In the Superior Court the jury rendered a special verdict as follows: "We, the jurors, find for our verdict the facts to be as follows: That a train of cars belonging to the Norfolk Southern Railroad Company blocked up the street or crossing, as alleged, in the town of Wilson on 27 November, 1913, for more than ten minutes. We find that there was an engineer in charge of said train, his name not being

known to us. The above findings were based by us on admissions made by defendant for the purposes of this trial. There was no defendant except the corporation, no charge being made against the engineer, who was in charge of said train."

Upon consideration of the special verdict, the court held that the defendant corporation was not guilty, because "in its judgment the language of said ordinance made only the engineer and not the corporation guilty." The court was probably so impressed because the ordinance imposes a fine of not more than $10 on any engineer violating any provisions of this section and does not provide for any specific punishment upon the railroad company.

The imposition of the punishment upon the engineer was not intended to put the sole responsibility upon him, but is additional punishment upon the engineer for a smaller sum than is allowable against the corporation itself under whose orders he is acting.

The fact that no specific punishment is prescribed in the ordinance as to the corporation does not exempt it from liability. Revisal, 3702, provides: "If any person shall violate any ordinance of city or town he shall be guilty of misdemeanor and shall be fined not exceeding $50 or imprisoned not exceeding thirty days."

Revisal, 2831 (6), provides: "The word 'person' shall extend (111) and be applied to bodies politic and corporate as well as to individuals, unless the context clearly shows to the contrary." *S. v. Ice Co.*, 166 N. C., 369.

Here the railroad company was forbidden to run or operate its trains at a higher rate of speed than 10 miles an hour or without the engineer ringing the bell, and it is further provided: "No railroad train or locomotive shall block any street crossing for a longer period than ten minutes." This made it unlawful for the railroad company *ex vi termini* to thus block the street with its train or locomotive, and it was liable for that unlawful act the same as any person; and by Revisal, 3702, such unlawful act was a misdemeanor and punishable by a fine not exceeding $50 or imprisonment for thirty days. The fact that the railroad company could not be imprisoned did not exempt it from the fine. *S. v. Ice Co., supra.*

The power of the town to prescribe such ordinance is settled under a nearly similar ordinance of New Bern in *S. v. R. R.*, 141 N. C., 736, which has been cited with approval in *White v. New Bern*, 146 N. C., 447; *Staton v. R. R.*, 147 N. C., 428.

The words of the ordinance, "No railroad train or locomotive shall block any street crossing for a longer period than ten minutes," make

that act unlawful, and necessarily make the owner of the train or locomotive liable under Revisal, 3702. The further provision that the engineer is punishable by a smaller fine in no wise exempts the owner of the train, who is responsible for such conduct as much so as if it were a "person." The engineer, unless thus named, would not be liable for the forbidden acts. But the owner would be. If the engineer had not thus been made liable, no one would question that the corporation would be liable for running its trains in town limits at the forbidden rate of speed or without ringing the bell, or for blocking the crossing with its trains or cars. Adding liability (to a smaller fine) on the engineer no more relieves the corporation than the recent act making officers of illegal trusts individually punishable exempts the trusts themselves from punishment for their illegal acts.

It would be inconvenient to take the engineer out of his cab and delay the train for his trial or to give bond (if he could do so). On the other hand, if he is allowed to proceed, the name of the engineer might be unknown, for the defendant has several hundred of them, and it would be impracticable to serve the warrant on him in a distant state to which he may be on his way, or even at a remote point in this State, and difficult to prove his identity. It is reasonable to presume that the intelligent authorities of the town of Wilson merely intended to make the engineer responsible, as well as the railroad company, for blocking their streets for more than ten minutes. They could not have intended
(112) to make the engineer alone responsible, exempting those "higher up" and the railroad company whose cars and engines were allowed by the management to thus deprive the citizens of the use of their own streets. If this, however, is held to be what the town council really did, it practically repeals the ordinance; but they can easily amend their ordinance to express their true meaning beyond dispute, which was to make the engineer liable as well as the railroad company.

The judgment should be reversed, and the court below should impose sentence upon the special verdict in accordance with law.

HOKE, J., concurs in dissenting opinion.

Cited: Nance v. Fertilizer Co., 200 N. C., 707; *Sanders v. R. R.*, 201 N. C., 679.

STATE v. CLEVELAND ROGERS.

(Filed 21 October, 1914.)

1. Indictment—Criminal Law—Unlawful Burning—Ginhouse—Interpretation of Statutes.

An indictment for "willfully and feloniously setting fire to a certain ginhouse, the property of W. B. H., with intent to burn and destroy the same," is sufficient for conviction of the offense charged under Revisal, secs. 3336, 3341, the word "ginhouse" meaning the same as "cotton gin"; and where the punishment inflicted was within the limits prescribed by either section, it becomes immaterial under which section the conviction was had.

2. Same—Evidence—"Charring."

Where the defendant has been tried and convicted under an indictment charging that he willfully and feloniously set fire to a certain "ginhouse," etc., *it is held* that the evidence of "charring" is sufficient proof of "burning" to sustain the sentence; and *it is further held* that the motion in arrest of judgment was properly denied under the circumstances, the objection relating to informalities and refinement, and the defendant having been fully informed of the charge against him. Revisal, secs. 3254, 3255.

3. Witnesses—Maps—Evidence—"Approximately Correct."

A witness is permitted to make a map, while on the stand, and explain his testimony therefrom, though he testifies that the map was "approximately correct."

4. Criminal Law—Unlawful Burning—Questions—Identification—Appeal and Error.

Upon a trial for setting fire to a certain ginhouse, etc., a witness testified that he knew the prisoner well, and saw the defendant running away from the ginhouse, which was ablaze, and recognized him in the light of the fire. The defendant objected to a question of the solicitor, asking if the witness had any doubt that the prisoner was the man whom he saw, the question with the answer *held* to be no error.

5. Appeal and Error—Objections and Exceptions—Immaterial Evidence.

Exceptions to the admissibility of evidence should be specific, nor will they be regarded on appeal when the evidence excepted to is merely irrelevant, but not prejudicial.

6. Trials—Evidence—Corroboration.

Where a witness has testified to certain material matters, it is competent for another witness to testify what the former witness had said to him, it being corroborative of the witness who has testified.

7. Trials—Speeches to Jury—Improper Argument—Appeal and Error.

Upon his argument to the jury the counsel for the defendant, being tried for unlawfully setting fire to a ginhouse, told of his having gone on the prosecutor's premises, and of his own knowledge, of facts and circum-

stances relating to the locality, which had not been testified to, and were at variance with the testimony of one of the State's witnesses. The prisoner's counsel excepted to certain language used by the solicitor in reply, and under the circumstances of this case *it is held* that the prisoner's counsel cannot be heard to complain; and the Supreme Court reminds counsel that from respect for the occasion they should abstain from controversies of this character; and the courts, that they should prohibit them.

8. Courts—Expression of Opinion—Speeches to Jury—Interpretation of Statutes—Appeal and Error.

In this case *it is held* that the remarks of the trial judge made with reference to the argument of defendant's counsel in his address to the jury were not an intimation of opinion upon the facts, and not held for error. Revisal, sec. 535.

(113) APPEAL by defendant from *Cooke, J.*, at March Term, 1914, of WAKE.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

B. C. Beckwith for defendant.

CLARK, C. J. The defendant was convicted on an indictment for "willfully and feloniously setting fire to a certain ginhouse, the property of W. B. Hopkins, with intent to burn and destroy the same." *S. v. Purdie,* 67 N. C., 25; *S. v. Pierce,* 123 N. C., 745. The indictment was sufficient both under Revisal, 3336 and 3341, and it was immaterial under which, as the punishment inflicted was within the limits prescribed for either. Revisal, 3336, covers a willful attempt to burn a "cotton gin," which from the context evidently means the same thing as a "ginhouse." Revisal, 3341, makes punishable the willful burning of any "ginhouse." Here the ginhouse was set fire to, but not consumed. The form here used was held sufficient in *S. v. Green,* 92 N. C., 779, and is substantially the same as that used in the other two cases above cited.

The tendency formerly prevailing in criminal proceedings was checked by the statutes, now Revisal, 3254 and 3255, which prohibit such
(114) proceedings to be "quashed or judgment reversed by reason of any informality or refinement, if they express the charge in a plain, intelligible, and explicit manner." The whole course of this trial shows that the defendant was fully informed of the charge against him and for what he was being tried. He was at no disadvantage on that ground, and there is no other object in the indictment. The motion in arrest of judgment was properly denied. The "charring" was sufficient proof of a "burning," even in a charge for arson. *S. v. Hall,* 93 N. C., 573.

The witness Hopkins was permitted to use a map "for the purpose of explaining the testimony of the witness." This was competent, and is very often resorted to, both in civil and criminal procedure. *Arrowood v. R. R.*, 126 N. C., 629; *Tankard v. R. R.*, 117 N. C., 558; *Riddle v. Germanton, ibid.*, 388, and cases there cited; *S. v. Wilcox* (murder), 132 N. C., 1120, and *S. v. Harrison*, 145 N. C., 408 (for kidnapping). Both these latter cases were thoroughly contested, but the Court affirmed its previous ruling on this point in *S. v. Whiteacre*, 98 N. C., 753, and *Dobson v. Whisenhant*, 101 N. C., 645. It is true the witness said the map was "approximately correct." It could hardly have been otherwise, being made at the time and merely to illustrate his evidence. This did not render the map incompetent as a part of his testimony, for the defendant doubtless made the most of it by arguing that therefore his whole testimony was only approximately correct. But that was a matter for the jury.

The witness stated that on discovery of the fire, which was blazing up 2 feet or more, he ran to the ginhouse and saw the defendant running away, "whom he distinctly recognized, aided by the light from the fire; that he was well acquainted with defendant, having known him ever since he was a little boy." The solicitor then asked: "Have you any doubt as to the defendant being the man?" The objection made was overruled, and the witness answered, "No." The testimony was competent. *S. v. Lytle*, 117 N. C., 799. Nor can we sustain exception 3, which pointed to no particular part of the testimony. Exceptions to evidence must be specific. *S. v. English*, 164 N. C., 498. At most, the evidence was merely irrelevant, and hence possibly a needless consumption of the time of the court, but it was not legally prejudicial to the defendant.

The evidence in regard to the defendant being refused credit at the store of the owner of the ginhouse, and the defendant's remarks about it, was competent as tending to show motive, taken in connection with other evidence offered for the same purpose. The testimony of King that Hopkins told him on the night of the fire that the defendant had fired his ginhouse was competent as corroborative evidence. *S. v. Maultsby*, 130 N. C., 664; *S. v. Rowe*, 98 N. C., 629; *S. v. Parish*, 79 N. C., 610.

The defendant excepted to the solicitor's argument containing (115) strictures upon defendant's counsel, because calculated to prejudice the jury against the defendant. The judge states in the case on appeal that "defendant's counsel in his argument referred to what he knew personally in regard to the location and surroundings, without having given it in evidence, and had criticised the testimony of the prose-

cutor because at variance with the result of his own untestified knowledge of the location. That thereupon the solicitor gave the counsel 'notice that if he persisted in that line of argument, he (the solicitor) would reply to it.' But counsel for defendant continued to refer to what he knew personally of the location and surroundings, and criticised the conduct of the prosecuting witness (Hopkins), contending that he was offended because he (the counsel) had gone on his premises to make an inspection." The solicitor, in reply, contended that the conduct of the counsel in riding over the prosecutor's premises in a buggy "with a Negro, inspecting them without the consent of the owner and driving away in disregard of the owner when he had attempted to stop him for the purpose of ascertaining their business, was calculated to irritate." There was more on both sides of this kind of argument (if it can be so styled). It was improper in defendant's counsel to use his personal knowledge of the locality without its being given in testimony. This case differs from *S. v. Lee,* 166 N. C., 250, where counsel was merely drawing inferences from the testimony.

From the facts as stated by his Honor, it seems that the defendant's counsel made the first transgression. He ought to have been restricted to the evidence given in to the jury. We do not feel called upon to pass upon the query as to which side offended the most against the orderly proceedings of the court and that dignity and seemliness which should always surround a trial in a court of justice. If the defendant did not profit by this unseemly debate we cannot see that he can complain when it was caused by his own counsel. We cannot see that he was in any way prejudiced by it, for the jury were doubtless intelligent enough to understand that they were to try the cause upon the evidence as deposed to by the witnesses and upon the law as laid down by the court. Such controversies should be barred not only by the judge, but by the respect of the counsel on both sides for the occasion. This was, as is usual, merely what *Chief Justice Pearson* styled "cross-firing with small shot." There is no evidence in the record that the defendant's counsel received worse than he dealt, nor that his client was prejudiced in any way.

The last exception is that the court in its charge said: "Now, I grant you it might have been better (and I am not criticising him) if the defendant's attorney had gone to the man's house and represented to him that he was there for the purpose of making measurements or preparing the case for trial." This was not an intimation of any "opinion (116) whether a fact is fully or sufficiently proven," which is forbidden by chapter 452, Laws 1796, now Revisal, 535. It has been often held that the "facts" referred to are those in dispute on which the lia-

bility of defendant depends. *S. v. Angel,* 29 N. C., 27; *S. v. Jacobs,* 106 N. C., 695, and cases there cited.

We find nothing in the transcript which convinces us that the defendant was in any wise prejudiced by the rulings excepted to.

No error.

Cited: S. v. White, 171 N. C., 786; *S. v. Spencer,* 176 N. C., 712; *S. v. Baldwin,* 178 N. C., 691; *S. v. Murdock,* 183 N. C., 781; *S. v. Kee,* 186 N. C., 475; *S. v. Hart,* 186 N. C., 603.

STATE v. S. M. POLLARD.

(Filed 21 October, 1914.)

1. Homicide—Self-defense—Willingness.

Where the evidence is conflicting, upon a trial for a homicide, as to the question of whether the prisoner was guilty of manslaughter or was justified in the killing by acting in self-defense, it is reversible error for the trial judge to charge the jury that the prisoner would be guilty of manslaughter should they find that the prisoner entered willingly into the fight with a deadly weapon, although for the purpose of defending himself, for every man who is induced to act in self-defense by reason of a threatened and deadly attack upon himself in a very genuine sense does so willingly.

2. Same—Elements of Self-defense—Unlawful Fighting—Trials—Instructions.

Where self-defense is relied upon on a trial for homicide, with evidence tending to establish it, it is for the jury to determine whether the prisoner acted with reasonable apprehension that he must kill the deceased in order to save his own life or himself from great bodily harm; and should they find that the prisoner acted with such reasonable apprehension exclusively in his own defense, judging his conduct by circumstances as they reasonably appeared to him at the time of the homicide, and that he had not provoked the fight, or was not at fault in bringing it about, they should render a verdict of acquittal.

3. Same—Killing of Officer—Evidence.

The defendant, on trial for the murder of an officer of the law, was suspected by the latter of keeping a gambling place, he having watched the place for some time, occasioning bad blood between the prisoner and himself. There was evidence tending to show that the deceased was a man of violent temper and dangerous, and had actually threatened to kill the prisoner, and that these things were known to the prisoner; that at the time of the homicide the deceased entered the prisoner's place of business, armed with two pistols in his pockets, and was ordered out by the prisoner, and also that the deceased had remarked to others upon

this occasion that he was not taking any chances that evening; that deceased refused to leave at the prisoner's command, and followed him as he was waiting on a customer, and was again ordered to leave, whereupon the deceased again refused to leave, and cursed the prisoner, throwing his right hand to his right hip, and putting his left foot a little forward, and then the prisoner fired his pistol, when a struggle ensued for the possession of the pistol, in which the pistol was again fired, and under these circumstances the fatal wound was inflicted. *Held:* Reversible error for the judge to charge the jury, among other things, that if they found that the prisoner was willing, under the circumstances, to enter into the fight, he would be guilty of manslaughter, for such a charge leaves out the question whether the deceased unlawfully entered into the fight.

CLARK, C. J., dissenting.

(117) APPEAL by defendant from *Daniels, J.*, at April Term, 1914, of PITT.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Manning & Kitchin, Harry Skinner, Jarvis & Wooten, Julius Brown, L. G. Cooper, F. G. James & Son, Moore & Long, and N. W. Outlaw for defendant.

WALKER, J. The prisoner was indicted in the court below for the murder of T. H. Smith, and convicted of manslaughter. Sentence having been pronounced, he appealed to this Court. The deceased was chief of police at Farmville, N. C., and was shot by the prisoner at the latter's store in Farmville, on 17 January, 1914, it being Saturday night. There was evidence tending to show that there had been some ill feeling between the two men, on account of the fact that the deceased had been watching the prisoner's place of business and had threatened to prosecute him for gambling on his premises and selling liquor, and that deceased was very angry with and had threatened to kill the prisoner. They had an altercation the Saturday night of the week before the homicide was committed. It was shown that the deceased was a man of violent temper and dangerous, to the knowledge of the prisoner. On the night of the homicide the deceased entered the prisoner's store and was ordered out, prisoner saying to him, "I have told you to keep out of my place of business, and I wish you would get out." In order to better understand the occurrences at the time of the shooting, it is well to give a brief description of the drug store. The store stands on the corner of the street, and the entrance to the store is at the corner. On the left as one enters there is a row of show cases; then in front of the door near the wall there is another row of show cases, on one of which stands the soda

fountain and on the other stands the cigar case, with a space of about 2 feet between the two; then near the wall parallel to the first row of show cases is the third row of show cases. Smith entered the store at the door and walked first where some young men were punching a punch board near the soda fountain; one of them asked him to (118) take a punch, and he said, "No, I am not taking any chances tonight," and then turned and walked in the direction of the third row of show cases. When Smith entered the store, defendant was standing behind his counter near the soda fountain, where the young men were punching; about this instant some customer called for a package of cigarettes, and defendant walked down behind the counter to the cigar case to wait on the customer. While defendant was standing behind the cigar case, Smith walked from the door up to within 6 or 7 feet of where defendant was standing. Defendant said to Smith, "I have told you to keep out of my place of business, and I wish you would get out." Smith replied, "I am not going anywhere, you damn son of a bitch," and then threw his right hand to his right hip, putting his left foot a little forward. This position placed Smith partly facing and partly sidewise to the defendant. When defendant saw Smith throw his right hand to his hip pocket, he fired the fatal shot, believing, as he says, that his own life was in danger. When defendant fired, Smith was near enough to him to reach out his left hand and catch hold of the pistol in defendant's hand. A struggle then ensued for the possession of the pistol, and while the struggle was going on, the second shot was fired, which went in the floor behind the counter, defendant remaining all the time behind the same. When Smith entered the store he had his hands in his pants pockets, so nearly all the witnesses say, but he had his right hand out of his breeches pocket just before the shooting took place, according to those who were looking at him at the time. This was the defendant's contention, as stated in its brief. The prisoner introduced testimony to show that he acted strictly in self-defense and for the protection of himself against a threatened assault by Smith, which would have endangered his life. Smith had two pistols, one in his right overcoat pocket and the other in his left hip pocket. As he was being taken from the store after the shooting, he fired at the prisoner with one of these pistols, but did not hit him. The prisoner contended, and offered proof to show, that just before he fired the fatal shot, Smith had placed himself in a hostile and menacing attitude, which at once inspired him with the fear or apprehension that deceased was about to attack him with one of the pistols, and for this reason he shot deceased, knowing his violent character and that he had threatened to kill the prisoner. There was evidence bearing more or less upon the question, whether the prisoner fired in self-defense

or because of his animosity toward Smith, or whether he entered into the altercation willingly.

The State contended that the pistol was fired by the prisoner without any legal provocation, though the solicitor announced that he would not prosecute him for murder in the first degree, and that the prisoner
(119) was, at least, guilty of manslaughter, as he entered into the fight willingly. This brings us to an instruction of the court which we think was erroneous and entitles the prisoner to a new trial. It is this: "If you should find from the evidence that the defendant Pollard saw the deceased Smith when he came in the store, and saw that his face was red and that he appeared to be mad, and that he, defendant, then walked from the position he occupied to the cigar case to wait upon a customer, and that the deceased saw the defendant there and approached him and came in about 6 or 7 feet from him, and the defendant told deceased to get out, and the deceased replid, 'I am not going anywhere, you damn son of a bitch,' and turned and carried his right hand to his hip pocket, and the defendant believed the deceased was about to draw his pistol for the purpose of assaulting the defendant with it, and that the defendant was willing to enter into a fight with the deceased with deadly weapons, and immediately drew his pistol and shot and killed the deceased, defendant would be guilty of manslaughter; and this would be so if the manner and appearance of deceased were such as to cause defendant to believe that Smith was armed with deadly weapons, and that he was about to harm him with them."

It will be seen, at a glance, that the learned presiding judge has blended the doctrine of self-defense and that of manslaughter in one instruction, without proper discrimination between the two, and he used an expression which was manifestly calculated, though of course not intended, to mislead the jury as to the true nature of manslaughter, and to produce confusion in their minds. Every man who is induced to act in his self-defense by reason of a threatened and deadly attack upon himself, in a sense, and a very genuine sense, is willing to enter into the fight, for every man may fairly be supposed to be willing to defend his life and limb against one who threatens either by a demonstration of force. What his Honor intended to say, we assume, was this, that if the prisoner justifiably fought upon a principle of self-defense, they should acquit, for he had said this before in his charge; but if he did not, and entered into the fight willingly, but with legal provocation, he would be guilty of manslaughter. This he did not say.

The very same kind of instruction now under consideration was given by the Court in *S. v. Baldwin,* 155 N. C., 494, and met then with our condemnation. In that case *Justice Hoke* said with reference to it:

"The judge charged: 'If you should find that he fought willingly at any time up to the fatal moment, it would be your duty to convict the defendant of manslaughter, there being no evidence that he retreated or otherwise showed that he abandoned the fight; but if you should find that he entered into the combat unwillingly, then you should proceed to consider his plea of self-defense.' In *S. v. Garland,* 138 N. C., 675, the Court said: 'It is the law of this State that where a man provokes (120) a fight by unlawfully assaulting another, and in the progress of the fight kills his adversary, he will be guilty of manslaughter at least, though at the precise time of the homicide it was necessary for the original assailant to kill in order to save his own life.' Citing Foster's Criminal Law, p. 276. But authority does not justify the position as contained in the excerpt from his Honor's charge, 'That if he fought willingly at any time up to the fatal moment, it would be your duty to convict of manslaughter.' This would be to inculpate a man who fought willingly, but rightfully, and in his necessary self-defense. True, the concluding portion of the statement would seem to qualify the position to some extent, but not sufficiently so to correct it, and in a case of this importance, and as the matter goes back for another hearing, we have considered it best to advert to the error." If he had fought willingly, and with legal provocation, which was not sufficient, though, to acquit or to reduce his assault to self-defense, he would still be guilty of manslaughter. If the homicide is not murder in the first or second degree, and yet is not excusable in law, as having been done in the slayer's self-defense, it follows that it must be manslaughter. The judge may have had in mind the doctrine as stated in *S. v. Quick,* 150 N. C., 820, where it is said: "There is evidence tending to prove that the quarrel was a 'drunken brawl,' started suddenly by an altercation over some gin; that the deceased whipped out his pistol and shot at defendant about the same time, if not a little sooner, than defendant shot at him; that the parties fought willingly, suddenly, and upon equal terms. This brings the case within those precedents which hold that if two men fight upon a sudden quarrel, and one kills the other, the chances being equal, this constitutes manslaughter. *S. v. Massage,* 65 N. C., 480; *S. v. Hildreth,* 31 N. C., 429; *S. v. Brittain,* 89 N. C., 481; *S. v. Ellick,* 60 N. C., 450. Killing, the result of passion produced by fight, is manslaughter. *S. v. Miller,* 112 N. C., 878; *S. v. Crane,* 95 N. C., 619. It is further held that if a person upon whom an assault is made with violence resent it immediately by killing the aggressor, and act therein in heat of blood and not exclusively in his own defense, it is manslaughter. *S. v. Tackett,* 8 N. C., 210; *S. v. Roberts,* 8 N. C., 349; *S. v. Smith,* 77 N. C., 488; *S. v. Barnwell,* 80 N. C., 466." But that does not justify the charge given in this

case. In order to be guilty at all, he must have fought willingly, but wrongfully. If he fought willingly, but rightfully, that is, exclusively in his own defense, no excessive force being employed, he should be acquitted. But he is entitled to have the jury judge his conduct by circumstances as they reasonably appeared to him at the time of the homicide. It is the reasonable apprehension of danger by him, to be found by the jury, that excuses his act, and he may act upon appearances.

(121) We recently stated the principle in *S. v. Blackwell,* 162 N. C., 672, citing *S. v. Barrett,* 132 N. C., 1005, as follows: "The reasonableness of his apprehension must always be for the jury, and not the defendant, to pass upon; but the jury must form their conclusion from the facts and circumstances as they appeared to the defendant at the time he committed the alleged criminal act. If his adversary does anything which is calculated to excite in the prisoner's mind, while in the exercise of ordinary firmness, a reasonable apprehension that he is about to assail the prisoner and take his life, or to inflict great bodily harm, it would seem that the law should permit the latter to act in obedience to the natural impulse of self-preservation and to defend himself against what he supposes to be a threatened attack, even though it may turn out afterwards that he was misled; provided, always, as we have said, the jury find that his apprehension was a reasonable one and that he acted with ordinary firmness. The prisoner must not only have thought that he was in danger of his life or of receiving great bodily harm, but his apprehension must be based on reasonable grounds, to be determined by the jury in the manner we have stated, and not by the prisoner." Also citing *S. v. Cox,* 153 N. C., 638; *S. v. Kimbrell,* 151 N. C., 702; *S. v. Dixon,* 75 N. C., 275, and *S. v. Nash,* 88 N. C., 618. It was also well stated by *Justice Allen* very recently in *S. v. Johnson,* 166 N. C., 392, thus: "These authorities and many others to the same effect could be cited establishing the following propositions: (1) That one may kill in self-defense to prevent death or great bodily harm. (2) That he may kill when not necessary if he believes it to be so and has a reasonable ground for the belief. (3) That the reasonableness of the belief must be judged by the facts and circumstances as they appear to the party charged at the time of the killing," and in *S. v. Gray,* 162 N. C., 608, by the same justice: "One may kill when necessary in self-defense of himself, his family, or his home, and he has the same right when not actually necessary if he believes it to be so, and has a reasonable ground for the belief." See *S. v. Vann,* 162 N. C., 534; *S. v. Robertson,* 166 N. C., 356; *S. v. Ray, ibid.,* 420. This benignant principle of the law was denied to the prisoner by the instruction of the court which we have quoted, because, however willingly a man may fight, if he is in the right and

keeps within the legitimate bounds of self-defense, the law will protect him. It is only when, under the guise of self-defense, he is acting from some ulterior motive of vengeance or malice, and not strictly in defense of his person, that he will be condemned. The very question was presented in *S. v. Garland,* 138 N. C., 675, where *Justice Hoke* said: "Where a man provokes a fight by *unlawfully* assaulting another and in the progress of the fight kills his adversary, he will be guilty of manslaughter at least, though at the precise time of the homicide it was necessary for the original assailant to kill in order to save his own life. This is ordinarily true where a man *unlawfully* and (122) willingly enters into a mutual combat with another and kills his adversary. In either case, in order to excuse the killing on the plea of self-defense, it is necessary for the accused to show that he 'quitted the combat before the mortal wound was given, and retreated or fled as far as he could with safety, and then, urged by mere necessity, killed his adversary for the preservation of his own life.' Foster's Crown Law, p. 276." It will be observed that the learned judge there states that the prisoner must unlawfully and willfully enter a mutual combat with his adversary, and this explains what is said in *S. v. Exum,* 138 N. C., 600, citing *S. v. Kennedy,* 91 N. C., 572, and *S. v. Brittain,* 89 N. C., 481. But in this case there was ample evidence tending to show that the prisoner did not commit any unlawful act, although he may willingly have stood his ground and defended himself against what he had reason to believe was a murderous assault upon him.

The jury may have found from the evidence that the prisoner had been informed of the deadly threat made against him by the deceased; that he had also heard of his violent temper and dangerous tendencies; and if some of the evidence be true—and the jury must pass upon its credibility—that, by his threatening attitude toward the prisoner when he approached him in the store, he had determined to execute his threats, then and there, and that such was the impression reasonably made upon the prisoner by his conduct. If such were the case, as has been formerly and justly said by this Court, the prisoner could not be expected to confront a lion with the same composure as he would a lamb, a pronounced enemy and belligerent as he would a friend or a man of peaceful intentions. He must not only be willing to defend himself against attack, but he must also be in the wrong to deprive him of the favorable consideration of the law.

If the instruction of the court be correct, it would be difficult if not impossible to make out a case of self-defense, because every man who is in the right, when defending his person against a threatened and deadly assault, would be convicted of manslaughter if the jury should find that

he acted willingly in protecting himself against the attack. We would then have the converse of the dictum of Foster and Hale, for instead of every homicide being turned into self-defense, every case of genuine self-defense would be turned into murder or manslaughter. It is possible for an assailant to be in the right, if he has not himself created the necessity for the assault or brought the trouble upon himself by some unlawful act. In this instance the jury may have found that the situation demanded prompt action by the prisoner in order to save himself from a menaced attack of a man, known by him to be his enemy and who (123) had actually declared vengeance against him, who was doubly armed for any eventuality, and who had said, almost at the fatal moment, that he would "take no chances" that evening. All these questions were for the jury upon the evidence. They may have rejected this testimony and have found, on the contrary, that the prisoner did not assault the deceased, honestly and with good faith, in his self-defense, but unlawfully and with a bad motive, convicting him of murder or manslaughter, as upon the evidence they might find the facts to be; but the prisoner was entitled to a legally proper consideration of the testimony for and against him, and was handicapped by an erroneous view of the law by which his willingness to defend himself was made the test of his criminality.

In a very true sense every man acts willingly when defending himself, that is, he exercises his volition naturally and irresistibly in favor of his own life, although, in another sense, he may be compelled to act in order to save his life, or to prevent grievous bodily harm to himself. He may be said not to act by choice, and still, being fiercely assaulted, he may be willing, by natural impulse, to resist it, even to the taking of his assailant's life. It is otherwise if he engages in a fight willingly, and not merely in self-defense, for this is also unlawful, being an affray. He begins in the wrong and ends, therefore, in the toils of the law. Being then in fault, the principle as stated by Foster and Hale applies: "He, therefore, who in case of a mutual conflict would excuse himself on the plea of self-defense must show that before the mortal stroke was given he had declined any further combat and retreated as far as he could with safety, and also that he killed his adversary through mere necessity and to avoid immediate death. If he faileth in either of these circumstances he will incur the penalty of manslaughter." Foster's Crown Law, pp. 276, 277; *S. v. Garland, supra. Justice Ashe,* quoting from Hale, stated the rule strongly and clearly in *S. v. Brittain, supra,* as follows: "If A. assaults B. first, and upon that assault B. reassaults A., and that so fiercely that A. cannot retreat to the wall or other *non ultra,* without danger of his life, and then kills B., this shall not be interpreted to be

se defendendo, but to be murder or simple homicide, according to the circumstances of the case; for otherwise we should have all the cases of murder or manslaughter, by way of interpretation, turned into *se defendendo.* The party assaulted indeed shall, by the favorable interpretation of the law, have the advantage of this necessity to be interpreted as a flight, to give him the advantage of *se defendendo,* when the necessity put upon him by the assailant makes his flight impossible; but he that first assaulted hath done the first wrong, and brought upon himself this necessity, and shall not have advantage of his own wrong to gain the favorable interpretation of the law, that the necessity which he brought on himself should, by the way of interpretation, be ac- (124) counted a flight to save himself from the guilt of murder, or manslaughter." But these are cases where the prisoner was, at first, in the wrong, or by his own conduct provoked the difficulty. His act was wrongful and unlawful in the beginning and committed willingly, and he will be adjudged guilty of murder or manslaughter, according as the jury may find the facts to be, unless he has, in good faith, abandoned the conflict and retreated to the wall, in which case his plea of self-defense may be restored to him. It was said in *S. v. Baldwin,* 152 N. C., 822: "Our decisions are also to the effect that though there may have been previous ill feeling between the parties, yet if they afterwards meet accidentally and a fight ensues, in which one of them is killed, it shall not be intended that they were moved by the old grudge, 'unless it so appear from the circumstances of the affair.' This was directly held in the case of *S. v. Hill,* 20 N. C., 628, where there had previously been a fight between the parties, the ruling being expressed as follows: 'Where two persons have formerly fought on malice and are apparently reconciled, and fight again on a fresh quarrel, it shall not be intended,' etc. The principle was affirmed and again applied in *S. v. Johnson,* 47 N. C., 247, and in the opinion this case is put by way of illustration: 'But where A. bears malice against B., and they meet by accident, and upon a quarrel B. assaults A. with a grubbing-hoe, and thereupon A. shoots B. with a pistol, the rule of referring the motive to the previous malice will not apply.' And this is in accord with the doctrine generally prevailing." But it is added that this does not conflict with the rule, as stated in many cases, notably in *S. v. Miller,* 112 N. C., 878, by *Justice Avery,* who there said: "It is true that when the killing with a deadly weapon is proved and admitted, the burden is shifted upon the prisoner, and he must satisfy the jury, if he can do so from the whole of the testimony, as well as that offered for the State as for the defendant, that matter relied on to show mitigation or excuse is true. *S. v. Vann,* 82 N. C., 631; *S. v. Willis,* 63 N. C., 26; *S. v. Brittain,* 89 N. C., 481. But when it

appears to the judge that in no aspect of the testimony, and under no inference that can be fairly drawn from it, is the prisoner guilty of murder, it is his duty, certainly when requested to do so, to instruct the jury that they must not return a verdict of any higher offense than manslaughter, just as it would be his duty to instruct, in a proper case, that no sufficient evidence had been offered to either excuse or mitigate the slaying with a deadly weapon. Though the law may raise a presumption from a given state of facts, nothing more appearing, it is nevertheless the province of the court, when all the facts are developed and known, to tell the jury whether, in every aspect of the testimony, the presumption is rebutted. *S. v. Roten,* 86 N. C., 701; *Doggett v. R. R.,* 81 N. C., 459; *Ballinger v. Cureton,* 104 N. C., 474."

(125) In the further development of this case it may be that the principles above stated may have close application to the facts as disclosed by the testimony. They are now mentioned as showing that the law is more lenient than would be indicated by the instruction of the court to which exception was taken.

It is just as unlawful to kill a man who gambles or illegally sells liquor as it is one who is innocent of these offenses, and even if the prisoner harbored malice towards the deceased because of his real or imagined persecutions as a public officer, he yet had the right to defend himself against a dangerous assault by him. This Court said in *S. v. Ta-cha-na-tah,* 64 N. C., 614: "The question whether, where an antecedent grudge exists, and the parties between whom it exists meet and an affray ensues, and one is killed, the killing shall necessarily, or by a presumption of law, be referred to the antecedent grudge, so as to make the killing murder, or whether the existence of malice in giving the mortal blow shall be matter of inference for the court or jury, from all the circumstances of which the antecedent grudge is one, was considered with great care and ability in *Jacob Johnson's case,* 47 N. C., 247, and we think the rule there announced cannot be shaken. The latter view was there asserted. We think the instructions of his Honor differ widely from that view, and they seem to be founded on what is said in that case to be a mistaken view of *S. v. Johnson,* 23 N. C., 354. His Honor refused the instruction asked for, that if the appellant fought only in self-defense and to save his own life, the homicide was not malicious, although a previous ill will were shown, and told the jury that if there was malice (by which we understand malice implied in law from the antecedent quarrel), the appellant was guilty of murder. In this we think there was error. It is true, the jury convicted the appellant only of manslaughter, but the instructions were erroneous, and we cannot see that they did not operate prejudicially to the appellant." This was

approved in *S. v. Brittain, supra,* with the comment that "this Court held the instructions to be erroneous because they could not see that they did not operate prejudicially to the appellant." The question at last is, Did the prisoner kill in defense of himself, because he reasonably believed that he was about to suffer death or great bodily harm? If he did, an acquittal should follow, although he did so willingly, for in such a case he has committed no unlawful act. If the prisoner fired his pistol and killed deceased with malice and not in self-defense, he is guilty of murder in the second degree unless he did it deliberately and with premeditation, when it would be murder in the first degree, for which the State does not contend; if he did so without malice and upon insufficient legal provocation and in the sudden heat of blood, it is manslaughter; and the same result would follow in law, if he used excessive force; but if he killed either because it was necessary to do so or because he (126) had good ground to believe it necessary in his defense, acting upon the circumstances as they reasonably appeared to him at the time, and with ordinary firmness, he is not guilty, and the jury should be instructed so to find. He was not bound to wait for his adversary to execute his threat or to put himself in condition to do so, provided he had reason to believe that his intention was to slay him with his pistol, or to do him great bodily harm. The jury must pass upon the reasonableness of his belief, giving him the benefit of the rule we have already stated, that they must judge his case by the circumstances as they appeared to him when he fired his pistol and inflicted the mortal wound, and not by the real situation as it may be found to have been. *S. v. Nash, supra; S. v. Barrett, supra,* and the other cases cited on this point.

The evidence in the case is voluminous. Some of it is incompetent, but as it may not be offered again, we need not consider it. There is other evidence which is competent, when confined to its proper limits, but so calculated to prejudice the prisoner by an improper use of it by the jury that they should be carefully instructed as to its legitimate bearing on the case and strictly cautioned not to be influenced by it, except in so far as it is relevant to the issue. The prisoner is entitled to this treatment of the evidence to prevent any wrong and prejudicial consideration of it.

The judgment will be set aside and a new trial awarded, because of the error indicated in this opinion.

New trial.

CLARK, C. J., dissenting: The deceased was chief of police of Farmville, and was shot and killed by the prisoner on the night of 17 January, 1914, in the store of the prisoner. The testimony of the witnesses for

the State is that a few minutes before he was shot the deceased entered the prisoner's store and walked down towards the middle. The prisoner kept his eyes on him and, when he was within 5 or 6 feet, ordered the deceased to get out, and shot him. Several witnesses testified that the prisoner ordered the deceased to get out and shot at the same time. Others said it was almost immediately after. There was evidence that the two men had had a quarrel in a barber shop, and that several times during the week the prisoner had made statements which amounted to threats against deceased. There was also evidence tending to show motive, that the prisoner kept a blind tiger and a gambling room, and the prisoner had said that if the deceased came there "searching or rambling over his business" he would ask him out, intimating violence if he did not go. There was also evidence that the prisoner during the same week and just before the homicide had bought a pistol.

(127) The deceased, under the solemnity of approaching death, made dying declarations in which he stated that the prisoner ordered him out and shot him instantly, without giving him any opportunity to defend himself or giving him any chance. Immediately after the shooting the two men grappled, and there is evidence that the only pistol in sight was the one the prisoner had used. As the deceased was being taken out of the store, after being shot, he pulled out one of his pistols, which he was entitled to carry as chief of police, and attempted to shoot the prisoner.

Taking the evidence of the prisoner himself (who testified under the most powerful inducement of saving his own life), he told the deceased to get out, and the deceased replying with an insulting expression, carried his hand to his pocket, and thereupon the prisoner shot him.

It is needless to go into the long drawn out evidence and the 129 exceptions that are made. The above is the kernel of the whole case. From the record it appears that the prisoner was defended by eleven able counsel, among them several of State-wide reputation. The trial was presided over by one of the ablest and most impartial judges in this State; the prisoner had the benefit of twelve peremptory challenges against only four allowed to the State, and was convicted by twelve jurors, each of whom answered that he was satisfied beyond a reasonable doubt of the prisoner's guilt. With these overwhelming advantages in favor of the prisoner, the jury found him guilty of manslaughter. It should require more than a mere technical error to cause us to grant a new trial. The sentence of the court to five years in the State's Prison is not a severe one in view of the evidence.

The point principally relied upon by the defense is the charge of the court that if "the defendant believed the deceased was about to draw his

pistol for the purpose of assaulting the defendant with it, and the defendant was willing to enter into a fight with the deceased with a deadly weapon, and immediately drew his pistol and shot and killed the deceased, the defendant would be guilty of manslaughter." It is insisted that the judge should have said, "If the prisoner entered into the fight *unlawfully* and willingly." But this element appears when the jury was required to find that the prisoner was willing to enter into a fight, *with a deadly weapon,* and *immediately* drew his pistol. This amply supplies the word "unlawfully," for it is not controverted that the prisoner shot before the deceased had drawn any weapon.

If the dying declarations of the deceased and the testimony of the State's witnesses are to be believed, the prisoner ordered the deceased out of his store and immediately shot him, without any provocation; and there is evidence which, if believed, tends to show that this was done for fear that the officer would expose him as a lawbreaker. If the prisoner's own evidence is to be believed, rejecting that for the State, the prisoner ordered the deceased out of his store, and upon (128) the deceased replying with an insult and moving his hand towards his pocket the prisoner shot at him. If the jury had believed the first state of facts, the prisoner should have been convicted of murder. If they believed the last, they would have acquitted him. There remained the third theory, that the prisoner ordered the deceased out of his store, as he said, and upon receiving an insulting reply, reached for his pistol, for it was not contradicted that he alone had his pistol out when he fired, and the judge properly told the jury in this connection that if the prisoner fought willingly with a deadly weapon he was guilty of manslaughter. By fighting "willingly" the judge evidently meant if he used his pistol without necessity, for he charged correctly upon the phase of self-defense. If, when the prisoner ordered the deceased out and the deceased replied (if he did) with an insulting expression, the prisoner had struck with his fist, the resulting fight would have been an affray. So if instead of his fist the prisoner used a pistol, and the deceased had done the same, the death of either would have been manslaughter. Certainly it is none the less so when the prisoner alone used this weapon.

In *S. v. Exum,* 138 N. C., 600, *Hoke, J.,* speaking for a unanimous Court approved the following charge: " 'If you should find from the evidence that the prisoner willingly engaged in a fight with the deceased, and that the deceased threw his hand to his hip pocket and advanced upon the prisoner in a threatening manner, and that the prisoner, being willing to fight, seized a pistol and shot the deceased, and that the deceased died from the wound (then inflicted by the prisoner), the prisoner would be guilty of manslaughter, provided that you should find

from the evidence that the appearance and manner of the deceased were such as to cause the prisoner to believe that the deceased was armed with a deadly weapon, and that the prisoner did believe he was armed with a deadly weapon and was about to harm him with it,'" this Court adding: "This charge is supported by abundant authority. *S. v. Kennedy,* 91 N. C., 572; *S. v. Brittain,* 89 N. C., 481." This case has been cited frequently since as authority. See citations in the Anno. Ed. It will be seen at once that if this charge was warranted in the *Exum case, supra,* and was supported by "abundant authority," as the Court said, and as has been repeatedly approved since, certainly the case is very much stronger against the prisoner here on the evidence of this case, even taking his own statement, and there was no error in the charge of Judge Daniels.

The advantages in favor of a prisoner on trial for homicide are so overwhelming that a new trial should not be granted in such cases (nor indeed in any case, civil or criminal) unless it can be plainly seen that if there was error it was such error as reasonably caused the result.
(129) This trial has been long drawn out and the prisoner's interests were amply guarded at every point. He has no cause to complain of the verdict or of the punishment.

Under the common-law procedure, before it was amended by statute, the prisoner would not have been allowed the benefit of counsel, nor of summoning witnesses, nor of cross-examining the State's witnesses. The humanity of the judges in such cases properly allowed the prisoner the benefit of every possible error or technicality. But since the law itself has humanely removed these grievances and put the prisoner not only on a level with the State in these respects, but still gives him enormous advantages—not only requiring a unanimous verdict in which each and every juror must find him guilty beyond a reasonable doubt, but of a great disparity in the number of challenges to the jury, and that errors committed against the State cannot be reviewed on appeal—errors which cannot be seen to have reasonably influenced the result ought no longer be taken as ground for a new trial. Indeed, the better thought of the age is that unless the verdict is clearly contrary to justice no verdict in any case should be reversed on appeal.

I feel that it is useless to discuss the case more fully. A perusal of the entire testimony would probably satisfy any disinterested person that whatever errors had been assigned or discussed, justice would not suffer, and the public interests for the preservation of human life would be served by the refusal to grant a new trial in this case.

The object of a trial of one who has committed homicide is not vengeance, but the protection of the lives of others by the punishment of those

who do murder. That this end is not attained can be seen from the very large number of homicides annually committed in this State, as reported by the Attorney-General under the statute, and the very rare cases of conviction. There must be a defect in the administration of justice when this is the case.

On a thorough perusal of the entire evidence, I think the ends of justice require that a new trial should not be granted. In a long trial of this kind, with numerous able counsel, if the result on appeal is to depend upon the judge running the gauntlet of every conceivable exception, as in this case, it is the judge and not the prisoner who is on trial. It is almost impossible under such circumstances that some technical flaw may not be found. It must be remembered that if the judge commits an error in favor of the prisoner it cannot be reviewed.

Cited: S. v. Kennedy, 169 N. C., 331; *S. v. Crisp,* 170 N. C., 793; *S. v. Wentz,* 176 N. C., 749; *S. v. Johnson,* 184 N. C., 644; *S. v. Bush,* 184 N. C., 780; *S. v. Baldwin,* 184 N. C., 792; *S. v. Robinson,* 188 N. C., 786; *S. v. Bost,* 189 N. C., 643; *S. v. Bost,* 192 N. C., 3; *S. v. Hardee,* 192 N. C., 536; *S. v. Waldroop,* 193 N. C., 15; *S. v. Evans,* 194 N. C., 123; *S. v. Dills,* 196 N. C., 460; *S. v. Gregory,* 203 N. C., 531; *S. v. Bryson,* 203 N. C., 730.

(130)

STATE v. JOHN ROSS.

(Filed 5 November, 1914.)

Cocaine—Possession, Actual or Constructive—Prima Facie—Burden of proof—Reasonable Doubt.

The possession of cocaine, etc., with certain exceptions, is made a misdemeanor and punishable under chapter 81, sec. 2, Laws 1913, and where the evidence tends to show that cocaine was found in the house the defendant was renting and occupying, concealed in a hole over the kitchen door, over which a picture hung, such possession, not falling within the exceptions, if established, comes within the meaning and intent of the statute, and is *prima facie* evidence of its violation, with the burden of proof on the State to show the possession by the defendant of the forbidden article, beyond a reasonable doubt.

APPEAL by defendant from *Devin, J.,* at March Term, 1914, of FORSYTH.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Jones & Clement for defendant.

CLARK, C. J. The defendant was tried in the city court and convicted under Laws 1913, ch. 81, sec. 2, which makes the possession of cocaine *prima facie* evidence of a violation of the statute.

On appeal to the Superior Court, the witness R. L. Blackburn, a policeman, testified that under a search and seizure warrant he entered the house in possession of John Ross and found 225 packages of cocaine up in a little scuttle-hole over the kitchen door, and a gallon and a half of liquor. The scuttle-hole was sawed just big enough to get a gallon jug in. One jug was in the scuttle. There was a picture just big enough to cover the hole, hanging over it. The defendant offered no evidence, but moved for a judgment of nonsuit.

The court entered a *nol-pros,* as to Ella Ross, whether as an act of clemency or because he thought that as a matter of law the possession was the possession of John Ross only, does not appear.

The court instructed the jury as to the nature of the facts which constituted the crime, and charged that the burden of proof was upon the State to satisfy the jury beyond a reasonable doubt that the defendant had cocaine in his possession, not being a physician or a pharmacist, nor having it under a *bona fide* prescription; and that the fact that it was found in his possession was evidence that it was in his possession unlawfully if he was not a physician, pharmacist, dentist, veterinary surgeon, or druggist, nor had it under a *bona fide* prescription. The cocaine was found in the house which the defendant admitted he rented and
(131) was occupying, and that it was over the door of his kitchen and concealed from the public in such a way as indicated that this was done purposely. The court charged that the jury must be satisfied that the article was cocaine and that it was in his possession, and of the other facts above stated.

The charge was much fuller than this, but this is sufficient. In *S. v. Lee,* 164 N. C., 533, the Court held that under this statute the guilty "possession was not necessarily actual possession, but that the statutory presumption could arise from the constructive possession; that the statute includes actual and constructive possession." We are of opinion that, in this case as in that, the possession shown was sufficient to establish the fact of possession within the meaning of the statute and made out a *prima facie* case against the defendant, and, there being no evidence to rebut this presumption, justified the verdict.

Indeed, if the defendant rented and was in the occupancy of the house, and was there when the officer went there, and such a quantity of cocaine

as that testified to was found in a secret place over the kitchen door, concealed behind a picture hung over the place, this would have justified a charge that if the jury should find the facts to be as testified they could return a verdict of guilty, there being no evidence offered in rebuttal, under this section which makes possession of cocaine a crime itself and not *prima facie* evidence of another crime.

No error.

Cited: S. v. Meyers, 190 N. C., 243; *S. v. Rose,* 200 N. C., 344.

STATE v. WALTER McDRAUGHON.

(Filed 21 October, 1914.)

1. Appeal and Error—Indictment—Omission from Record—Presumptions—Duty of Appellant—Motion to Dismiss.

Where an appeal is taken from the refusal of the trial court of the defendant's motion to quash an indictment, an inspection of the indictment is necessary for the Supreme Court to pass upon the question presented; and where it has not been sent up, the presumption being in favor of the correctness of the judgment appealed from, the burden is on the appellant to show error, and ordinarily the appeal will be dismissed upon motion of the appellee in the Supreme Court.

2. Appeal and Error—Indictment—Omission from Record—Power of Courts—Motion to Supply—Certiorari—Procedure.

Where an appeal is taken to the refusal of the trial court to quash an indictment, it is the duty of the appellant to see that a transcript of the indictment appears in the record; and when it does not so appear he should apply to the Superior Court to supply it, if one convenes in time; and if not, he should send to the Supreme Court as much of the record as could be procured, and apply here for a *certiorari* to give him opportunity to move in the court below.

3. Appeal and Error—Power of Courts—Indictment—Omissions.

The Superior Court has power to supply, by copy, an indictment necessary to be set out in the record in a criminal case on appeal to the Supreme Court which has been lost accidentally or otherwise, upon motion of appellant, based upon affidavits.

APPEAL by defendant from *Whedbee, J.,* at February Term, (132) 1914, of SAMPSON.

This is a motion to dismiss the appeal because of the insufficiency of the transcript.

The defendant was tried in the Superior Court upon an indictment duly found, and upon conviction was sentenced to serve eight months upon the county roads. Since the trial the bill of indictment has been lost, without fault, so far as the record discloses, upon the part of the defendant, and therefore is not a part of the transcript. The defendant has not made any effort to have the indictment supplied in the Superior Court, nor has he moved here for a *certiorari*.

There was a motion to quash the indictment, which was overruled, and there are certain exceptions to the charge of the court appearing in the case on appeal.

Attorney-General Bickett for the State.
J. D. Kerr, Sr., for defendant.

ALLEN, J. An inspection of the indictment is necessary in the consideration of the motion to quash, and also in order that we may pass upon the pertinency of the exceptions to the charge, and the question is therefore presented, upon the motion to dismiss, as to whose duty it is to supply the defect in the transcript.

In cases of this character the jurisdiction of this Court is not original, but appellate, and we are confined to the alleged errors in the case on appeal or those appearing on the face of the transcript of the record.

The presumption is that the judgment of the Superior Court is correct, and the burden is on the appellant to show errors. As far back as *S. v. Butts,* 91 N. C., 524, the requisites of the transcript were pointed out, and in *S. v. Frizell,* 111 N. C., 722, the Court said: "An appellant does not do his duty by simply taking an appeal and leaving it to the clerk to send up what he may deem necessary. It is the appellant's duty to see that the record is properly and sufficiently made up and transmitted. Hereafter the Court will dismiss the appeal or affirm the judgment, as the case may be, when the record is defective in any mate-
(133) rial particular, in all cases in which the Attorney-General, or the opposite party (in civil cases), sees proper to make such motion, unless sufficient excuse for the apparent laches is shown." And again, in *S. v. May,* 118 N. C., 1205: "The transcript fails to show that the court was held by a judge at the time and place required by law; that a grand jury was drawn, sworn, and charged, and presented the indictment; and there are other defects. It is the duty of the appellant to have the record sent up, and when it is in such condition as above stated, usually the Court will dismiss the appeal, unless it is shown that the appellant is guilty of no laches; otherwise, the appellant could always obtain six months delay by simply failing to have a sufficient record sent up."

It therefore appears to be well settled that it was the duty of the defendant to see that the indictment was a part of the transcript, and if lost, he ought to have applied to the Superior Court to supply it, or if no court convened in the county of Sampson prior to the time of docketing the transcript here, he ought to have sent to this Court as much of the record as could be procured, and then applied to this Court for a *certiorari,* in order to give him an opportunity to move in the Superior Court. He has done neither, and has offered no excuse for his laches.

The power of the Court to supply an indictment which has been lost accidentally or otherwise upon motion based upon affidavits is simply the power to make the record speak the truth, which is inherent in courts of common-law jurisdiction. The refusal to exercise this power would encourage negligence in the custodian of papers and criminality in those interested in abstracting the indictment from the files.

If a judgment in a civil action is lost before being recorded, it may be supplied in this way, and there is no special sanctity about an indictment which exempts it from the rule prevailing as to other parts of a record. In *Mount v. State,* 14 Ohio, 295, the Court says:

"It was not indispensable to the sentence that the original indictment should be before the Court. If lost or destroyed by accident, or by the fraud or design of the plaintiff in error, or stolen by him or another, and the prosecution were not in fault, its place might have been supplied by a copy like any other record or pleading," and this was cited with approval in *S. v. Rivers,* 58 Iowa, 102; *S. v. Strayer,* 5 W. Va., 676; *Bradford v. State,* 54 Ala., 230, holding that the Court may order the substitution of an indictment which has been lost. In *S. v. Gardner,* 81 Tenn., 137, the Court says: "The plain principle of the common law and of sound reason should apply to a criminal case as well as in civil cases, that is, when the papers are lost they shall be carefully and accurately supplied, by satisfactory evidence of their loss and their contents."

And to the same effect, Clark's Crim. Procedure, sec. 430, and (134) the same doctrine was applied to information in *Klein v. State,* 157 Ind., 152; *Long v. People,* 135 Ill., 436, and was recognized in *People v. Dennis,* 69 Am. Dec., 341; *S. v. Simpson,* 67 Mo., 647.

The motion to dismiss is therefore allowed, and

Appeal dismissed.

Cited: Schwarberg v. Howard, 197 N. C., 126; *Pruitt v. Wood,* 199 N. C., 792; *S. v. Simmerson,* 202 N. C., 584; *S. v. Golden,* 203 N. C., 441; *S. v. Currie,* 206 N. C., 599; *S. v. Gosnell,* 208 N. C., 404.

STATE v. LOUIS POWELL AND JUNIUS PRIDGEN.

(Filed 5 November, 1914.)

1. **Homicide—Principal—Abettor—Evidence—Trials—Questions for Jury.**

Where two defendants are on trial for the same homicide, and the deed was committed by one of them in the presence of the other, either actual or constructive, who has encouraged and abetted the killing, the latter is guilty of the same degree of crime as the one whose act directly caused the homicide; and where the evidence tends to show that A. and B. had ill will toward C.; that A. assaulted C., urged on by B., who had an open knife in his hand; whereupon C. in turn assaulted A., then left the room where the flight occurred, followed by B., with his drawn knife, and that A. attempted to follow, but was detained by a third person; that a very few minutes thereafter C. was found dead in an adjoining room from a knife cut near the region of the heart, in the presence of B., and the evidence being sufficient to sustain a verdict of the guilt of B. of murder in the second degree, *it is held* that it is also sufficient to sustain a verdict of guilty in the same degree against A. The principle of law relating to principals of the first and second degree in crime, and of accessories, discussed by WALKER, J.

2. **Homicide—Trials—Evidence—Continuous Transactions.**

Upon the trial for a homicide, *it is held* that the testimony of a witness relating the various occurrences between the prisoners and the deceased is competent as *pars rei gestæ*, they being one continuous transaction, each event being inseparable from the other.

APPEAL by defendant from *Cooke, J.*, and a jury, at June Term, 1914, of PENDER.

The defendant and Louis Powell were jointly indicted for the murder of Charles Brown, and were convicted of murder in the second degree. Charles Brown was killed at the house of Oliver Williams, who is the husband of Mary E. Williams. She testified for the State as follows: "On the night of 28 February, 1914, there was a quarrel in my house between the prisoners and the deceased. Pridgen and Powell were (135) in the kitchen and the deceased was in the adjoining room; Powell had a knife open in his hand; Pridgen threw a soup dish and an empty bottle at the deceased, and the latter ran into the kitchen with a chair and struck Pridgen on the head; Powell left the kitchen and the deceased followed him, and shortly thereafter, within five minutes, the deceased was lying on the floor in the house dead from a cut in the left side."

Dave Pridgen, a witness for the State, testified that he was at the house, and that Pridgen went into the kitchen; Powell followed him with a knife in his hand and said to Pridgen that he would not take it,

and "Damned if I would take it, and you don't have to." This witness further testified as to what then took place, as follows: "At that time I looked around and saw Charley in the other room, coming toward the kitchen, and Junius Pridgen threw an empty bottle at Charley, but missed him, and the bottle broke to pieces against the side of the house. Charley said something and picked up a chair and came into the kitchen and hit Junius and ran out. Louis got out first and Charley was right behind him." Question by the court: "Did I understand you to say they were running? Which was running in front and which was running after?" "Louis was ahead and Charley was right behind him. Louis had his knife in his hand. When defendant started out, I grabbed his coat-tail and he did not go out. I stayed in the kitchen a minute or two to see about Junius' head, and then went out to see where Charley and Louis were, and when I went into the south room I stumped my feet against Charley on the floor, but stepped across his body. When I called Charley, Louis spoke, saying, 'There is nothing ails him, but he is drunk,' and I reached down to lift him up and found his clothes bloody. And I said, 'Somebody bring me a light,' and Mary came with a light, and I said, 'Somebody has killed him.' I said, 'Louis, you have killed Charley,' and Louis Powell didn't say anything. I told everybody to stay in the house and sent Louis Pridgen after Mr. George Huggins, to tell him what the trouble was. I do not know anything about any fight or fuss except that part of the affair when Charley started towards Junius Pridgen, after Junius said, 'Don't a damned man touch me.'" And he further testified: "I went out of the kitchen after Charley and Louis because I had heard Louis say he would fix him, and I did not know what he would do, but did not want him to have any trouble."

Jacob Harrell, a witness for the State, testified that he held a coroner's inquest, and that the wound was as near the heart as it could possibly be.

George Huggins testified that he picked up a knife with a white handle under the fence, where the fence had fallen down, and it looked like it had been thrown under the fence. This was found on the Sunday following, in the afternoon.

Mary Williams further testified as follows: "A black-handled (136) knife was found by the dead body of Charley Brown, that looked like the one he had in my room before he went out ahead of Charley."

Oliver Williams, the owner of the house, testified that on that afternoon, while the four men were at the house, he carried a gallon of whiskey there and all drank some of it.

Lizzie Foy, witness for the State, testified: "I was at the house the night Charley Brown was killed. All I saw was when Junius and Mary Ellen were in the kitchen, Louis went in the kitchen, and when he started

Mary Ellen told him to go out, and he said he was not going to see anybody hurt Junius that night. And Charley Brown said let him alone, he would fix him. And at that time Junius said, 'Look out!' and I ran in the other room, and after I got in there I heard the bottle hit the floor. I heard Mary Ellen tell someone to go and get Oliver Williams, her husband."

There was evidence that Louis Powell admitted having had the knife with the black handle that night, and also evidence that, when it was first picked up, "the blade was bloody to the very jaws and it was wide open."

At the conclusion of the evidence the defendant Junius Pridgen moved for a judgment of nonsuit. This motion was denied, and he excepted. At his request, made in due time, the judge agreed to reduce his charge to writing, and did so, except as hereinafter indicated.

The record discloses that the court reduced its charge to writing and read it to the jury, and at its conclusion they were directed to return and make up their verdict. Counsel for the prisoner Junius Pridgen at this time requested the court orally to charge the jury that they should not consider the fact that the prisoner had not testified to his prejudice, and the court so instructed the jury, but not in writing, and the prisoner excepted. The prisoners were convicted, and Junius Pridgen appealed to this Court, upon exceptions reserved by him.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

L. C. Grant and E. T. Burton for defendant.

WALKER, J., after stating the case: The State did not ask for a conviction of murder in the first degree, and there is no sufficient evidence of self-defense, so that the question is, Was the prisoner guilty of either murder in the second degree or manslaughter? But the court gave the prisoner the full benefit of the plea of self-defense in the charge, and also instructed the jury fully and correctly upon the law of manslaughter, as applicable to the facts of the case. The jury were told that
(137) if the killing with a deadly weapon had been established, the law raised a presumption of malice, and the prisoner would be guilty of murder in the second degree, nothing else appearing, and that the burden then rested upon him to show such circumstances of mitigation or excuse to the satisfaction of the jury, and not beyond a reasonable doubt, as would reduce the homicide to manslaughter or entitle him to an acquittal, explaining with sufficient fullness, as we have stated, the law as to manslaughter and self-defense.

The jury convicted both prisoners of murder in the second degree, and we must therefore inquire whether there was evidence to support the conviction, upon the motion to nonsuit. The special facts upon this point, which it is necessary to restate, are these:

Mary Ellen Williams testified: "On the night of 28 February, 1914, there was a quarrel in my house between the prisoners and the deceased. Pridgen and Powell were in the kitchen and the deceased was in an adjoining room; Powell had a knife open in his hand; Pridgen threw a soup dish and an empty bottle at the deceased, and the latter ran into the kitchen with a chair and struck Pridgen on the head; Powell left the kitchen and the deceased followed him, and shortly thereafter, within five minutes, the deceased was lying on the floor in the house dead from a cut in the left side."

It will be seen from this short statement that the prisoners, Louis Powell, who actually killed the deceased, and Junius Pridgen, the appellant, had a quarrel with Charles Brown, and were arrayed on one side as joint combatants against him, Junius Pridgen being in the beginning the more aggressive of the two. He committed the first assault upon Brown by throwing the soup dish at him, while he was standing in the other room. He evidently had ill will and malice towards him, or there was, at least, evidence to show that he had, as they were attentive, it seems, to the same girl, and a rivalry for her affections may have caused jealousy between them, Charles Brown having said "that he wanted to talk to the lady, too." Junius Pridgen missed his mark with the soup dish, and then hurled the bottle at him, missing him again, when Charles Brown rushed upon him and struck him on the head with his chair. There was evidence that, during this mêlée, Louis Powell and Junius Pridgen were acting in concert and with a common purpose, Louis having his knife drawn ready for action if it became necessary, and immediately after Junius was hit with the chair he went out of the door, Charles Brown immediately following him, and Junius following Charles. This evidence of a concert of action between Junius Pridgen and Louis Powell and a common design to kill Charles Brown is quite strong, for Powell had his knife open in his hand, as we have said, and Junius Pridgen must have seen it and knew, no doubt, that his demeanor toward Charles Brown had been angry and threatening, (138) and that his purpose, therefore, was a deadly one. Nevertheless, when Powell went out with Brown in this menacing humor and hostile attitude towards him, the prisoner Junius Pridgen followed closely behind Brown to a place not far from where he was slain, and was prevented from being there "at the death" solely by the intervention of others. The evidence tended to show, also, that the fatal blow was struck

just after they left the room, almost instantly, Brown being hotly pursued by Junius Pridgen to the door. A foe in front and a foe in the rear, and both envenomed against him. What a predicament! The outcome was the natural sequence from the beginning, which was brought about by the fierce assault of the prisoner, who now appeals from the verdict and judgment. He started the fight and tried to end it in the death of Brown, but by a fortuitous circumstance, not at all due to his volition, his companion in the wrong dealt the fatal blow, which nearly pierced the heart of Brown and resulted, of course, in his death. This is a fair statement of the evidence, which presents the salient facts of the case in their naked form. It would seem that no special authority or extended discussion is needed to show the guilt, in law, of the appellant. But he is entitled to have us say what law it is that condemns him, and we will proceed to determine this part of the case.

Let us premise the discussion by stating what is decided in all the cases, and especially in *S. v. Whitson,* 111 N. C., 695, that as the jury found that one of the defendants, Louis Powell, slew the deceased, under circumstances which would make him guilty of murder, any other defendant who was then and there present, aiding, encouraging, and abetting the killing, would be guilty of the same degree of crime as the man who struck the fatal blow. This is not only settled by authority, but is a truism. The law upon the subject has been thus stated: The parties to a homicide are: (1) Principals in the first degree, being those whose unlawful acts or omissions cause the death of the victim, without the intervention of any responsible agent; (2) principals in the second degree, being those who are actually or constructively present at the scene of the crime, aiding and abetting therein, but not directly causing the death; (3) accessories before the fact, being those who have conspired with the actual perpetrator to commit the homicide, or some other unlawful act that would naturally result in a homicide, or who have procured, instigated, encouraged, or advised him to commit it, but who were neither actually nor constructively present when it was committed; and (4) accessories after the fact, being those who, after the commission of the homicide, knowingly aid the escape of a party thereto. In many states the distinction between principals and accessories before the fact has been abolished by statute, and those who participate are guilty as principals. But see Revisal, secs. 3287-3290. The aid-
(139) ing and abetting in a murder or manslaughter may consist of help rendered to the perpetrator by the aider or abettor in the preliminary stages of the homicide, or in its commission; or of encouragement given to him by acts, words, and gestures, as by joining in a conspiracy to commit a homicide, or by hiring, instigating, inciting, advising, or

counseling him to commit it, or by being privy to the homicide and countenancing it by being present at its commission, or by aiding and abetting him in any of the foregoing ways in some other unlawful act that would naturally result in a homicide if the homicide actually results therefrom. Mere presence without giving aid or encouragement at or before the commission of a homicide and without prior conspiracy, although with knowledge that the crime is to be committed, and even with approval of its commission, if that approval is not communicated to the perpetrator, does not constitute aiding and abetting. If defendant had advised the commission of a homicide or incited it, his advice or encouragement must have contributed to the deed. The aider and abettor must either act with criminal intent or he must share in the intent of the principal. One who aids and abets with full knowledge of the situation thereby adopts the criminal intent of his principal. But he adopts it only to the extent of his knowledge, or of the natural and reasonable consequences of the act encouraged by him. All who join in the common design to kill, whether in a sudden emergency or pursuant to a conspiracy, are liable for the acts of each of their accomplices in furtherance thereof. This liability attaches whether the acts were specifically contemplated or not, and although defendant did not know when or how the homicide was to be committed. The accomplices are so liable, although the conspirator who actually committed the homicide cannot be identified. There may be liability for a homicide committed in the execution of a common design, although the plan did not involve taking life. It is often said that all who aid and abet the doing of an unlawful act are liable for a homicide proximately resulting therefrom and a natural and probable consequence thereof, although not contemplated by the parties or even forbidden by defendant. Under this rule those who have aided and abetted in an abortion, burglary, robbery, grand larceny, resisting arrest with dangerous weapons, procuring and using deadly weapons in escaping from custody, breach of the peace involving personal violence and the use of deadly weapons, or assault involving danger to life as from the use of dangerous weapons, or an attack by several, have been held responsible for homicide committed by their accomplices in the furtherance of the common object. The distinction is sometimes made that if the common design is to commit a trespass or a minor offense, the accomplices are not liable for a homicide committed by the principal unless it was a plain and direct consequence of the design; but if the common design was to commit a felony, (140) they are liable, although the homicide results collaterally therefrom (but we need not decide this question, as it is irrelevant here). If a common design does not contemplate the commission of a homicide,

and is of such a nature that a homicide will not be a natural or probable result, participation in that design is not of itself sufficient to make one liable for a homicide committed, concurrently with the execution of the common plan, by the independent act of a confederate, growing out of his private malice, or other cause having no connection with the common object, unless the accomplice was present, aiding and abetting the homicide itself. We have substantially taken this statement of the controlling principles of this case from 21 Cyc., 679-691, always seeing that it coincides with the law of this State as declared in the statutes and the decisions of this Court. Many of our cases are cited in the notes to support the text, and it would seem from the frequent reference to our cases that no court has more definitely and conclusively settled the principles applicable to this phase of the law of homicide.

The particular law which governs this case was stated by *Chief Justice Ruffin* in *S. v. Hildreth,* 31 N. C., 429: "One who is present and sees that a felony is about being committed, and does in no manner interfere, does not thereby participate in the felony committed. Every person may, upon such an occasion, interfere to prevent, if he can, the perpetration of so high a crime; but he is not bound to do so at the peril, otherwise, of partaking of the guilt. It is necessary, in order to have that effect, that he should do or say something showing his consent to the felonious purpose and contributing to its execution, as an aider and abettor. Therefore, the proper instruction, in the case supposed, would have been that if the prisoner, after discovering the deadly intention of his brother, instead of preventing its execution, deterred others from preventing it, or incited his brother to go on, then he would be guilty of murder." This doctrine was again announced and applied in *S. v. Simmons,* 51 N. C., 21 (indictment for murder), as follows: "Where two persons had formed the purpose of wrongfully assailing the deceased, and one of them, in furtherance of such purpose, with a deadly weapon and without provocation, slew him, it was held that both were guilty of murder." There are many cases decided by this Court which are to the same effect. Wharton says that a person actually present, assisting to the extent of his ability in the accomplishment of a homicide, is guilty as principal in the first degree, without reference to the extent or the efficaciousness of the aid rendered by him. Wharton on Homicide (3 Ed., by Bowlin), sec. 44. It may be well here to refer to the rule as expressed in Clark's Cr. Law (2 Ed.), p. 116: "The terms 'aider and abettor' and 'accomplice' are frequently used, and the student (141) should understand their meaning. An abettor, as has been seen, may be either a principal in the second degree, where he is present when the crime is committed (either actually or constructively), or an

accessory before the fact. An aider can only be a principal in the second degree or an accessory after the fact. An aider and abettor, therefore, is a principal in the second degree. An accomplice is anyone who is concerned with another in the commission of a crime. Each person concerned is the accomplice of the other, whether he be principal in the first or second degree, or accessory before or after the fact."

There is no definition of an aider or abettor, or a principal, we may say, that does not fasten guilt, under the facts of this case, upon the prisoner, whose appeal is now before us. He and Louis Powell were the sworn antagonists of Brown; Louis Powell encouraging, by word and act, an assault upon him with deadly intent, and both acting in unison. Junius Pridgen executed his purpose as a willing coadjutor, having himself strong and resentful malice against Brown. They practically united in the first assault upon him, Junius actually striking the first blow, and immediately repeating it, under the urging of Louis Powell, and after he had been castigated by Brown he followed him in his pursuit of Louis Powell, as they both left the room, as the jury may well have inferred from the evidence, with the intent to assist Louis Powell in his manifest purpose of slaying the deceased.

In *S. v. David,* 49 N. C., 354, *Judge Manly* thus stated the rule, in his charge to the jury, which was approved by this Court and prevails to this day: "Such is the law in respect to the principal actor in the commission of this homicide. The rule with respect to the principals in the second degree is that all persons who are present at the commission of the crime, aiding and abetting its commission, are guilty also. An intention to kill is not necessarily involved in a criminal homicide. A purpose to assist another with violence, and under circumstances that must necessarily result in death, or some great bodily hurt, is sufficient to characterize a killing thus occurring as murder. If, therefore, David, when he approached the deceased, intended to assist the woman in resisting him, and to do so by violence, if needful, reckless of the consequences, he also would be guilty of the blow struck by the woman in the prosecution of the purpose, and will be guilty of murder. But if no such purpose was entertained by David at the time he advanced upon the deceased—if, in other words, he was not present as an aider and abettor, he would not be guilty. A common purpose or intent was requisite, but it was not necessary that the purpose or intent should be preconceived for any particular length of time; it is sufficient if it had been formed, and was entertained and acted on at the time of the fatal blow." It is almost needless to say that *Judge Pearson,* after a brief but conclusive statement of the law, showed by convincing reasoning, without reference to his citations, that *Judge Manly* correctly charged the jury in (142) that case.

It may truly be said that presence at the time the homicidal deed is done is essential to make one a principal, even in the second degree, as generally understood; but this presence may be actual or constructive. The participant need not be an eye and ear witness of the homicide. Clark's Cr. Law (2 Ed.), p. 102. "A person, if present, must be a principal, if guilty at all. He cannot be an accessory, for, as we shall see, absence is essential to make one an accessory." Clark's Cr. Law (2 Ed.), p. 103. The writer says, at p. 105: "There must also be a community of unlawful purpose at the time the act is committed. Acts done by one of a party, but not in pursuance of the arrangement, will not render the others liable as principals. Thus, if two persons start out to commit a burglary or robbery, and on the way one of them kills a man, or sets fire to a house, or, in escaping, one of them maims or kills an officer or other persons, to prevent being taken, the other, not having contemplated such an act, is not a principal. It would be otherwise, though, if the act done were a probable consequence of the execution of the common unlawful purpose. Thus, where two persons start out to commit a burglary or robbery, and, encountering resistance from the owner of the house or person to be robbed, one of them kills him, the other is a principal in the murder. So, also, where several persons start out to beat a man, and one of them kills him, they are all principals." It is useless to cite more authorities for so plain a proposition.

The difficulty always is in applying a particular doctrine of the law to given facts. But we have no such embarrassment here. This was a "running fight," in which the prisoner Junius Pridgen opened the battle by a fierce attack upon his adversary, Charles Brown, first by hurling the dish at him, and failing in this assault, he again attacked him with a bottle, breaking it against the wall, and being assaulted by the common adversary of himself and Louis Powell with a chair, which temporarily disabled him, he recovered and joined with Powell (who led the way) in what the jury may have found was a third assault upon Brown, which they contemplated at the time, and which finally, but in a very short while, was consummated by a fatal stab to the heart. The case of *S. v. Price,* 158 N. C., 641, is substantially like this case, as to the feature of it.

Some of the remaining exceptions are very general, and the points intended to be raised have frequently been decided against the appellant's contention. If his Honor fell short of giving all the law of the case in his charge, the defendant should have called attention to the shortcomings of the court by a request for special instructions. *Simmons v. Davenport,* 140 N. C., 407; *S. v. Yellowday,* 152 N. C., 793. A (143) party cannot "lie by" and await the verdict of the jury, taking

his chances thereon, and afterwards complain that the charge of the court was not as full, or as explicit, or as comprehensive as it might have been, unless by special prayers its alleged defects have, in due time, been brought to its attention, so that they may then be cured. *S. v. Tyson,* 133 N. C., 692.

Our conclusion is that, on any view of the facts, considered in the light of the general and well settled law and our decisions in particular, the verdict and judgment were well warranted by the evidence, and the nonsuit was properly denied.

The prisoner mainly relied upon his motion to nonsuit, but reserved a few minor exceptions. It was entirely proper to hear the testimony of the witness Mary E. Williams as to the matters that occurred at her house. It was all one continuous transaction, each event being inseparable from the others, and competent as *pars rei gestæ.*

The prisoner requested the court to instruct the jury that the fact of his not taking the witness stand in his own behalf should not be taken against him. This was a proper request, but it appears that it was made orally, after the court had given its charge in writing, at the request of the prisoner, and was granted as a matter of favor, and the court, in responding favorably but orally to the request, complied with the spirit of the statute. A party cannot take advantage of his own wrong. If he wanted it to be written, he could have asked for such an instruction in apt time. The case of *S. v. Dewey,* 139 N. C., 556, answers this objection fully and conclusively, and no further comment is required, except that the prisoner was asking a favor of the court, after it had fully performed its function of charging the jury, and it does not come with good grace from him to object, because in granting it, according to the very terms of the request and without the slightest prejudice to him, the court failed to write it out. The exception, under the circumstances, is without merit. Trials are too serious in their consequences to be thwarted by such slight departures from the usual form, if such were the case here, and we have seen that it is not. The prisoner has no ground of complaint, as the State treated him with great leniency. There was ample evidence to warrant a conviction of murder in the first degree. The other exceptions are formal, and of course without any real merit.

We have reviewed the case at some length, because of its importance, and cannot sustain the exceptions.

No error.

Cited: S. v. Horner, 174 N. C., 792; *S. v. Rideout,* 189 N. C., 163; *S. v. Hardee,* 192 N. C., 536; *S. v. Allison,* 200 N. C., 195; *S. v. Jones,* 206 N. C., 816.

(144)

STATE v. W. L. DAVIS.

(Filed 11 November, 1914.)

Spirituous Liquors—Possession—Prima Facie Case—Purposes of Sale—Burden of Proof—Reasonable Doubt—Interpretation of Statutes.

On the trial under an indictment against the defendant for having spirituous liquor on hand for the purpose of sale, contrary to our statute, chapter 44, sec. 2, Public Laws of 1913, the court charged the jury, in effect, that the defendant must not necessarily be convicted of selling the liquor if he had more than one gallon on hand for the purpose, and correctly charged as to the presumption of defendant's innocence, the effect and meaning of *prima facie* case, as used in the statute, and that the burden of proof was on the State to establish the guilt of the prisoner beyond a reasonable doubt. *Held:* The charge is not open to the objection that the judge told the jury to convict the defendant of a misdemeanor if he had violated any of the provisions of section 2 of the act.

APPEAL by defendant from *Lane, J.*, at May Term, 1914, of DAVIDSON.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

E. E. Raper, P. S. Vann, W. H. Phillips, and Walser & Walser for defendant.

WALKER, J. This was an indictment against defendant for having in his possession, *for the purpose of sale,* spirituous liquor, contrary to law, as declared by the statute of the State forbidding it (Public Laws of 1913, ch. 44, sec. 2). The defendant was convicted, and appealed.

His only exception is that "the judge erroneously told the jury that a violation of any of the provisions of this section (No. 2) of the act would make the defendant guilty of a misdemeanor." We have stated the contention strictly according to his brief. It is the only one mentioned therein, and all other assignments of error, if there are any of merit, are, therefore, abandoned. *In re Will of Parker,* 165 N. C., 130; Rule of this Court, No. 34 (140 N. C., bottom p. 498). But we think the defendant is mistaken as to what the court told the jury. We now give the charge in substance, because it shows clearly that no such criticism can justly be passed upon it, and further for the reason that it is, in itself, perfectly correct in law. This is what the learned presiding judge said: "The defendant is indicted for having on hand, *for the purpose of sale,* more than one gallon of spirituous liquors. The defendant pleads not guilty to the charge. The law presumes every man to be

innocent when he comes into the court charged with a criminal offense, and this presumption of innocence clings to him until the State, by competent evidence, rebuts the presumption of innocence which the law throws around every person charged with crime. The burden is put upon the State, before the jury can convict in the case, to (145) satisfy the jury beyond a reasonable doubt of the guilt of the defendant; that is, that he had on hand, *for the purpose of sale,* spirituous liquors. Now, you have heard these statutes and provisions of the sections of the statute read. It is necessary for the court to explain to you fully these sections, because you are to take the law from the court, and from the court alone, and apply it to the evidence in the case and say what the facts are. It is not necessary, in order for a person to violate the law and be guilty of a misdemeanor, according to this statute, to sell liquor, but he can violate the law without selling any liquor at all if he keeps it on hand for the purpose of sale, if it is in his possession for the purpose of sale. And it is not necessary, in order to violate the law and be guilty under this statute, that the person have in possession more than one gallon, but possession of any quantity under this statute is a violation of the law, whether it is a quart, a pint, or half-pint, or any amount whatever, that he had in possession for the purpose of sale, and constitutes violation of the law. The statute further says that when it is admitted or shown beyond a reasonable doubt to the jury that the person is in possession of more than one gallon of spirituous liquor, three gallons of vinous liquors, or five gallons of malt liquors, at any one time, whether in one place or more places, that it shall be *prima facie* evidence that such person has it on hand for the purpose of sale. The term *'prima facie,'* as used in connection with the force and effect of evidence, means no more than that the latter, on its face or at first view and without contradiction or explanation, tends to prove the fact in issue—not that it does necessarily establish it. Perhaps a better legal definition is that it is such as is, in judgment of law, sufficient to establish the ultimate fact, and, if not explained or rebutted, remains sufficient for that purpose. It does not, in law, forestall the verdict, but leaves the inference of guilt, as in this case, for the jury to find, after excluding all reasonable doubt."

It will be seen from this short statement of the charge that the contention of defendant cannot possibly be sustained. The court distinguished very lucidly between the offense denounced by the statute and the mere fact of possession of more than a gallon, which was made *prima facie* evidence of guilt. The charge is well supported by *S. v. Wilkerson,* 164 N. C., 431, and it seems that the instruction was a studied effort to

follow the principle therein declared, and, we may add, a very successful one. That there is no error is manifest. The guilt of defendant was made to turn solely upon his having in his possession spirituous liquor, whether one gallon, one quart, or one gill, *for sale,* and this was clearly explained to the jury, and the difference between this offense and the *quantum* of evidence required to make out a *prima facie* case, and the burden resting upon the State to finally establish the guilt, were so unmistakably set forth in the charge that even a juror of the
(146) most ordinary intelligence and understanding could not be misled thereby.

The people have, by a large majority, declared for prohibition of the sale of liquors in this State. There is abundant law and procedure to enforce their will, and the only way to make it tell and to accomplish the purpose for which the law was enacted is to compel obedience to it, as by the imposition of adequate punishment by the judges. A law is of no force and becomes a dead letter unless those into whose charge it has been given for enforcement, according to the popular will, perform their duty by punishing the guilty and inflicting heavy penalties upon those who defiantly violate it. It is not more law that we need, but more practical and severe enforcement of that which we already have. The innocent should be protected against an incorrect and unjust construction of the law, by turning the language of the law into that which it does not mean, and was not intended to mean; but when, as in this case, that is done, and the guilty one is discovered and properly convicted, the only way to make the law of practical advantage and to execute the will of the people is to make the convict feel the heavy weight of the law. This is all that has been decided by this Court up to this date, in *S. v. Fisher,* 162 N. C., 550; *S. v. Wilkerson, supra,* where the subject was fully considered and the authorities cited and reviewed, and in *Express Co. v. High Point,* 167 N. C., 103. But before a defendant is punished at all, he should be properly convicted in a prosecution for selling liquor, as in any other case, and that is not done unless the provisions are followed in all essential respects. We have not been able to discover any material departure from the law governing this case.

No error.

Cited: S. v. Simons, 178 N. C., 682.

STATE v. ALEX., BENTON, AND LEONARD THOMAS.

(Filed 25 September, 1914.)

1. Criminal Law—Work on Road—Indictment, Sufficient—Statutes.

A warrant charging the statutory offense for failure to work the public roads is sufficient to sustain a conviction which substantially follows the statute, and a motion in arrest of judgment upon the ground of the insufficiency of the warrant will be denied when it charges that the defendant did, on or about a certain date, in a certain county, unlawfully and willfully fail to work a certain public road on which he was due road service, after he had legal warning from the overseer, and without tendering the overseer of the road the sum of one dollar. *S. v. Moore*, 166 N. C., 284, cited and applied.

2. Criminal Law—Work on Road—Statutes—Indictment—Matters of Defense.

It is not necessary for a warrant under the statute for the unlawful failure to work a public road to charge that the defendant was an able-bodied man between the ages of 18 and 45 years, for this is a matter of defense.

3. Criminal Law—Work on Roads—Defense—Certificates of Performance—Trial—Evidence—Questions for Jury.

Where upon trial for unlawfully failing to work the roads a defendant pleads not guilty, and introduces a certificate that he had performed this service from August, 1913, to August, 1914, and the evidence on the part of the State tended to prove that the defendant was notified to work in August, 1914, a conflict of evidence on the material fact arises as to whether the certificate covered the time when the defendant was notified to work; and a request that the court charge the jury that they return a verdict of not guilty upon the whole evidence is properly refused.

4. Criminal Law—Work on Road—Overseer—Notice—Agreements—Admissions—Trials.

The defendant being tried for unlawfully failing to work on the public road under a sufficient indictment, a witness testified, without objection, that he was overseer of that section, and *it is held* that it was competent for him to further testify that the defendant lived on that particular road, and that upon giving him the notice required, and telling him of the day appointed and where to go, he had agreed to do so, the agreement of defendant being in the nature of an admission that the service was due by him.

APPEAL by defendants from *Lane, J.*, at September Term, 1914, (147) of ANSON.

The defendants were convicted in the Superior Court, upon appeal from a justice of the peace, for failure to work the roads, three cases being consolidated by consent.

The warrants were the same in each case, except as to name of defendant, and were as follows:

"*To the Sheriff or other lawful officer of Anson County*—GREETING:

"Whereas complaint has been made to me this day on the oath of A. J. Johnson, setting forth that Benton Thomas did on or about August, 1914, with force and arms, at and in the county aforesaid, unlawfully and willfully fail to work the public road on which he was due road service, after having had legal warning by the overseer, A. J. Johnson, contrary to the statute made and provided and against the peace and dignity of the State:

"These are, therefore, to command you to forthwith apprehend the said Benton Thomas and him have before me at my office in Lanesboro Township, at Peachland, N. C., on 14 August, 1914, at 11 o'clock a.m., then and there to answer the charge and be dealt with according to law.

"Given under my hand and seal, 12 August, 1914.

H. M. BAUCOM, J. P."

(148) The warrants were amended by adding thereto, "and without tendering to the overseer of said road the sum of $1," and the material parts of the statute under which the warrants were issued are as follows: "That all able-bodied male persons between the ages of 18 and 45 years shall be required annually to perform six days labor on the public roads under the direction and control of a superintendent or overseer of the section to which he is assigned: *Provided,* that any such person may be discharged upon payment to the superintendent of the road section wherever he may reside $1 per day previous to the time set for work. The same shall be received in lieu of labor. . . . The notice shall be at least two days before the day named for the work, and shall state the place and the hour of the meeting of the hands and what implement the hands shall bring with them. . . . Any person liable to work on the road, being personally warned by the superintendent or by leaving a written notice at his usual abode, shall refuse or neglect, having had at least two days notice, to attend by himself or an able-bodied substitute acceptable by the superintendent or overseer, with such tools as the superintendent may direct . . . and also be guilty of a misdemeanor and fined not exceeding $5. . . . That in case any person shall remove from one district to another, who has prior to such removal performed the whole or any part of the labor aforesaid, or in any other way the whole or any part of the amount aforesaid in lieu of such labor, and shall produce a certificate of the same from the overseer

or superintendent of the proper district, such certificate shall be a complete discharge for the amount herein specified."

The evidence on the part of the State tended to prove that the defendants lived on the road described in the warrant; that they moved to that place from another township in December, 1913; that they were notified to work on the road on which they lived in March, 1914, when they produced a certificate from the overseer of the township from which they had removed that they had performed their road service from August, 1913, to August, 1914; that they were again notified to work the road in August, 1914, and agreed to do so, but failed to work, or to pay any sum of money, or to provide a substitute.

There was also evidence tending to prove that the certificate covered the time when the defendants were last notified to work the roads.

The defendants requested his Honor to instruct the jury, if they believed the evidence, to return a verdict of not guilty, which was refused, and they excepted.

There was a motion in arrest of judgment, which was overruled, and the defendants excepted.

There was a verdict of guilty, and from the judgment pronounced thereon the defendants appealed.

Attorney-General Bickett and Assistant Attorney-General Cal- (149) *vert for the State.*

Redwine & Sikes for the defendants.

ALLEN, J. The warrant substantially follows the statute, and this has been held sufficient in a charge for failure to work the public roads. *S. v. Covington,* 125 N. C., 642.

It notifies the defendant that the accusation against him is a failure to work a particular road in August, 1914, upon which he was due road service, after legal warning by the overseer, and falls within the principle declared in *S. v. Moore,* 166 N. C., 284, that "Criminal accusations, whether in the form of warrants or indictments, must fix and determine the identity of the offense with such particularity as to enable the accused to know exactly what he has to meet, and to avail himself of the conviction or acquittal as a bar to a further prosecution arising out of the same facts, and when these requirements are met, the rights of the accused are properly and sufficiently safeguarded."

The cases relied on by the defendant can easily be distinguished from this.

In *S. v. Smith,* 98 N. C., 747, the warrant did not charge in terms or informally that the defendant had been assigned and was liable to road

duty on the road described, nor that he had been duly summoned as prescribed by statute. The conclusion reached by the Court was that a warrant that simply charged that "the defendant failed to work as a hand in Swift Creek Township" did not charge a criminal offense.

Woolard v. McCullough, 23 N. C., 432, was a civil action for the recovery of a penalty, and the Court decided that there was no evidence that the lands of the defendant were in any district assigned to the overseer.

In the case at bar there is evidence that the defendant lived on the section of the road of which Johnson was overseer, and that he (Johnson) had charge of the lands on which the defendant lived.

In *S. v. Woodly,* 47 N. C., 276, the defendant was indicted for violating a statute against concealing and transporting slaves.

In *S. v. Pool,* 106 N. C., 698, the warrant did not specify in what county the offense was committed, nor was the road described with reasonable certainty; neither did it appear in the warrant that the prosecutor was the overseer of the road, nor that the defendant was assigned and was liable for duty, nor that the defendant had not paid the $1.

In *S. v. Green,* 151 N. C., 729, the warrant failed to allege that the defendant was assigned to and was liable to work the particular road.

It is not necessary to charge that the defendant was an able-bodied man between the ages of 18 and 45. These are matters of defense. *S. v. Smith,* 157 N. C., 578; *S. v. Yoder,* 132 N. C., 1111.

(150) The contention principally relied on by the defendant, under the exception to the refusal to charge the jury to return a verdict of not guilty upon the whole evidence, is that the evidence on the part of the State shows that the defendants produced certificates that they had performed their road service.

The difficulty about this position is that there is a conflict of evidence on the material fact whether the certificate covered the time when the defendants were notified to work, and we must assume that this question was fairly submitted to the jury, as the charge is not a part of the record.

The evidence on the part of the State tended to prove that the defendants were notified to work in August, 1914, and that the certificate was for work from August, 1913, to August, 1914.

The other grounds of the exception are not tenable. The witness Johnson testified, without objection, that he was overseer of Section 11, and it was competent for him to say that the defendants lived on that road.

He also testified that he gave to the defendants two or three days notice, and that he told them a certain day to come, and where, and that

they agreed to do so, and this agreement to work, without objection, is some evidence, in the nature of an admission, that they were liable for the road service demanded of them.

We have carefully considered the exceptions, and find no error in the trial.

No error.

STATE v. D. L. TRIPP.

(Filed 2 December, 1914.)

1. Criminal Law—Courts—Judgment Suspended—Consent of Defendant —Recorders' Courts.

The authority of the courts having jurisdiction of the subject matter to suspend judgment upon conviction in criminal matters for a determinate period and for a reasonable length of time, arising from the disposition of the court to ameliorate the condition of the defendant, and requiring his consent, express or implied by his presence at the time without objection, or otherwise, applies to municipal or recorders' courts. The power of the recorder, under the statute, to suspend the judgment, and the constitutionality of the statutory jurisdiction conferred, is upheld in this case. *S. v. Hyman*, 164 N. C., 411.

2. Same—Appeal—Trial de Novo—Waiver.

When it appears that a defendant convicted in a criminal action has consented that the judgment be suspended against him, it will be considered a waiver of his right of appeal on the principal issue of his guilt or innocence; and, where this has been done in a court inferior to the Superior Court, of his right to a trial *de novo*, under the statute.

3. Same—Writ of Review—Procedure—Constitutional Law—Statutes.

There being no appeal provided where a judgment in a criminal action has been suspended by the trial court with the defendant's consent, and sentence subsequently imposed, the Supreme Court has authority under Article IV, sec. 8, of our Constitution, and the Superior Court under Revisal, sec. 584, in the exercise of its appellate jurisdiction, to review the judicial proceedings of courts of inferior jurisdiction by writs of *certiorari*, *recordari*, and *supersedeas*, in order to afford a litigant his legal right of redress; and except in rare instances, which do not obtain in the case at bar, the appellate courts are confined to the facts as they appear of record, and can only review the proceedings as to their regularity or on questions of law or legal inference, as where the lower court has refused to hear evidence on the subject before imposing the sentence or has committed manifest and gross abuse of the discretion reposed in them.

APPEAL by defendant from *Rountree, J.*, at August Term, 1914, (151) of DURHAM.

Criminal action. On the hearing it was made to appear that on 22 December, 1913, defendant was convicted in two cases in recorder's

court of Durham, on warrants charging him with unlawfully selling spirituous liquors. In one case he was sentenced to pay a fine of $100 and costs, which was complied with. In the second case the following entry was made: "The defendant comes into court and pleads not guilty. After hearing the evidence in this case it is adjudged that the defendant is guilty, and the judgment is suspended, the defendant to give bond in the sum of $100 to appear at this court on the first Tuesday on each and every month for twelve months and show that he is of good behavior and not handling spirituous liquors unlawfully"; and in reference to this last proceeding, the case on appeal states further: "The defendant was personally present in court and also represented by counsel when said order and judgment were made, and consented thereto, and did not appeal therefrom. The defendant gave the $100 bond required and appeared on the first Tuesday of each and every month as required, when his conduct was inquired into, until the first Tuesday in May, 1914, when he failed to appear, and was called and failed, but did appear on 7 May, 1914, the forfeiture of the bond being then stricken out at the request of the defendant. On 7 May the city attorney, Charles Scarlett, prosecuting officer of the recorder's court, stated that he desired to offer some evidence in regard to the defendant's conduct, and the case was continued from time to time until 23 June, 1914, when it was heard before P. C. Graham, recorder of the recorder's court in Durham, in regular session held in the courthouse in the city of Durham. The State and the
(152) defendant being represented by counsel, the recorder heard evidence offered both by the State and the defendant, and after hearing said evidence found the facts."

Thereupon follows a detailed statement of facts as found by the recorder, showing, since his conviction and before the hearing, a course of continued and repeatedly disorderly conduct on part of defendant in the city of Durham, including two violations of the criminal law (neither of these, however, being for unlawfully selling liquor); and the record on the hearing before the recorder then continues: "That the conduct of the defendant has been subversive of good morals. That the defendant has not been of good behavior since 31 December, 1913, and has violated the terms and conditions upon which said judgment was suspended. Whereupon the judgment of the court being prayed, it is ordered, considered, and adjudged that the defendant be sentenced to serve a term of six months in the common jail of Durham County, to be assigned to work on the public roads of Durham County."

From this judgment defendant appealed to the Superior Court and, on such appeal, insisted:

1. That defendant was entitled to a hearing *de novo* as to the original issue of guilt or innocence.

2. That the judge should hear evidence on the questions presented to the recorder's court at time sentence was imposed as to the behavior of defendant, and pass upon same.

3. That the Legislature could not confer upon the recorder's court jurisdiction of the offense.

The court being of opinion against the defendant, entered judgment that the sentence before the recorder's court be affirmed and defendant's appeal be dismissed.

And from this judgment defendant, having duly excepted, appealed to Supreme Court.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Bryant & Brogden for defendant.

HOKE, J., after stating the case: The power of a court, having jurisdiction, to suspend judgment on conviction in a criminal case for determinate periods and for a reasonable length of time has been recognized and upheld in several decisions of our Court, as in *S. v. Everitt,* 164 N. C., 399; *S. v. Hilton,* 151 N. C., 687; *S. v. Crook,* 115 N. C., 760, and we see no good reason why it should not be intrusted to the sound discretion of these municipal courts.

It may be well to note that, while it has been sanctioned in this State to a somewhat greater extent than it existed at common law, there has been decided intimation given in some of the cases that the (153) practice should not be hastily enlarged, as it may be susceptible of great abuse to the injury of the citizen. Thus, in *Hilton's case, supra,* the Court said: "In this State, as shown in *S. v. Crook,* 115 N. C., 760, the power to suspend judgment and later impose sentence has been somewhat extended in its scope, so as to allow a suspension of judgment on payment of costs, or other reasonable condition, or continuing the prayer for judgment from term to term to afford defendant opportunity to pay the cost or make some compensation to the party injured, to be considered in the final sentence, or requiring him to appear from term to term, and for a reasonable period of time, and offer testimony to show good faith in some promise of reformation or continued obedience to the law. These latter instances of this method of procedure seem to be innovations upon the exercise of the power to suspend judgment as it existed at common law; and while they are well established with us by usage, the practice should not be readily or hastily enlarged or extended to occasions which might result in unusual punishment or unusual methods of administering the criminal law."

A perusal of these authorities will show further that this power to suspend judgment, in its origin and growth, has proceeded from a disposition to ameliorate the condition of defendant and that it has been upheld in its usual application only with his express or implied assent. This was directly recognized in *Everitt's case, supra,* as follows: "Where a defendant submits or is convicted of a criminal offense and is present when the judge, in the exercise of his reasonable discretion, suspends judgment upon certain terms, and does not object thereto, he is deemed to have acquiesced therein, and may not subsequently be heard to complain thereof; and in proper instances it will be presumed that the court exercised such discretion."

And in *Hilton's case, supra,* in reference to this position, the Court said: "And in more recent applications of the principle the better considered decisions are to the effect that the power indicated should only be upheld when sanctioned by usage and where the consent of the defendant was expressly given or would be implied from the fact that its evident purpose was to save defendant from a more grievous penalty, permitted or required by the law. And in *S. v. Griffis,* 117 N. C., 709, in allowing an appeal from a justice's court because the judgment had been suspended without defendant's consent and so depriving him of his right to present matters making for his defense, *Avery, J.,* for the Court, said: "It is in order to preclude the possibility of such an infringement of individual right that the authority of the court on convictions to postpone the infliction of punishment has been conceded only when the defendant, either expressly assents or, being present, fails to object, and is therefore presumed to give his consent to the order."

(154) The course, then, being only permissible with the consent of the defendant, when such assent appears, as it does in this case, it may properly be considered a waiver of his right of appeal on the principal issue of his guilt or innocence and of the right given by this statute in which a trial *de novo* is provided for; and the further consideration of the cause involves only the proper disposition of the right and propriety of imposing the suspended sentence. No appeal on this question having been provided by the statute, and there being nothing in the record to challenge the validity or propriety of the sentence, his Honor was clearly right in dismissing the appeal. It must not be supposed that in approving this position we hold or intend to hold that a defendant is without redress in case grievous or substantial wrong should be done in the proceedings subsequent to conviction. Both under our Constitution and statutes the writs of *certiorari, recordari,* and *supersedeas,* "as heretofore in use," have full vigor in this State (Constitution, Art. IV, sec. 8, and Revisal, sec. 584), and whenever a substantial wrong has been done in

judicial proceedings, giving a litigant legal right to redress, and no appeal has been provided by law, or the appeal that is provided proves inadequate, the Supreme Court, under the constitutional provision, to all courts of the State and the Superior Courts of higher jurisdiction, by reason of the statute (and well sustained precedents), to all subordinate courts, over which they exercise appellate power, may issue one or more of these important writs and under it see that the error is corrected and justice duly administered. The principle in this jurisdiction applies to criminal as well as civil causes and enables our Superior Courts to supervise the judicial action of recorders, justices of the peace, and all courts, as stated, over which they are given appellate power. *S. v. Locke,* 86 N. C., 647; *S. v. Swepson,* 83 N. C., 585; *S. v. McGimsey,* 80 N. C., 377; *Brooks v. Morgan,* 27 N. C., 481; 4 Pl. and Pr., 27-55; 12 Cyc., p. 794.

The remedy, therefore, for a legal wrong is ample, but, in its application by means of the writs referred to, the higher court acts only as a court of review, and in all ordinary instances must act on the facts as they appear of record, and, while in rare instances the appellate court, in the exercise of its discretion, may enlarge the scope of inquiry (4 Enc. Pl. and Pr., p. 257), there is nothing to justify such an exceptional course in this instance, and the rule is that they deal with the facts as they appear, and can only revise the proceedings as to their regularity or on questions of law or legal inference.

Speaking to this question of *certiorari* and this feature of its application, in *Brooks v. Morgan, supra, Chief Justice Ruffin* said: "It has often been used as a writ of false judgment to correct errors in convictions and judgments of justices of the peace out of court. But it is not restricted even thus far; for at common law it is, as Mr. (155) Chitty observes, 2 Genl. Pr., 374, "a legal maxim that all judicial proceedings of justices of the peace, upon which they have decided by conviction or order (such as an illegal order for turning the highway or the like), whether at general or special sessions, or individually, and either by general or particular statute, are of common right removable into the King's Bench by *certiorari,* unless that remedy has been expressly taken away by particular enactment." It is stated that even when a statute says that particular cases shall be finally determined in the quarter sessions, yet that does not oust the jurisdiction by *certiorari,* because the court understands therefrom that it was meant merely that the facts should not be reëxamined. Therefore, although an appeal which is in the nature of a new trial on the facts and merits cannot be sustained, unless expressly given by statute, the Superior Court will always control inferior magistrates and tribunals, in matters for which a writ of error lies not, by *certiorari,* to bring up their judicial proceed-

ings to be reviewed in the matter of law; for in such case "the *certiorari* is in effect a writ of error," as all that can be discussed in the court above are the form and sufficiency of the proceedings as they appear upon the face of them. The Superior Court, being our highest court of original jurisdiction, has always exercised the superintending control, which the King's Bench has in England, as far as necessary to the preservation of the common right of the citizen. Such a jurisdiction is indispensable in a free country, where the principle of arbitrary decision is not acknowledged, but the law is held to be the true and only standard of justice. It never could be intended by the Legislature that summary adjudications of justice out of court, or in session, should, however erroneous in point of law, conclude the citizen; and although the party affected by them may, perhaps, insist that they are void, and resist them *in pais,* or sue those who act under them, it is much better to allow him at once and directly to subject them to revision and reversal, if found to be against law. It was doubtless, upon this ground that the principle came to be incorporated, as a maxim, into the common law of England. It is equally essential to the uniformity of decision, and the peaceful and regular administration of the law here, that there should be some mode for correcting the errors, in point of law, of proceedings not according to the course of the common law, where the law does not give an appeal; and, therefore, from necessity, we must retain this use of the *certiorari.*

In the case before us on the propriety of this sentence, the matter is necessarily and properly referred, in the first instance, to the legal discretion of the recorder, and, no appeal being provided for, the question would ordinarily become one for review by the Superior Court only in case the recorder would refuse to hear evidence on the subject, or,
(156) having heard evidence, would commit manifest and gross abuse of discretion in imposing the sentence upon defendant, either because no violation of the condition had been shown or because the punishment was so severe as to be out of all reasonable proportion to the offense. And no such case is presented in this record. Here the recorder has heard the evidence, and without referring to his findings in detail we are all of opinion that they fully justify his conclusion that "defendant has not been of good behavior since December, 1913, and has violated the terms and conditions upon which said judgment was suspended." And there is nothing in the sentence imposed to permit or call for our interference as a matter of law.

On the record, therefore, we think his Honor was right in refusing to hear the evidence offered, and approve his ruling on defendant's second position.

The question as to the power of the recorder's court in the premises and the constitutionality of the acts conferring jurisdiction thereon has been ruled adversely to defendant's position in several decisions of this Court where it was directly presented, and may be regarded as no longer open to discussion. *S. v. Hyman,* 164 N. C., 411, and authorities cited.

There is no error, and the judgment dismissing defendant's appeal is Affirmed.

Cited: S. v. Johnson, 169 N. C., 311; *Taylor v. Johnson,* 171 N. C., 85; *Dickson v. Perkins,* 172 N. C., 362; *S. v. Burnette,* 173 N. C., 736; *S. v. Geer,* 173 N. C., 760; *S. v. Hardin,* 183 N. C., 818; *S. v. Lakey,* 191 N. C., 575; *S. v. Schlichter,* 194 N. C., 279; *S. v. Cornett,* 197 N. C., 628; *S. v. Rhodes,* 208 N. C., 242, 243; *S. v. Anderson,* 208 N. C., 789.

STATE v. J. H. HEAVENER.

(Filed 9 December, 1914.)

1. Appeal and Error—Objections and Exceptions—Brief—Answered Questions—Harmless Error.

Exceptions in the record not set out in the appellant's brief are taken as abandoned under Supreme Court Rule 34 (164 N. C., 551), nor will such exceptions be sustained when it appears that they were made to questions which were in fact answered.

2. Homicide—Self-defense—Prisoner's Apprehensions—Comparative Physique—Trials—Evidence—Questions for Jury.

Upon a trial for homicide, where it appears that the prisoner and the deceased entered willingly into the fight, and that the prisoner shot and killed the deceased when the latter was following him apparently unarmed and striking him with his hand, it is competent for a witness in behalf of the State, a physician who had professionally attended the deceased, to testify that the deceased had had tuberculosis for several months before his death, accompanied by a cough and loss of voice, the prisoner having pleaded self-defense and testified that the deceased was taller than he was, and weighed more, it being for the jury to determine whether the deceased, in his physical condition, was apparently weak or strong or incapable of overpowering the prisoner or of successfully resisting his attack.

3. Appeal and Error—Homicide—New Trials—Prejudicial Error—Immaterial Evidence.

Upon a trial for homicide, when it appears that the prisoner and deceased became suddenly engaged in a fight, in the former's store, and that the prisoner shot and killed the deceased with a pistol which he drew from his pocket, testimony of a witness that the prisoner kept his pistol

in a show case near which the firing commenced will not be held as reversible error, as it cannot be considered that testimony of this slight character could have influenced the jury in deciding the main issue as to the guilt of the prisoner, or that a different result would follow upon another trial. *Semble*, the evidence admitted was competent under the circumstances of this case, and, furthermore, being objected to after it had been received and there being no ruling thereon by the trial court, its admission cannot be held as error on appeal.

4. Homicide—Verdict, Directing—Nonsuit—Deadly Weapon—Malice, Presumption.

Malice is presumed from the killing of a human being with a deadly weapon, with the burden on the defendant to show facts and circumstances which would reduce the homicide from murder to manslaughter or excusable homicide, and under such circumstances the judge may not direct a verdict for the defendant, especially, as in this case, where there is evidence that the prisoner has used excessive force in repelling the attack made on him by the deceased, which raises a question for the jury.

5. Homicide—Trials—Instructions—Verdicts—Appeal and Error—Harmless Error.

On a trial for homicide, where the verdict rendered by the jury convicts the defendant in a less degree, the refusal of the court to give special instructions upon the law, arising from the evidence, of murder in the second degree is harmless if erroneous.

6. Homicide — Trials — Instructions Given—Instructions Asked—Appeal and Error—Harmless Error.

Where self-defense is relied on upon a trial for murder, the refusal of the defendant's prayers for instruction as to his reasonable belief that he was in danger, when sufficiently covered in the charge to the jury, is not erroneous.

(157) APPEAL by defendant from *Webb, J.*, at February Term, 1914, of CATAWBA.

The defendant was indicted for the murder of one Summey Huffman. It appears that, on or about 1 November, 1913, the deceased went to the store of the accused. At the time of the homicide there was no one in the store but the prisoner, his wife, the deceased, and one A. W. Rhinehardt. Heavener and Huffman became involved in a quarrel, and Heavener shot Huffman three times, twice in the chest, once on the left side, and once on the right side, and the third shot struck the

(158) upper and back part of the head—about the crown of the hair.

A doctor testified: "Either of the shots in the chest might have killed him; both in the chest, in all probability, would; I am sure the last would alone—the shot in the head."

In order to understand the nature of the questions presented by the exceptions, it will be sufficient to set out only a part of the testimony of A. W. Rhinehardt, a witness for the State, who stated: "I live in Lin-

colnton and know where J. R. Heavener lives and where his store is. It is in Catawba County, near Mr. Lewis Rudisill's store. I knew Summey Huffman. He is dead now. He died the first day of November, 1913, I believe. He died in Mr. J. R. Heavener's store building between 1 and 2 o'clock, to the best of my knowledge. He was shot three times—in the right and left sides, and in the top of the head. I don't know where he was injured in the right side—somewhere in the right lung, and on the left side; he was injured near the heart, about the lower part of the back of his coat, about here (indicating); and he was shot in the top of the head, just in front of the crown of the head, as well as I could say, up in the hair. I cannot tell whether that ball went through the head. I don't know that the balls came out any part of the body. I saw the hole blown through the top of his head and his hair burnt. I never paid any attention to anything oozing from the place, because I just barely looked at it. I got to the store between 1 and 2 o'clock; had no time piece with me. The defendant and Summey Huffman were both there when I got there. They were brothers-in-law; Huffman married Heavener's sister. Mrs. Heavener was the only other person in the store when I got there. Mr. Cling Sigmon was going out when I went in; met me at the door coming out. I went in the store, and the first I saw about this whole thing was that Mrs. Heavener was back about the heating stove at the left-hand counter as you go in the store from the front, and Mr. Huffman was there cursing her. I couldn't tell the language he was using. Mr. Heavener was standing behind the right-hand counter, or near the right-hand counter, across about even with her, and Mr. Heavener said: 'Hush up and come on up here, and we will make out that statement.' They came on up to the front, and Mr. Huffman sat down on a chair at the front door and asked him to make him an itemized statement of what he and his family owed him, and he would pay him, and Mr. Huffman told him to make it $6 and not more, for that was all it was, and there was some vulgar talk used by Mr. Huffman to Mrs. Heavener. When he made those remarks, Mr. Heavener says, 'Hush up, that is too bad; better mind what you are saying.' By that time Mr. Huffman rose up off the chair and walked to where Mr. Heavener was, at his little glass show case he had his books lying on—writing desk, or whatever you call it—put his right hand on the corner of this book-desk and says to him, 'If you don't make out that statement (159) as I told you to—$6 even—I will beat you every time I catch you in my way.' He didn't have it that way, but I won't use the vulgar language. Mr. Heavener said, 'Well, it is $6.60,' 60 or 65 cents, and there was an oath right there, and Huffman slapped at him and called him a liar—slapped at him with his left hand; slapped him at first on the face;

and at that time Heavener threw his hand on his hip pocket and threw up his left hand and said, 'Don't you come on me. I will take your life out of you,' and cursed him—said it somehow that way. Huffman said something at that time, and slapped at him again, and Heavener took the pistol and shot the first shot. When Heavener shot the first time, he and Huffman were facing each other; either one was in reaching distance of each other. I noticed the load splatter on the right side of his chest—the fire out of his pistol—and then Mr. Heavener stepped back and got around behind the counter. Huffman kept after him, and slapped at him as he went, both walking slowly, Heavener backwards and Huffman forwards, and I heard the pistol snap two or three times before he fired the second time. When he fired the second time he was hit in the left side of the chest, and he sank down—began to sink, just going down, and caught the counter with his left hand. As he sank down, it appeared he was wanting to hold himself up, and he got weaker and weaker, and kept sinking, and as he sank down with his head about level with the top edge of the counter, Heavener shot him in the top of the head. When Huffman was shot the last time, he was behind the counter. When Huffman began to sink, Heavener was standing right in front of the heating stove and looking at him as he went down. Just immediately before he fired the shot in the top of the head, he moved forward towards him—either leant or made a step. I couldn't tell you the exact height of that counter; it was just an ordinary counter—higher than that table (indicating). When it first began, Heavener was standing at the opening between the counters, and Huffman was out in the aisle. Huffman slapped at him with his left hand, and had nothing in his hand, and had nothing in his right hand that I saw. When the first shot was fired, Summey was standing with his hand on this little glass show case that set off from the end of the counter, and Heaven was standing at the end of the counter; Huffman was in about reaching distance. When Huffman struck with his left hand, Heavener pulled out his pistol and fired. He reached back in his hip pocket, and when he came out with his hand there was a pistol in it. Just before he reached to the pocket from which he took the pistol, he said, 'I will take your life.' When that first shot was fired, Huffman was following Heavener. I couldn't tell you how many times the pistol snapped. I heard it. When Huffman slapped at Heavener, he didn't have anything in his hand, that I (160) know of. When the second shot was fired, Huffman began to sink this way (indicating), and he was low enough to reach up with his hands to the top of the counter to hold himself; put his left hand on top of the counter. At that time Heavener was about the same distance from him he had been in the time of backing; Heavener leaned over or

stepped over, made a bow towards him. When he fired the ball in the top of the head, Huffman slipped right straight back and Heavener said (making sound indicated by witness), 'Too bad; somebody bring some water here and outen the fire.' Mrs. Heavener said, 'Is somebody afire?' He said, 'His clothes are burning.' She came from the back end of the store with a bucket of water and a dipper in it, and I took out a dipper full and went behind the counter and stood between the dead man's legs and poured water where the second shot was fired and 'outened' the fire; the fire was burning the turned-back part of his coat, or near about. I don't think Mr. Huffman breathed after I got behind there. I stood there watching him a minute or two, and he never moved. The first conversation defendant and I had together after this about anything was that I told Mr. Heavener that I expected I would have to be a witness on this, and to save my life I couldn't swear to the number of shots that were fired, if any missed him. I said, 'Let's look at the pistol and see how many cartridges were shot out of it,' and he said, 'All right,' and he got the pistol and broke it down and pulled the shells out of it, and there were three empty ones and two loaded, and he put them back, and I went out of the store; and he called Lester Walsh to go and tell Mr. Perry Jarrett to come down there, and then we walked out, and Mr. Heavener told me to come down to the corner, to the platform of the warehouse, that he wanted to talk to me; and I went with him, and he said, 'I want you to do all you can for me in this case; you are my main witness.' I said, 'I will do all I can—everything I can, as far as the truth goes.' That was the last of it. I went home. I can't tell you where Mrs. Heavener was during the shooting. She was somewhere between the heating stove and the back end of the store. I noticed her, when the first shot was fired, walking back the other way from the heating stove. Don't know where she went to. I was paying attention to the man doing the shooting, and wanted to keep myself out of danger. Mr. Huffman was drunk when he came in there. He appeared to me, when I saw him coming down the road just before, to be pretty drunk, was staggering very much. The stove was about halfway back in the building from the front door to the back door, and the shooting took place near the front door; commenced there, and the wind-up of it was nearly back even with the stove. Before Heavener shot, he used some kind of little curse word—didn't speak it very loud. He said that, and 'I will take your life' followed right along."

There was evidence on the part of the prisoner tending to show (161) that he shot Huffman in self-defense and under great provocation, as the latter, it seems, had greatly insulted his wife, using profane and vulgar language in doing so, and when told to desist he became very

angry with the prisoner and pursued and struck him, at the same time taking something out of his pocket, which prisoner testified put him in fear of his life and caused him to shoot to defend himself against the infliction of great bodily harm upon him by the deceased. This evidence will be noticed in the opinion.

The prisoner was convicted of manslaughter, and from the sentence of the court to confinement in the State's Prison for eighteen months he appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

A. A. Whitener, W. C. Feimster, and Self & Bagby for defendant.

WALKER, J., after stating the case: We will consider the exceptions in the order of their statement by the appellant.

Exceptions 1 and 2 were taken to the rulings of the court excluding evidence offered by the prisoner. The questions, to which the State objected, were in fact answered, so that no harm was done. Besides, these assignments of error are not mentioned in the prisoner's brief, and are, therefore, to be considered as abandoned by him, under Rule 34 of this Court (164 N. C., 551), which provides: "Exceptions in the record not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." *S. v. Smith,* 164 N. C., 476; *In re Will of Parker,* 165 N. C., 130.

The third exception was taken to the testimony of Dr. F. T. Ford, that the deceased had tuberculosis for several months before his death, accompanied by a cough and the loss of his voice. But this was competent to show that he was not a strong man and able to cope with the prisoner in their struggle when he was shot. The prisoner testified that "Huffman was a tall man, some taller than he was, and must have weighed something like 50 pounds more than he," and this matter, as to the comparative strength and physical ability of the two men, was gone into more fully in the course of the trial. It was, therefore, relevant to show, in rebuttal of the prisoner's testimony, which was intended to produce the impression that he was inferior in strength to his antagonist, that this was not the case, but that the deceased was in such a state of health as to be much weakened thereby, and to the extent of losing much of his original and natural power and vigor as a man, which his height and general build would seem to indicate. "It is competent to show
(162) the state of deceased's health at the time of the killing." 21 Cyc., 911. In *S. v. Hough,* 138 N. C., 663, it was held that evidence of the size and strength of the deceased could be considered for

the defendant, in passing upon the plea of self-defense. The converse must be true, that the State may also have the benefit of it upon a similar plea. It goes to the question, whether the prisoner was justified in his apprehension that he was about to be killed or to receive great bodily harm. Reviewing this general principle, it is thus stated in 21 Cyc., at p. 911:

"*Physical Condition of Parties—Admissibility in General—On Part of Defendant.*—Evidence as to the relative size, strength, and physical condition of the parties to a homicide is admissible in behalf of a defendant only when the proof establishes a *prima facie* case of self-defense, or a predicate has been laid therefor by proof that at the time of inflicting the mortal wound defendant had been attacked by the deceased, and in the absence of such proof it is incompetent.

"*On Behalf of State.*—It is also proper for the State to show the relative physical strength of the parties; and while the rule requires that the inquiry should be general and not leading, with a constant view to avoid the introduction of irrelevant matter, the State may prove the age of the person assaulted as tending to show the fact of disparity of strength, or that he was intoxicated at the time and unable to make or resist an attack. It is competent to show the state of deceased's health at the time of the killing, or to show the mental and physical condition of the deceased immediately after receiving the mortal wound."

It was for the jury to say whether, in his physical condition, he apparently was weak or strong, capable or incapable of overpowering the prisoner in their combat, or of successfully resisting his attack. *S. v. Thawley,* 4 Harr. (Del.), 562.

We will consider the fourth assignment, though, in connection with the fifth, which is based upon an exception to the testimony of E. Q. Dellinger, as to the place in the store where the deceased kept his pistol. The witness stated that he did not know where it was kept at the time of the homicide, but two years before he saw it in his show case at the store. He was not permitted to say what he was doing with it at the time he saw it. We do not perceive how this evidence, if incompetent, which we do not concede, was harmful to the prisoner. Jurors are presumed to be intelligent, at least, and they are not likely to attach any weight or importance to a fact that has no probative force whatever with respect to the issue in the case. This kind of proof was held to be admissible in *Lillie v. State,* 100 S. W. Rep. (Neb.), 316; but we put our decision upon the ground that, if there was any error at all, it was not prejudicial, and too insignificant to induce a reversal of the judgment. It could not possibly have any influence upon the jury in deciding the main issue as to the guilt of the prisoner. That he had a pistol and (163)

used it with fatal effect is not questioned. There was practically no evidence of preparation beforehand to commit the crime. It was the result of a sudden quarrel, in which both engaged willingly, it seems, and the general evidence is of such a character as to exclude the inference that this attenuated fact had any part in producing the verdict. What we said in *S. v. Smith, supra,* is very applicable and cannot be too often repeated or too highly commended: "A defendant is entitled in law to hear the particular accusation against him; to have the prosecution restricted to that accusation, and consequently the proof, and not to be convicted of any other offense than the one specially charged in the indictment. This is his natural and constitutional right. But there must be prejudicial and not merely theoretical error. Verdicts and judgments should not be lightly set aside upon grounds which show the alleged error to be harmless or where the appellant could have sustained no injury from it. There should be at least something like a practical treatment of the motion to reverse, and it should not be granted except to subserve the real ends of substantial justice. Hilliard on New Trials (2 Ed.), secs. 1 to 7. The motion should be meritorious and not frivolous. The commentators on New Trials, Graham and Waterman (Vol. 3, page 1235), thus state the prevailing rule: 'The foundation of the application for a new trial is the allegation of injustice, and the motion is for relief. Unless, therefore, some wrong has been suffered, there is nothing to be relieved against. The injury must be positive and tangible, not theoretical merely. For instance, the simple fact of defeat is, in one sense, injurious, for it wounds the feelings. But this alone is not sufficient ground for a new trial. It does not necessarily involve *loss* of any kind, and without loss or the probability of loss there can be no new trial. The complaining party asks for redress, for the restoration of rights which have first been infringed and then taken away. There must be, then, a probability of repairing the injury; otherwise the interference of the court would be but nugatory. There must be a reasonable prospect of placing the party who asks for a new trial in a better position than the one which he occupies by the verdict. If he obtain a new trial, he must incur additional expense, and if there is no corresponding benefit, he is still the sufferer. Besides, courts are instituted to enforce right and restrain and punish wrong. Their time is too valuable for them to interpose their remedial power idly and to no purpose. They will only interfere, therefore, where there is a prospect of ultimate benefit.' Tried by this rule, we do not think any reversible error was committed."

The evidence here may have been competent as tending to show that the defendant was not afraid of the deceased, knowing that his pistol was all the time easily accessible to him, within the reasoning of *S. v.*

Kinsauls, 126 N. C., 1095. In addition to what has been said, it (164) may be remarked that the objection to Henry Shepherd's testimony, as to the pistol, seems to have been made after all of the evidence was in, or had been heard, and there was no ruling upon it. *Tyson v. Tyson,* 100 N. C., 360; *Scroggs v. Stevenson, ibid.,* 354; *S. v. English,* 164 N. C., 498. The other part of his evidence, to which exception was taken, the court excluded, and expressly instructed the jury not to consider it.

The court properly overruled the motion to nonsuit, or what is equivalent to the same thing, to direct a verdict for the prisoner, which was the subject of the sixth exception. The second prayer for instructions was also properly refused, because it requested the court to charge that the prisoner was not guilty of murder in the second degree, and he was acquitted of that offense, so he got by the verdict what he wanted, without the instruction, and this rendered the supposed error harmless. *S. v. Worley,* 141 N. C., 764. But there was no error in refusing the instruction, as there was ample evidence to support a verdict of murder in the second degree, if not in the first degree; and, besides, the killing with a deadly weapon having been admitted, malice was presumed, and the burden was upon the defendant to show facts and circumstances which would reduce the homicide from murder in the second degree to manslaughter or excusable homicide. *S. v. Brittain,* 89 N. C., 481; *S. v. Simonds,* 154 N. C., 197; *S. v. Rowe,* 155 N. C., 436; *S. v. Yates, ibid.,* 450.

There was strong evidence to the effect that if defendant shot in self-defense he used more force than was necessary to resist the attack and protect himself, the question of excessive force being for the jury. The evidence, therefore, supports the verdict for manslaughter. *S. v. Quick,* 150 N. C., 820.

The last three exceptions, directed against the refusal to give the third, fourth, and fifth prayers for instructions, as to defendant's reasonable belief that he was in danger, were substantially given in the charge, and the prisoner was there accorded the full benefit of the principle of self-defense, as stated in *S. v. Turpin,* 77 N. C., 473; *Com. v. Selfridge,* Har. and Thompson Cases on Self-defense, p. 1; *S. v. Nash,* 88 N. C., 618; *S. v. Barrett,* 132 N. C., 1005, and the many subsequent cases approving them. He told the jury that, "If a man believes one in pursuit of him has something (deadly) in his hand, *whether he has something in his hand or not,* if the man honestly believes and has reasonable grounds to believe—that is, reasonable ground to apprehend, and he does apprehend—that he is in danger, then and there, of suffering death or great bodily harm, and fires his pistol under those circumstances, he is not

guilty." This was quite as strong and broad as the prisoner's own prayer, and certainly it comprehended fully as much.

(165) There was very little evidence that the deceased was assaulting the prisoner with a deadly weapon, or that the latter had any reasonable ground to think so; but the jury gave him the benefit of the doubt, and a most favorable construction of the evidence, and he has not the slightest ground to complain of the verdict. His attack upon the deceased was cruel and merciless. After he had practically rendered him helpless, he continued to fire upon him. This was excessive force, and called for a verdict of manslaughter at least. There are strongly extenuating circumstances, not in law, but morally, upon the question of punishment—the gross and vulgar insult to the prisoner's wife and the aggressive conduct of the deceased. But for leniency he must appeal to another department of the Government.

A most careful review of the whole case has satisfied us that no error was committed on the trial.

No error.

Cited: In re Craven, 169 N. C., 564; *Schas v. Assurance Society,* 170 N. C., 424; *Smith v. Hancock,* 172 N. C., 153; *S. v. Davis,* 175 N. C., 729; *S. v. Beal,* 199 N. C., 303; *S. v. Caudle,* 201 N. C., 86.

STATE v. J. W. FORD.

(Filed 23 December, 1914.)

1. Appeal and Error—Fragmentary Appeals—Directing Verdict "Not Guilty"—Order Striking Out Entry—Mistrial—Discretion of Court—Interpretation of Statutes.

Where the judge has ordered the entry to be made by the clerk of a verdict of not guilty on the trial of a criminal case, for a variance between the offense charged in the indictment and the proof, but conceiving his action to be erroneous, he then, in the presence of the jury, still sitting on the case, directs the clerk to strike out the entry and, withdrawing a juror, directs a mistrial, *it is held* that the order of the judge striking out the verdict of not guilty left the case in exactly the same attitude it was before the entry of such verdict, and the withdrawal of a juror and order of mistrial, being in the discretion of the court, except in capital cases, are not reviewable.

2. Same—Fragmentary Appeals.

An appeal is fragmentary from an order of the trial judge to the clerk to strike out a verdict of not guilty in a criminal case, which the judge

had directed to be entered, but subsequently, when the jury is still sitting on the case, it is stricken out by the order of the court, and the appeal will be dismissed; for in such instances the acts of the court are analogous to his rulings upon evidence or like matters during the progress of the trial.

WALKER, J., dissenting.

APPEAL by defendant from *Justice, J.*, at August Term, 1914, of CHEROKEE.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

W. M. Axley and Witherspoon & Witherspoon for defendant.

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CLARK, C. J. The defendant was indicted on three counts; for larceny of lumber, for embezzlement of money, and for obtaining money by false pretense, all from J. M. English. Prior to the trial the defendant moved the court to require the State to furnish a bill of particulars on the third count charging false pretense. The State having failed to comply with this order, the court refused to allow the prisoner to be tried on that count.

Pending the trial it was suggested by the defendant's counsel that there was a variance, in that the bill laid the property in J. M. English, while the evidence showed that the ownership was in J. M. English & Co. The court intimated that the variance would be fatal, whereupon the solicitor asked the court to hold the defendant and allow him to send a new bill, which request was granted by the court, and the court ordered a verdict of not guilty, and charged the sheriff to hold the defendant under a $500 bond. But the solicitor requested the court to strike out the order for the verdict of not guilty which had been entered by the clerk, and the court then in the presence of the jury, who had not been discharged, and in the presence of the defendant and his counsel, and in its discretion, struck out the verdict of not guilty, and also in its discretion withdrew a juror and ordered a mistrial.

The appeal is premature. In *S. v. Webb,* 155 N. C., 427, the Court said: "The appeal of the defendant must be dismissed because, in this State, no appeal in ordinary form lies in a criminal prosecution except from a judgment on conviction or on a plea of guilty duly entered. Revisal, 3274, 3275. It would lead to interminable delay and render the enforcement of the criminal law well nigh impossible if an appeal were allowed from every interlocutory order made by a court or a judge in the course of a criminal prosecution, or from any order except one in its nature final. Accordingly it has been uniformly held with us, as stated, that an ordinary statutory appeal will not be entertained except from a

judgment on conviction, or some judgment in its nature final." To same purport, *S. v. Goings,* 100 N. C., 504.

Formerly in this State the State was allowed to appeal from a verdict of not guilty in criminal cases. *S. v. McLelland,* 1 N. C., 632; *S. v. Haddock,* 3 N. C., 162. But for many years now the statute has restricted appeals by the State to the cases named in Revisal, 3276, except that appeals have been allowed the State from a verdict of not guilty in certain courts, as in *S. v. Bost,* 125 N. C., 707; *S. v. Mallett, ibid.,* 718.

(167) If the statute should again permit an appeal from a verdict of not guilty, of course then it might be allowable for the trial judge to set aside the verdict without the necessity of an appeal; but that is not contended for by the State in this case.

It is true that a verdict of not guilty can be set aside in case of fraud, as in *S. v. Freeman,* 66 N. C., 647; *S. v. Swepson,* 79 N. C., 632; but that also is by no means the proposition now before us.

In this case there has been no action whatever by the jury. The judge, upon a mistaken impression, possibly, as to the legal effect of the evidence as to a variance, directed a verdict to be entered. The jury took no action. The direction was that of the judge, just as would be his action in admitting or rejecting evidence, or in charging or refusing to charge the jury upon a proposition of law. In either of these cases he could, before the jury acted, withdraw or admit the evidence, or change his instruction. So here, the jury having taken no action, being entirely passive, and not having left the box, the judge, under the impression that he had erred as to his conclusion that there was a variance which entitled the defendant to an acquittal, struck out the order (which had been made to the clerk and not to the jury) to enter a verdict of not guilty. Having done this, the case was in exactly the same attitude that it was before he directed the clerk to make the order, and being in that condition, the order for a mistrial was entirely a matter in his discretion, as this is not a capital case. *S. v. Hunter,* 143 N. C., 607; *S. v. Scruggs,* 115 N. C., 805. An appeal does not lie from an order for a mistrial (*S. v. Twiggs,* 90 N. C., 685; *S. v. Jefferson,* 66 N. C., 309; *S. v. Bailey,* 65 N. C., 426), because it is a discretionary matter.

Under the original procedure at common law defendants in criminal cases were not allowed the benefit of counsel to address the jury, nor compulsory process to summon witnesses in their behalf, nor to cross-examine the witnesses, in any of the two hundred and four offenses which were punishable by death. Under these circumstances, the slowly growing humanity of the times induced the judges to create many artificial advantages in favor of prisoners charged with high crime. But these discriminations in favor of defendants did not usually apply to offenses punish-

able less than capitally, and even as to them the reason for the discrimination has long since ceased to exist. Yet the shadow of the remembrance too often biases a clear perception of the nature of proceedings in criminal actions. In *Paraiso v. United States,* 207 U. S., 368, *Mr. Justice Holmes,* speaking of this singular survival of former technicalities in favor of defendants, characterizes it as "the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert."

Here the jury has taken no action. The judge, though he (168) deemed, as a matter of law, that there had been a variance which entitled the defendant to a verdict of not guilty, did not so instruct the jury, and the jury did not so return their verdict. But he directed the clerk to act for the jury by entering a verdict of not guilty. This, strictly, he had no right to do, and the practice has been tolerated only from the fact that the State has no right to appeal. This judge, discovering his mistake, directed the clerk to strike out the entry before the jury had even tacitly accepted the instruction by leaving the box. The defendant had suffered no harm. The jury had not acted and the court rescinded its action before they had left the box. The judge then, exercising his undoubted discretion, in all except capital cases, made a mistrial.

Appeal dismissed.

WALKER, J., dissenting: I do not understand the facts to be as stated in the opinion of the Court. The judge held that there was a variance, and directed a verdict of acquittal, there being no dissent by the jury. This is common practice on the circuit and has been sanctioned by this Court. Whether the judge was right or wrong, the verdict of not guilty having been entered, it cannot be stricken out, at least against the consent of the defendant and he cannot be tried on that indictment again. It will be noticed that if it is stricken out, there will be no verdict left, though the jury had been fully charged with the case. The judge could not order a mistrial, which occurs always before verdict, but a new trial, and this could not be done, under the circumstances of this case. We cannot avoid the legal effect of the court's action by calling it by the wrong name—a mistrial. I have no time, in the closing hours of the Court, to cite the authorities and demonstrate what I think is the clear error of the Court.

STATE v. J. W. BAILEY.

(Filed 9 December, 1914.)

Intoxicating Liquor—Unlawful Sale—Evidence—Trials—Defense—Good Faith—Questions for Jury.

Evidence that the defendant delivered intoxicating liquor to another in North Carolina and received money for it is evidence of his guilt, upon a trial for an illegal sale of such liquors, requiring that the case be submitted to the jury; and while the defense is open to him that he had ordered it from beyond the borders of the State, where such transactions are lawful, in good faith, and not as a subterfuge to evade the law, but solely for accommodation and without profit, it is for the jury to determine the truth of the matter upon the evidence under proper instruction from the court. *S. v. Burchfield*, 149 N. C., 537, and that line of cases, cited and distinguished, and the Webb-Kenyon law *is held* inapplicable to the facts of the case.

CLARK, C. J., *concurring* in result on grounds stated by him.

(169) APPEAL by defendant from *Harding, J.*, at August Term, 1914, of BURKE.

The defendant was indicted in the Superior Court for selling intoxicating liquor to Pink Thorne. The defense is that he did not sell the liquor to Thorne, but that the transaction in which liquor was delivered to Thorne at his home was conducted with him by his wife, who is now dead. The State introduced evidence to the effect that Pink Thorne had received liquor from the defendant and paid him $1 for it. The witness Pink Thorne testified: "I have forgotten how much money I gave him, possibly something like $1." He also stated that he and defendant ordered some liquor, contributing the money together, and he got a gallon and defendant a gallon, and he thought it came from Richmond, Va., but did not know whether it did or not. There was also evidence from which the jury might have inferred that the liquor was ordered from Richmond, Va., by defendant, shipped by express to him upon a prior agreement between Pink Thorne and defendant that the latter, in ordering his gallon, should also order one gallon for the witness, which the latter afterwards received and for which he gave defendant $1, it being a purchase by defendant and delivery to the witness solely for his accommodation, the liquor having been bought in Richmond, Va., and shipped on joint account, all of which was done in good faith and not to evade the law. There was also evidence tending to show that defendant had brought some of the State's witnesses to court in his automobile and was associating with them under suspicious circumstances, though he denied that

he said anything to them about the case, and stated that they were to pay him for the service. The defendant testified that he was sick and confined to his bed, and that his wife ordered the liquor, and it was gotten by the witness Pink Thorne through her, and not through him, he having nothing to do with it. There was testimony as to defendant's good character, and also as to his bad character. He was convicted, and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Avery & Huffman and Clark & Broughton for defendant.

WALKER, J., after stating the case: When the State had offered evidence tending to show that defendant had delivered liquor to Pink Thorne and received $1 therefor from him, it was entitled to have the case submitted to the jury, this being some evidence of his guilt (*S. v. Johnston,* 139 N. C., 640), and then it was for the jury to (170) decide whether there had been an illegal sale or whether the defendant had acted in good faith in purchasing the liquor in Virginia for the mere accommodation of Pink Thorne. The question of good faith on the part of the defendant could not have been eliminated by the judge in his charge, although there may have been strong evidence to establish it, and especially when there was a view of the evidence which negatived it and tended to show defendant's guilt. *S. v. Whisenant,* 149 N. C., 515; *S. v. Wilkerson,* 164 N. C., 431. The charge of the court, which was a clear statement of the law applicable to the case in its every phase, gave defendant the full benefit of his contention that he had not in fact sold the liquor nor delivered it illegally, and that it was purchased in Richmond, Va., one gallon for himself and one for Pink Thorne, as an accommodation to him, the judge telling the jury, plainly and distinctly, that if it was bought in Richmond, Va., and shipped to defendant for the purpose stated in good faith, the defendant would not be guilty, and they should so find. The jury have said, under this fair and faultless charge, that defendant illegally sold the liquor and did not buy it for the accommodation of Pink Thorne, having himself no profit or interest in the transaction. There was ample evidence to warrant this verdict. The jury might have found that the liquor was not shipped from Richmond, Va., but was procured in this State illegally, and delivered to defendant, for money, which would be criminal (*S. v. Burchfield,* 149 N. C., 537), or that he sold it outright in this State, the alleged purchase outside the State being a mere pretense or subterfuge, and intended as a cloak for his illegal act. The question of good faith, being one of fact, was undoubtedly for the jury to decide. The character of the defendant, the

suspicious circumstances, and other matters deposed to by the witnesses directly bore upon this question.

It is sometimes necessary to look below the surface of a transaction, or, as in this case, a sale of liquor, to discover its real nature. It may have a perfectly innocent form when we view it superficially, whereas, if examined more critically, its illegal character is clearly exposed. It is the function of the jury to make this investigation, and among other circumstances they may consider is the good faith of the party. If this were not true, the prohibition law might easily be evaded and flagrant violators of it would escape punishment. The law against the sale of liquor, which has received the pragmatic sanction of the Legislature, with the emphatic consent of the people, should be fairly and reasonably construed and strictly enforced according to their will as plainly expressed, leaving no chance or opportunity for its evasion and no loophole for the escape of the guilty. When a dealing in liquor is clearly within its prohibition, a conviction and an infliction of the penalty should follow; but, at last, the jury would find the facts and the court declare the law thereon.

(171) We have not considered the effect of the act of Congress, ratified 3 March, 1913, and known as the "Webb-Kenyon law," as we have disposed of the case upon other sufficient grounds, and therefore it would be supererogatory to do so. The cases of *S. v. Patterson,* 134 N. C., 612; *S. v. Long, ibid.,* 754; *S. v. Herring,* 145 N. C., 418; *S. v. Williams,* 146 N. C., 618, and *S. v. Burchfield, supra,* are not pertinent to the discussion of this case, in the view we have taken of it, as they were decisions upon intrastate sales, where the transactions were conducted wholly within this State. If the defendant imported the liquor for an illegal purpose, to wit, a sale in this State, the case might be brought within the terms of the Webb-Kenyon law, because, as consignee, he might have no right to make such a disposition of it. But the defendant was not indicted for importing liquor into the State for an illegal purpose, but for unlawfully selling it here. Whether it is within the constitutional power of the Legislature to prohibit the introduction into this State of liquor which is intended solely for private use or consumption, we prefer not to say, as it would be now a moot question, the Legislature not having passed any such general law. It would, therefore, be improper to express any opinion upon it in advance.

The motion to nonsuit, at the close of the evidence, was, therefore, properly refused, as was also the request to instruct the jury that they should return a verdict of not guilty.

No error.

CLARK, C. J., concurs in result on the following additional grounds:

1. Even if "the defendant had acted in good faith in purchasing the liquor in Virginia, for the mere accommodation of Pink Thorne," it would have been no defense, for Revisal, 3534, provides: "If any person shall unlawfully and illegally procure and deliver any spirituous or malt liquors to another he shall be deemed and held in law to be the agent of the person selling said spirituous or malt liquors, and shall be guilty of a misdemeanor and shall be punished in the discretion of the court." It had been held in *S. v. Taylor,* 89 N. C., 577, that "When a defendant purchases intoxicating liquors in good faith for another, as his agent, he is not guilty." It was to cure the mischief of this decision that Revisal, 3534, was enacted. This statute was sustained by *Brown, J.,* in *S. v. Johnston,* 139 N. C., 640, and by *Walker, J.,* in *S. v. Burchfield,* 149 N. C., 537, and even though the liquor was brought in from another State, *Vinegar Co. v. Hawn,* 149 N. C., 355.

2. If it be objected that, applying the above statute, the sale must be ascribed to Richmond, Va., to avoid this evasion the General Assembly enacted Revisal, 2080, which provides: *"Place of Delivery of Liquor, Place of Sale.* The place where delivery of any intoxicating liquor is made in the State of North Carolina shall be construed (172) and held to be the place of sale thereof." In *S. v. Patterson,* 134 N. C., 612, this statute was held constitutional, the Court saying (at p. 616): "It would be a vain thing to prohibit the sale of liquor in any designated territory if vendors a short distance off can at will fill orders coming from within the prohibition territory upon the judicial fiction that the sale is complete upon delivery to the carrier, who is construed as agent of the vendee. Whether it may or not require an act of Congress to make a similar change as to liquor shipped into prohibited territory from points outside the State in no wise affects the power of the State to so provide when the shipment is from another point in the State." This has now been done by the United States act, ratified 3 March, 1913, known as the "Webb-Kenyon" law.

S. v. Patterson, supra, was cited as authority, *S. v. Long,* 134 N. C., 754. In *S. v. Herring,* 145 N. C., 418, *Hoke, J.,* citing it, held: "The Legislature has the authority, and it is not unconstitutional, to make the place of delivery the place of sale in a county where the sale of spirituous liquor is prohibited." At that time the sale of liquor was prohibited in only a part of the State. In *S. v. Williams,* 146 N. C., 618, *Connor, J.,* said: "If the quantity of intoxicating liquor which any person, for any purpose, has in his possession, except those named in the act, is a public nuisance in Burke County, it is unquestionably in the power of the Legislature to make it criminal to carry it there."

In *S. v. Mugler,* 123 U. S., 623, it was held that the Legislature could prohibit anyone from manufacturing liquor, "though solely for his own use." If so, the Legislature can make it illegal to import it at all. If it has power to make it unlawful to sell it, it can make it unlawful to buy it for it is the same transaction. It is a vain thing to prohibit liquor being "manufactured" in a county if the Legislature is powerless to prohibit it from being "imported." If the act of the Legislature was powerless heretofore to prohibit the importation from another State, this has now been cured by the Webb-Kenyon law, which gives the State the same power as if the liquor had been manufactured in this State.

Independent, therefore, of the reasons so well given in the opinion of the Court in this case, the defendant should be held guilty; certainly this is so as to all "imports" since the passage of the Webb-Kenyon law. Our statute, Revisal, 2080, making the "place of delivery of liquor the place of sale," applies irrespective whether the place of origin is in another State or within this State. And Revisal, 3534, makes the person who procures it for the purchaser guilty of a misdemeanor.

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STATE v. JAMES KNOTTS, JESSE HELMS, HIRAM SIKES, AND WILL STAMEY.

(Filed 23 December, 1914.)

1. Criminal Law—Indictment—Sufficiency—Interpretation of Statutes.

Under the provisions of Revisal, sec. 3254, a warrant or indictment, etc., in criminal cases shall be sufficient in form if the charge against the prisoner is expressed therein in a plain, intelligible, and explicit manner, and they may not be quashed, or stay of judgment granted, by reason of any informality or refinement, if in the bill or proceedings sufficient matter appears to enable the court to proceed to judgment.

2. Same—Duplicity—Motions to Quash.

A motion to quash an indictment for assault because of duplicity will be denied when it appears on the face of the indictment that though the assault is charged as being made on two or more persons, it was committed by one and the same act; the remedy of the defendant, if any is available, being by proper application to require the State to elect or, perhaps, to sever the prosecutions.

3. Criminal Law—Intent—Deadly Weapon—Malice Presumed—Trials—Instructions.

From the intentional commission of a criminal offense, without just cause or excuse, the law will presume general malice, which will support a verdict of guilty; and upon trial for a secret assault with a deadly

weapon it is not error for the judge to charge the jury that malice would be presumed from the use of the weapon, and immediately thereafter that malice would be presumed from the intentional use thereof.

4. Criminal Law—Secret Assault—Common Design—Evidence—Trials.

On trial for a secret assault there was evidence tending to show that the several defendants were alone in the shadow of a deserted house in the night time, and seeing two policemen approach, who were unaware of their presence, one of them said to the others, "Let us kill them." One of the policemen, using a flashlight to see his way along, flashed it in the face of one of the defendants, who fired upon him, and this was seen by the other policeman following, but not by the one who was then shot, whereupon the other defendants, excepting one, firing from the dark, inflicted injuries upon the other policeman. *Held:* The defendants being together and aiding and abetting each other in pursuance of an unlawful and common design, were each guilty of a secret assault upon the policeman first shot, who did not see his assailant; and this applies, also, to the defendant thus engaged, who did not have a pistol or use one, as he is considered as having participated in the assault. Revisal, sec. 3621.

5. Criminal Law — Conspiracy — Inference — Circumstantial Evidence—Trials—Questions for Jury.

No direct proof of an agreement to enter into a conspiracy for an unlawful purpose is necessary, for the conspiracy may be perfected by the union of the minds of the conspirators; and the fact of conspiracy may be established by an inference of the jury from other facts proved—that is, by circumstantial evidence.

6. Criminal Law—Secret Assault—Common Design—Aider and Abettor—Evidence—Former Acts—Robbery.

There was evidence tending to show that all the defendants charged with a secret assault upon two policemen were together on the night prior to the time, under suspicious circumstances, and afterwards held up, with pistols, some Negro boys for the purpose of robbery, and that after the assault charged, one was active in looking after another one of them who had been shot. At the time of the assault this defendant was present with the others, but was unarmed and did not actively engage in the shooting which occurred. *Held:* The evidence tending to show a secret assault made by the other defendants was evidence against the one who was present but did not actively participate in the assault, and the evidence of the robbery was also competent against all the defendants upon the question of whether the design to commit the subsequent secret assault was common to them all.

7. Criminal Law — Defendants' Character — Presumptions—Trials—Remarks of Counsel—Appeal and Error.

Where the defendants in a criminal action have not testified as witnesses, it is correct for the trial judge to refuse to charge the jury, on their behalf, that the law presumed them to be men of good character; and where the prisoner's attorney in addressing the jury has urged upon them this erroneous proposition, it was not error to permit the solicitor, in reply, to argue that the defendants had not taken the witness stand and their attorney should not be permitted to claim that their character was good.

8. Constitutional Law — Unusual Punishment — Secret Assault — Appeal and Error.

The sentence of the court in this trial for secret assault is not objectionable as imposing an unusual or excessive punishment.

(174) APPEAL by defendant from *Shaw, J.*, at August Term, 1914, of MECKLENBURG.

The prisoners were indicted below for a secret assault on A. B. Moore and Neal Elliott, were convicted, sentenced to confinement in the State's Prison for terms ranging from four to fifteen years, and have appealed from the judgment to this Court.

The indictment charged that the four prisoners jointly committed the assault with pistols upon Moore and Elliott, shooting both of them. The prisoners moved to quash the indictment, because it charged a secret assault by all the prisoners upon two persons named in the bill, Elliott and Moore. The motion was overruled.

Owing to the character of the other exceptions, it will be necessary to set forth the evidence somewhat at large.

Neal Elliott, witness for the State, testified: "I was assistant chief of police of Charlotte when I was shot, on the morning of 18 July, 1914. I have known the defendant Sikes for two or three years, Knotts for five years, Helms for four or five years, and Stamey for five years. I
(175) was on duty that night. I had a call from Andy James. A. B. Moore and I went in an automobile to investigate the trouble. Call came about 12:30 a.m. Went on North Brevard Street, where it crosses S. A. L. Railway. Got there about 12:35 a.m. We hunted all over the neighborhood, but could not find the parties. We then crossed over the Norfolk Southern Railroad tracks, and approached the house in the angle between the Norfolk and Southern and Southern railways. This afterwards proved to be a vacant house, where the shooting occurred. Policeman Moore was in front of me about 5 feet, and had a flashlight, which he used in walking while we were approaching the house from the railroad fill, and flashed it in Sikes' face. (Witness here used a plat of the premises to explain his evidence.) Hiram Sikes said, 'Take that light out of my face,' and at once shot Moore down and shot at Moore two more times. I recognized Sikes by the flashlight in Moore's hands. I also recognized Will Stamey, who was standing by Sikes. I shot at them and they disappeared behind the end of the house, but ran around the house when the shooting began. Sikes and Stamey were to my left; at the same instant someone shot me from the right, 7 or 8 feet away. As I turned, Jim Knotts fired at me and struck me, and I shot at him. Helms then shot at me and I shot at him. I shot four times, and they disappeared around the east end of the house. I had no infor-

mation that Knotts and Helms were there until they shot at me. They were shooting so fast that I could not tell how many times they shot. This house was an old, unoccupied house. The house was between the two railroad fills, the Norfolk and Southern and the Southern. I recognized Knotts when his pistol flashed, and I recognized Helms when his pistol flashed. It was about a minute from the time of Sikes' shooting till Knotts and Helms shot. I was shot here (indicating a point just above the heart), and it came out about that far (indicating to the jury) from my backbone. The defendants were in the rear of the vacant house, the porch of which faces towards the fill from which we approached. I never saw Stamey shoot. So far as I could observe, Stamey had nothing to do with the shooting. Just standing there. I had seen Sikes before he shot, while the flashlight was in his face. I recognized him. I recognized his voice when he said, 'Take that flashlight out of my face.' I saw Stamey standing by Sikes, and I recognized him before any shooting. Helms shot at me, but did not hit me. I don't know who shot at me first, whether Knotts or Helms. I turned and then Knotts shot at me. Helms was standing when he shot. I don't know about Moore firing. I fired the first shot after Sikes shot Moore down. Sikes only shot at Moore and not at me. I was shown down after Jim Knotts shot me. I saw Helms shoot at me. Lloyd Hipp was the first man who got to me. Bob Malcolm was the second one. I know Jule Freeman. I don't know whether he was there. The last thing I remember, (176) they were taking me up the elevator at the hospital."

A. B. Moore, witness for the State, testified: "I was a policeman on the night of the shooting. In consequence of information received, Mr. Elliott and I went on North Brevard Street, near the S. A. L. Railway, looking for the parties reported by Andy James, who was supposed to be on the railroad, east of Brevard Street. We then went west and crossed the Norfolk and Southern Railway fill, when I saw the flash of a pistol and fell to the ground. I wasn't far from a house when I was shot. I had a flashlight, walking along with it. I did not see anyone before I was shot. (Witness here describes the wound, indicating that same was in his chest above the heart and ranged downward, going through his body in the center of the back.) The ball was found in my shirt. I did not recognize who shot me. One shot was all that I knew of, but I was also shot through the thigh. I was unconscious after I was shot. I do not recollect shooting any myself, but my pistol, I found after I regained consciousness, had been discharged; every shell was empty. I said to Elliott, 'I am shot,' and he said, 'I am shot, too,' and walked up on the bank. I never saw anyone there. I didn't hear anyone say, 'Take the flashlight out of my face.' I was carrying the flashlight

in front, using it to walk by. I do not know why I did not see Sikes. I do not know why I did not hear him say, 'Take the flashlight out of my face.' I cannot explain why Elliott, who was 5 feet behind me, could see Sikes and hear him when I did not. I do not remember shooting my pistol. It was a No. 38 pistol; all the cartridges in my pistol had been shot."

Lester Tucker, witness for the State, testified: "I am 20 years old. I have known Jim Knotts for fifteen years; Will Stamey for twelve years; Helms twelve or fourteen, and Sikes about twelve years. I live in North Charlotte with my father. Five blocks from my house is where the shooting took place. On that night before the shooting I saw all of the defendants on overhead bridge about 11:30. I saw pistol showing in the crowd. It was a .22 or a .32. I don't know who had it. Jim Knotts and Sikes were in the crowd. I heard the shooting. Then I dropped off to sleep. Soon Will Stamey came and waked me up. There was no one with him. He said a crowd over yonder had been shooting; said, 'Go over and see if the police got any of them.' We went to Seventeenth and Caldwell streets; saw Knotts, and I whistled to him. He came up and I asked him did they get any of them. He said, 'No, sir.' He said Hiram Sikes was shot. Knotts asked me to go with Stamey and get Sikes and bring him on down; called and whistled for Sikes, but could not find him. Knotts said to Stamey, 'Protect
(177) yourselves with pistol if anyone comes up.' The other two defendants I did not see till yesterday. I heard twelve or fifteen shots fired. I could tell difference in sounds of pistols. The first four or five shots sounded louder than the others. The other shots sounded like .22 or .32 pistols. The first shots sounded like a .38 or .44. Stamey told me he ran as the shooting began. Stamey was in his shirt sleeves and had no pistol."

Charlie Simpson, witness for the State, testified: "I lived at the time on Sixteenth Street; I know the night the shooting occurred. Saw Hiram Sikes Saturday morning, when wounded, about 10 o'clock. I saw him the night he was shot, about 2 o'clock a.m. He got to my house, called me; said come go a piece with him; 'I am shot,' he said; 'I got in shooting scrape.' I said, 'If I go with you, they might think I was in it.' And he said, 'Yes, you had better go back.' Sikes never said he shot anybody."

R. H. Moore, chief of police, witness for the State, testified: "I know defendants. I have known Helms one year and the others five or six years. On the morning after the shooting on 18 July, about 6 o'clock, defendant Helms was brought into my office. His clothing was wet with dew; a part of the legs of his trousers was wet. I asked him where

he had been the night before; he said he had been with Knotts and the other defendants in company with some others at the Caldwell bridge. Said he (Knotts), Stamey, and Sikes all left this crowd then. I asked him when he left. He said between 1 and 2 o'clock. I asked about the shooting. He said the defendants were all at this old house, and that the officers crossed the Norfolk and Southern Railway and were approaching them. He said that as they were crossing the Norfolk and Southern Railway, Knotts said, 'Yonder come two of them G—— d—— policemen; let's kill them.' And he said that, when the officers got down to them, Sikes told one of the policemen to take the light out of his face, and shot. Knotts was next brought into my office. He stated that he and the other defendants were the four at the old house when the shooting occurred. He said that Stamey did not shoot. He said that the three did the shooting from this side. I said something to him about being in trouble. He said that he was not in any greater trouble than he could come out of. I asked Knotts if they knew whom they were shooting at. He said he thought at the time it was McKnight and Orr, other policemen. He said he had nothing against Elliott; that Elliott had been nice to him. I next had a conversation with the defendant Sikes. I told him that Helms and Knotts had made a statement, and that Knotts said he (Sikes) was there. Sikes said he was shot by a policeman; that he got into a shooting scrape and got shot. Sikes said that they came on in front of him, and one of them flashed his light in his face and he shot him. I next had a conversation with Stamey. He said that he and the other defendants were there at the old (178) house. He said that the officers came, and Knotts said, 'Let's kill them'; that the policemen were coming over the fill of the Norfolk and Southern, and one of them, approaching the house, flashed his light in the face of Sikes and Sikes shot; Stamey said that he had no pistol; said that he ran around the corner of the house after Knotts and Helms began shooting."

Andy James (colored), witness for the State, testified: "I remember the night of the shooting. Me and Haywood McCoy went to Policeman Johnston about 15 minutes after 12. Me and Haywood McCoy were coming from an entertainment at the corner of Brevard Street and the Seaboard Railroad. Knotts walked out and stopped us and asked where we were going, and drove us down the railroad with a pistol. No one was with him then. He drove me down about a box car length further, and two other men ran out from 'ehind the box car. I did not know them before they got around us. They commenced searching us and Knotts grabbed Haywood in the collar and Stamey felt of my pockets, and then Sikes threw pistol across my shoulder in Haywood's face, and

the little fellow Stamey said, 'Let the niggers go on; they ain't got nothing.' I started on down the railroad; they still held Haywood there; then Helms came up the railroad cursing, and said, 'What are you doing here? If you haven't got nothing, you ought to have been going on.' I started on one side of the box car, started to run, and he shot. Bullets came over my shoulder."

On objection, the court instructed the jury that this evidence could only be considered by them as tending to show that the defendants were all acting together and in concert at the time the policemen were said to have been shot, and could be considered by the jury for no other purpose. Defendants excepted to this charge to the jury.

Andy James further testified: "I went to Huntley's store and waited for Haywood, and he brought my hat, and we went immediately to Policeman Johnston and told him, and he sent us to the police station. I then reported this to Chief Elliott, and he and Mr. Moore went out to hunt the men who had assaulted us, and we went with them to where the offense was committed, and the officers searched and could not find anyone, and they then told me to go on home. We were not cursing white folks when they stopped us. Neither of them put their hands in our pockets. They did not demand money or property from us. They felt my pockets and found out I had nothing and had no pistol. One of them says something about a pistol while patting my pockets; they made us run down the railroad."

The prisoners duly objected to evidence of the statements of the prisoners, or any of them, made to the officers. The court instructed the jury to consider these statements as evidence only against the
(179) particular one of the prisoners who made them, and not otherwise, if they found that, in fact, they were made.

After the introduction of the foregoing testimony the State rested its case. Each of the prisoners then moved to nonsuit the State, and particularly to nonsuit on the charge of secret assault, since there was a variance between the allegations and the proof offered in the trial. Motion overruled. The prisoners offered no testimony, and no further testimony was introduced by the State. The prisoners objected that the solicitor had argued that there was no presumption that the defendants were men of good character, that there was a presumption of innocence as to each defendant until his guilt was established beyond a reasonable doubt. This was in reply to an argument of prisoners' counsel that the prisoners were men of good character and that there had been nothing shown against their character. Their objection was overruled. The solicitor further argued, in reply to arguments of defendants' counsel that the defendants were men of good character and that there was noth-

ing shown against their character, and stated that as the defendants had not gone on the stand, under the law they were not allowed to argue that the characters of the defendants were good. Prisoners objected to this course of argument, and were overruled. The prisoners jointly and severally reserved exceptions to all of their overruled motions and objections. At the close of the evidence, after moving to nonsuit, they prayed, in behalf of each and all of them, instructions that the jury find each of the defendants not guilty generally, if they believed the evidence, or not guilty of a secret assault on Moore or Elliott. These special instructions were refused, although taken in due form and apt time. They also asked for an instruction that there is a variance between the allegations of the indictment and the proof. Refused. Exceptions were duly reserved to these refusals. Exceptions were also taken to the charge, which will be noticed hereafter.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Stewart & McRae for Stamey and Helms.

J. E. Little for Knotts.

Stack & Parker for Sikes.

WALKER, J., after stating the case: The motion to quash was properly disallowed. It was based upon the ground of duplicity in the indictment, as the defendants were charged therein with a secret assault upon two persons, Neal Elliott and A. B. Moore. Motions of this kind are not favored. "The courts usually refuse to quash on the application of the defendant where the indictment is for a serious offense, unless upon the plainest and clearest grounds, but will drive the party to (180) a demurrer, or motion in arrest of judgment, or writ of error," as the case may require. *S. v. Colbert,* 75 N. C., 368; Chitty's Cr. Law, p. 300; *S. v. Baldwin,* 18 N. C., 195; *S. v. Knight,* 84 N. C., 790; *S. v. Flowers,* 109 N. C., 841. The court *may* quash the indictment in the first instance, without requiring the defendant to plead, but this power is purely discretionary. Instead of dismissing it in this summary way, the court will leave the defendant to his other remedies, unless the defect be gross and apparent. *S. v. Baldwin, supra.* The statute provides that every criminal proceeding by warrant, indictment, information, or impeachment shall be sufficient in form for all intents and purposes, if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding sufficient matter appears to enable the court to proceed to

judgment. Revisal, sec. 3254. It is true that this Court held in *S. v. Nash,* 88 N. C., 618, that if one commits an indiscriminate assault, by one stroke, or pistol shot, upon two or more persons, it is an assault upon each and every one of them, following *S. v. Merritt,* 61 N. C., 134, and that an acquittal or conviction for the assault upon one was not necessarily a good plea in bar to a subsequent indictment for the assault upon the other, which was met by an able and vigorous dissent by *Justice Ashe;* but this does not establish the defendant's proposition, that the pleading is double if the State elects to indict for a single assault upon all. It is best for the defendant that it should do so, and decidedly to his advantage in at least one respect, which is that an acquittal or conviction will be a complete bar to any further prosecution for an assault upon each of the persons. If he is embarrassed in his defense by the joinder, or single prosecution, the court may, on proper application, require the State to elect, or perhaps to sever the prosecutions, treating the indictment as one in two counts for different offenses. 1 Bishop's New Cr. Law, sec. 442. No such motion was made in this case, nor do we think the facts, or a proper regard for the rights of the defendants, suggested that such a course should be taken. It is laid down that injuries inflicted on two or more persons by another's single act may be charged against the latter in a single count, for there is, or may be deemed to be, but one offense. Thus, a battery or murder of two or more persons may be alleged in one count. We have some authority contrary to this, but by reason and the better decisions, certainly if one bullet or one blow, or one wrongful impulse of any kind, or probably if one transaction, results in the injury or death of two or more persons, all may be alleged in one count as one offense. Where two, with intent to murder, commit a joint assault, the one with a knife and the other with a
(181) gun, they may be jointly held in one count. And if a man shoots at two, meaning to kill one, but regardless which, a single count may contain the full accusation. So a libel on more persons than one may be averred in one count, without rendering it double, if the publication is a single act. Many acts, if together they constitute but one offense, may be laid in one count. Thus, assault, battery, and false imprisonment may be charged in one count, because, though when separately considered they are distinct offenses, yet collectively they constitute but one offense. 1 Bishop's New Cr. Law (2 Ed.), secs. 437, 438. This principle, as thus stated in the textbooks, is supported by *Rex v. Benfield,* 2 Burrow, 980, 984; *Rex v. Giddings,* Car. and M., 436 (41 Eng. Com. Law Rep., 344 and star p. 634); *The King v. Jenour,* 7 Mod., 400; *Shaw v. State,* 18 Ala., 547; *Cornell v. State,* 104 Wise, 527; *S. v. Batson,* 108 La., 479; *Kannon v. State,* 78 Tenn., at p. 390, and cases

cited; *U. S. v. Wiseman,* 182 Fed. Rep., 1017; *Oleson v. State,* 20 Wise, 62; *People v. Milne,* 60 Cal., 71; *Rucker v. State,* 7 Texas App., 549, and authorities cited. These cases hold, and many others might be cited to the same effect, that an indictment for an assault or murder of two persons is good upon its face, for the assault or murder may be committed in the same degree, by one and the same act. A person may, by a single act, endeavor to accomplish two or more criminal results. In such a case there can be no doubt that if the indictment sets forth the act and the intent to commit the two or more offenses according to the fact, it will not be open to the objection of duplicity. There is but one attempt, though the object aimed at is multifarious. In *Regina v. Giddings, supra* (41 E. C. L. Rep., 344), an indictment, which consisted of but one count, charged the four prisoners with assaulting George Pritchard and Henry Pritchard and stealing from George Pritchard two shillings and from Henry Pritchard one shilling and a hat, on 14 May, 1842. It appeared that the persons assaulted were walking together when the prisoners attacked and robbed them both. A motion was made to put the counsel for the prosecution to his election, upon the ground that the count charged two distinct felonies; but the court held that, as the assaulting and robbing of both individuals occurred at the same time, it was one entire transaction, and refused the motion. The great weight of authority, and we may safely venture to add, the almost unanimous opinion of the courts and text writers, sustains this view. The case of *Rex v. Clendon,* 2 Strange, 870, which seems to be against it, was denied to be law in *Rex v. Benfield,* 2 Bunon, 984, and in other subsequent cases, until it may now be regarded as overruled and as no longer a precedent. See 93 Eng. Reports (Full Reprint), p. 905; 2 Hawkins Pleas of the Crown, ch. 25, sec. 89 (8 Ed.), p. 331. In Archbold's Cr. Pl. and Pr. (6 Am. Ed.), at side page 96, he says: "There is no objection to charging a defendant in one count with assaulting two persons when the whole (182) forms one transaction," citing *Rex v. Benfield,* 2 Burr., 984, an opinion by *Lord Mansfield, Chief Justice.* And Wharton's Cr. Law (7 Ed.), sec. 393, says that "A man may be indicted for the battery of two or more persons in the same count, or for libel upon two or more persons when the publication is one single act, or for a double homicide by one act, without rendering the count bad for duplicity." On the face of this indictment the assault appears to have been committed by one and the same act, and therefore to be taken as a joint one, upon a motion to quash, which is directed against the bill, as it is, and without adding thereto any extraneous facts. This exception, therefore, is overruled.

The defendants next complain of the instruction to the jury that "malice is presumed from the use of a deadly weapon," but this was not

all of what the judge said, for immediately he told the jury, "if you find beyond a reasonable doubt from the evidence that deadly weapons were intentionally used by the defendants in committing an assault upon the said Neal Elliott and A. B. Moore without reasonable excuse therefor, if you find that an assault was committed upon them by the defendants, the defendants will be presumed to have acted maliciously." The statute provides that if any person shall maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, in a secret manner, with intent to kill such other person, he shall be guilty of a felony and punishable by imprisonment in jail or the penitentiary for not less than twelve months nor more than twenty years, or by a fine not exceeding $2,000, or both, in the discretion of the court. Revisal, sec. 3621. It has always been understood that malice, as used in statutes describing an offense or a wrong, means, in its legal sense, a wrongful act, done intentionally, without just cause or excuse. If, without cause or provocation, a blow is given to a person, likely to produce death or great bodily harm, it is done of malice, because done intentionally and willfully, without any excuse. This is general malice, as distinguished from particular malice, which is ill will against a person, and is required to be shown under some statutes, but not where the act itself implies a bad motive or a wicked heart. This definition originated, we believe, with *Justice Bayley* in *Bromage v. Prosser,* 4 Barn. and Creswell, 255, and has been almost unanimously adopted ever since. It was applied to criminal offenses in a very lucid opinion by *Chief Justice Shaw* in *Com. v. York,* 9 Metcalf (50 Mass.), 93, who said: "In *Wills v. Noyes,* 12 Pick., 324, the court charged the jury that legal malice might differ from malice in the common acceptation of the term; that to do a wrong or unlawful act, knowing it to be such, constituted legal malice. This was affirmed by the whole Court, who say that whatever is done 'with a willful disregard of the rights of others, whether it (183) be to compass some unlawful end, or some lawful end by unlawful means, constitutes legal malice.' So, in a more recent case, *Commonwealth v. Snelling,* 15 Pick., 340, the Court, after noticing the legal and popular meaning of the term 'malice,' say, 'in a legal sense, any act done willfully and purposely, to the prejudice and injury of another, which is unlawful, is, as against that person, malicious.' " See, also, Foster's Crown Law, 256; Russell on Crimes (1 Ed.), 614, note, and *Com. v. York, supra,* where the reason for this law is fully explained. Citing 2 Starkie on Ev., 903, the Court there says that the word "malicious" imports nothing more than the wicked and perverse disposition with which the wrongful act is done—the *malus animus.* This definition of the term has been applied indifferently and indiscriminately to civil and

criminal wrongs, with some exceptions noted, of which this case is not one. In *Taylor v. State,* 74 Tenn., 234, the defendant was indicted under a statute for a malicious assault by stabbing another, and the Court held, upon an appeal from a conviction of the assault, that "Even if the case rested entirely on the testimony of the other witness, the existence of malice might be found in the use of a deadly weapon upon inadequate provocation, or upon a provocation brought about by the defendant with the purpose of using the weapon. *Nelson v. State,* 10 Hum., 528. The malice required to constitute malicious stabbing is malice in its common-law significance. The law presumes such malice from the stabbing, to rebut which the proof, either on the part of the State or the defendant, must show circumstances which, if death had ensued, would have mitigated the offense from murder to manslaughter, or excusable homicide, or left a reasonable doubt of the commission of the higher grade of crime." And many authorities sustain this view. 1 McLain's Cr. Law, sec. 121, says: "By the term 'malice,' as commonly used in criminal law, is meant in general simply the intention of doing a criminal act without justification or excuse, and it is for most purposes synonymous with criminal intent. It does not imply bad feeling toward, or desire to injure, any particular person." And again, at section 259: "Intent to kill is not necessarily an ingredient in a charge of malicious stabbing, and under such a charge the accused may be convicted, even though the circumstances show that death resulting from such an assault would be manslaughter and not murder, malicious intent being general malice and not malice aforethought. In such case malice against the individual is not essential, general malice being sufficient," citing *Nichols v. State,* 8 Ohio St., 435; *Taylor v. State,* 6 Neb., 234; *Tyra v. Com.,* 2 Metc. (Ky.), 1. See, also, *S. v. Schœnwald,* 31 Mo., 157; *S. v. Hambleton,* 22 Mo., 452; *In re Murphy,* 109 Ill., 31; *Com. v. Hicks,* 89 Mass. (7 Allen), 573. In *Davison v. The People,* 90 Ill., at p. 229, it is said that malice is "a formed design of doing mischief to another, (184) technically called *malitia præcognitata,* or malice prepense. It is either express, as where one with a sedate and deliberate mind and formed design kills another, which formed design is evidenced by certain circumstances discovering such intention, as in lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm, or implied, as where one willfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. Malice is always presumed where one person deliberately injures another. It is the deliberation with which the act is performed that gives it character. It is the opposite of an act performed under uncontrollable passion which prevents all deliberation or cool reflection

in forming a purpose. If, then, a person deliberately uses a deadly weapon on another, it must be inferred that it was malicious. If there was fixedness of purpose in its use, it could only be from malice. The deliberation excludes all other conclusions than that there was malice. It is not the mere use of the weapon that shows malice, but its deliberate use." And in *Com. v. Goodwin,* 122 Mass., at p. 35: "There is no authority for the proposition contained in the eleventh request, that the word 'maliciously' means a feeling of ill will, spite, revenge, and malice towards the person threatened. The willful doing of an unlawful act without excuse is ordinarily sufficient to support the allegation that it was done maliciously and with criminal intent." The Court then refers to the exceptions in regard to trespasses to property, punishable as malicious mischief, when cruelty or hostility or revenge towards the owner must be shown. It then concludes thus, at p. 36: "The act itself implies criminal intent, and there is no occasion, in construing the statute, to hold that, to create the offense, anything more is required than is implied in the usual definition of malice," citing *Com. v. Williams,* 110 Mass., 401; *Com. v. Waldin,* 3 Cush., 558. This definition of malice has been, we think, adopted by this Court. *Brooks v. Jones,* 33 N. C., 260; *S. v. Long,* 117 N. C., 791, where it is said to exist, in law, if the wrong is inexcusable, "general malice being wickedness, a disposition to do wrong, a black and diabolical heart, regardless of social duty and fatally bent on mischief." But there is a recent case which has an important bearing upon this question, where the prisoner was indicted for "maliciously, wantonly, and feloniously" burning a warehouse. *S. v. Millican,* 158 N. C., 617. He assigned as error that the judge had failed to define the word "wantonly" to the jury. *Justice Allen,* for the Court, said with reference to this feature of the case: "There was no suggestion in the evidence, nor do counsel contend here, that the fire may have been caused by the defendants accidentally, and under the charge of the court

(185) the jury had to find, in order to convict the defendants, that they agreed with Dempsey Wood, colored, to burn the warehouse, and that they at once carried out the agreement and deliberately set the building on fire, and if so, the act was of necessity wanton and malicious, and it could do not good to so describe it. In other words, his Honor would have been justified in charging the jury that, if they were satisfied that the defendants agreed to burn the warehouse, and that pursuant to that agreement they deliberately burned it, the act was wanton and malicious, and this is the only view presented to the jury upon which they could convict." Here the defendants, in plain violation of the law, a band of marauders, without any legal or moral excuse or justification, shoot down two officers of the law, who were at the time in the lawful

and rightful discharge of their duty, and in the nighttime, not only with implied but with manifest malice, to be gathered from the undisputed facts showing a most outrageous and vindictive criminal purpose to defy the law and resist its ministers even unto their death, and with every indication in their admitted acts of a wicked and diabolical motive, a disposition to do flagrant wrong, "being regardless of social duty and fatally bent on mischief." It was hardly necessary to discuss the technical question as to implied malice, but we might well have confined ourselves to the uncontroverted facts, which so clearly show particular malice, that it would have been harmless error if the judge had made any mistake in the part of the charge to which exception was taken. While it is true that the use of a deadly weapon in a sudden brawl may not necessarily imply malice, the use of one in a secret assault made in the darkness, and without a semblance of provocation, affords such convincing evidence of malice that to hold otherwise would be a repudiation of the plain and unanswerable logic of the facts. In this case, the lying in wait in the darkness, the sudden and unprovoked assault, the deadly character of the weapons employed, all disclose a bad and malignant purpose. *S. v. Long, supra.* If malice is implied from the use of a deadly weapon in murder, why not in an assault, when the plain intent is to kill, for the malice must, of course, exist at the time of the assault and does not depend necessarily upon the nature of the result, whether there ensues a homicide or only great bodily harm. It is the definite intent to kill without good cause or excuse, willfully and wrongfully executed, that fixes the malicious motive, as said in *S. v. Johnson,* 23 N. C., 354, and *S. v. Johnson,* 47 N. C., 247. If a party fires his pistol with intent to murder, can his intent be changed by the accidental failure of his purpose, or by a slight movement of the victim's body, so that the shot misses the vital mark and saves his life, though wounding him severely? The intent is formed before or immediately at the time of the act which is to be done. If the other view were allowed to prevail, the statute would become nugatory.

But *Rex v. Matthew Hunt,* 2 English Crown Cases (1 Moody), (186) 93, is precisely in point, the facts bearing a close likeness to those in this case. The prisoner was indicted upon a statute for a felonious and malicious assault, and was tried before *Mr. Justice Gasselee* at the Lent assizes for Cambridge, in the year 1825, for the offense, the specific intent charged being, in the three first counts, to prevent his apprehension for a larceny of the property of William Headley in the nighttime, and, in the last count, to do the prosecutor some grievous bodily harm. He had cut Richard Cambridge, a servant of Headley, who was assisting the latter in arresting him. There was a conviction, the jury finding

specially that he intended to do grievous bodily harm to anybody upon whom his blow might alight, though the particular cut was not calculated to do such harm. The wound of Cambridge got well in a week. The learned judge respited the sentence until the opinion of the judges could be taken, it having been contended by Pryme, his counsel, that there was no evidence of malice against Cambridge, who was cut, but against Headley only, and that upon the statute general malice was not sufficient, but it must be actual malice against the particular person; but *Lord Chief Justice Best* and *Littledale, J.*, held, upon grave consideration, "That general malice was sufficient under the statute, without particular malice against the person cut, and that if there was an intent to do grievous bodily harm, it was immaterial whether grievous bodily harm was done." It was also held that, "On an indictment for maliciously cutting, malice against the individual cut is not essential; general malice is sufficient; an intent to do grievous bodily harm is sufficient, though the cut is slight and not in a vital part; the question is not what the wound is, but what wound was intended."

This exception of defendants, therefore, is equally untenable. What is said in *S. v. Jennings,* 104 N. C., 774, an indictment for a secret assault, as to the necessity of proving actual malice of the defendant at the time he stabbed the prosecutor, is not in conflict with the view now expressed, as the language was used there with reference to the special facts of that case, for it appeared that the parties were then engaged in an affray, and the defendant "covertly" cut the prosecutor in the back. There was no deliberation or premeditation about it, but an act apparently inspired by sudden passion or fury during the fight.

There can be no doubt, in any view of the facts, that the assault was a secret one within the meaning of the statute. The defendants were assembled near an old empty house about midnight; they saw the policemen approaching, and one of them said, "Yonder comes two of them G—— d—— policemen; let's kill them," and Sikes fired two shots and "shot Moore down," and then fired two more shots. The light of Moore's lantern flashed in Sikes' face, when he said, "Take that light out
(187) of my face," and at once fired the first shot. Sikes was recognized by Elliott by the flash of the lamp in Moore's hand. Moore was evidently unconscious of Sikes' presence when the latter fired, and the court, at defendants' request, charged the jury that, if they believed the evidence, they should acquit Sikes of a secret assault on Neal Elliott, because he saw them by the flash of the lantern. But Knotts and Helms shot Elliott before he was aware of their presence, and if Sikes was present, aiding and abetting this assault, he is equally guilty with them, but he is surely guilty, with the others, of a secret assault upon Moore. They

were all concealed in the darkness and behind a house, when they opened fire, and Moore fell at the first shot, before he knew they were there or had any opportunity to defend himself. This case falls obviously within the intent and spirit of the statute, and also within its very letter. The attack was made under the cover of darkness and the defendants were as effectively concealed as if they had been lying in wait in an ambush. If the State's testimony is believed, the jury could well have inferred therefrom that this officer of the law, A. B. Moore, was shot down while acting in the discharge of his duties and when he was utterly unconscious of the presence of his assailants. This is all that is necessary to sustain an indictment for a secret assault, according to all the authorities, from *Jennings' case, supra,* to *S. v. Whitfield,* 153 N. C., 627. A. B. Moore testified that he did not see any of them before he was shot, nor did he hear Sikes say, "Take that flashlight out of my face."

It was contended that defendant Will Stamey was not guilty, as he took no part in the assault; but we think otherwise. He was there, furthering by his presence and his action, sympathy, and encouragement of the common design. If the defendants were banded together with a common purpose, and Sikes shot Moore when Moore was unconscious of his presence, then all would be guilty of a secret assault upon Moore. If in furtherance of the common purpose Knotts and Helms shot Elliott when he was unconscious of their presence, then all would be guilty of a secret assault upon Elliott. He who hunts with the pack is responsible for the kill. An aider and abettor, or an accomplice, is as guilty as he who fired the pistols and wounded the policemen.

"As the creeper that girdles the tree trunk, the Law runneth forward and back—
For the strength of the Pack is the Wolf, and the strength of the Wolf is the Pack."

And so the Attorney-General argued to us, as we think, correctly. Stamey was present, and while perhaps not as bold and aggressive as the others, and while his courage may have failed at the critical moment, he was equally a participant in the unlawful act. It is not necessary, however, that the accused should have been an original con- (188) triver of the mischief, for he may become a partaker in it by joining the others while it is being executed. If he concurs, no proof of agreement to concur is necessary. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete. This joint assent of minds, like all other facts of a criminal case, may be established as an inference of the jury from other facts proved; in other words, by circumstantial evidence. *Spies et al. v. People,* 122 Ill., 213;

2 Bishop Cr. Law, 190, and note 7. Individuals who, though not specifically parties to the assault, are present and consenting to the assemblage by whom it is perpetuated, are principals when the assault is in pursuance of the common design. *Spies v. People, supra,* at p. 225; Wharton on Homicide (2 Ed.), sec. 201; *Reg. v. Johnson,* 7 Cox's Cr. Cases, 357. "There might be no special malice against the party slain, nor deliberate intention to hurt him, but if the act was committed in prosecution of the original purpose, which was unlawful, the whole party will be involved in the guilt of him who gave the blow." Foster, p. 351, sec. 6. "Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any coconspirator in the accomplishment of the purpose in which they are all at the time engaged." *S. v. McCahill,* 72 Iowa, 111. It makes no difference at what time any one entered into the conspiracy (1 Greenleaf Ev., sec. 111); it may be, as we have seen, at any time before it is fully executed. But Stamey was a part of this assemblage at the very beginning, and to show that he was consenting to the unlawful acts and joined in the common design and was really an active participant, we need only refer to the fact of Stamey's conduct before, at the time of, and after the shooting took place. They had assaulted and "held up" on the highway, on the same night, two negroes, Andy James and Haywood McCoy. Andy James testified: "I remember the night of the shooting. Me and Haywood McCoy went to Policeman Johnston about 15 minutes after 12. Me and Haywood McCoy were coming from an entertainment at the corner of Brevard Street and the Seaboard Railroad. Knotts walked out and stopped us and asked where we were going, and drove us down the railroad with a pistol. No one was with him then. He drove me down about a box car length further, and two other men ran out from behind the box car. I did not know them before they got around us. They commenced searching us, and Knotts grabbed Haywood in the collar and Stamey felt of my pockets, and then Sikes threw pistol across my shoulder in Haywood's face, and the little fellow Stamey said, 'Let the niggers go on; they ain't got nothing.' I started on down the railroad; they still held Haywood there; then Helms came up the railroad, cursing, and said, 'What (189) are you doing here? If you haven't got nothing, you ought to have been going on.' I started on one side of the box car, started to run, and he shot. Bullets came over my shoulder." At the time Sikes fired his pistol at Elliott and Moore, Will Stamey was standing by his side, "in the thick of the fight," but did not shoot, if he had a pistol. Lester Tucker testified: "On that night, before the shooting, I saw all of the defendants on overhead bridge about 11:30. I saw pistol showing in

the crowd. It was a .22 or a .32. I don't know who had it. Jim Knotts and Sikes were in the crowd. I heard the shooting. Then I dropped off to sleep. Soon Will Stamey came and waked me up. There was no one with him. He said a crowd over yonder had been shooting, and to go over and see if the police got any of them. We went to Seventeenth and Caldwell streets; saw Knotts and I whistled to him. He came up, and I asked him did they get any of them. He said, 'No, sir.' He said Hiram Sikes got shot. Knotts asked me to go with Stamey and get Sikes and bring him on up to our house. Knotts gave Stamey a pistol and we went down, called and whistled for Sikes, but could not find him. Knotts said to Stamey, 'Protect youself with pistol if anyone comes up.'" This shows conclusively that he was there for the purpose of aiding and betting his comrades, and the jury so found. But defendants contend that the evidence as to what occurred when the negroes were assaulted was not competent against them, being a collateral transaction. But this is not the case. Underhill on Cr. Law, sec. 90, p. 113, disposes of the exception, for it is there said: "The fact that evidence introduced to prove the motive of the crime for which the accused is on trial points him out as guilty of an independent and totally dissimilar offense is not enough to bring about its rejection, if it is otherwise competent. Under this exception to the general rule, where facts and circumstances amount to proof of another crime than that charged, and it appears probable that the crime charged grew out of the other crime, or was in any way caused by it, the facts and circumstances may be proved to show the motive of the accused. Thus it may be shown that the victim of a homicide, for which the defendant is on trial, was a police officer, or other person engaged in investigating the circumstances of another prior and independent crime of which the accused was suspected." *Com. v. Ferrigan,* 44 Pa. St., 386; *Moore v. United States,* 150 U. S., 57. It was held in *Dunn v. State,* 2 Ark., 229, that testimony of a person's guilt, or participation in the commission of a crime or felony, wholly unconnected with that for which he is put upon his trial, cannot, as a general rule, be admitted. But where the *scienter* or *quo animo* is requisite to and constitutes a necessary and essential part of the crime with which the person is charged, and proof of such guilty knowledge, or malicious intention, is indispensable to establish his guilt, in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent is competent, (190) notwithstanding they may constitute in law a distinct crime.

Defendant Stamey was keeping bad company that night, giving them aid and comfort by his presence, which was by no means passive, and by his evident willingness, as all the evidence shows, to "see them out."

He was no casual or innocent onlooker, as his conduct, before and after the event, afforded sufficient ground upon which the jury might base a reasonable inference that he not only consented to, but participated in, the felonious assault. *S. v. Hildreth,* 31 N. C., 429; *S. v. Jarrell,* 141 N. C., 722; *S. v. Powell, ante,* 134, Being judged by his companions (*noscitur a sociis*), though not so ardent or violent as they were, not having used a deadly weapon and having fled at the crisis of the combat when danger was imminent, he still is as guilty as they, both in a legal and moral sense, and therefore must share their fate. The cases of *S. v. Kendall,* 143 N. C., 659; *S. v. Bowman,* 152 N. C., 817, and *S. v. Cloninger,* 149 N. C., 567, furnish analogies upon the question of his being an aider and abettor, or principal in the second degree. "The least degree of consent or collusion between the parties to an illegal transaction makes the act of one of them the act of the other," and suffices to show a conspiracy. *S. v. Anderson,* 92 N. C., 733, citing 2 Wharton Ev., sec. 1205, to which we add Underhill on Ev. (1898), sec. 491.

The characters of defendants were not involved, as they did not take the stand as witnesses in their own behalf, nor was there any evidence on that subject. It was said in *S. v. O'Neal,* 29 N. C., 251: "The rule is then established that no deduction results in law unfavorably or favorably to the character of an individual charged by an indictment from the fact that he has introduced no evidence to show he is a person of good character. The character, not appearing either good or bad, necessarily stands indifferent." See, also, *S. v. Danner,* 54 Ala., 127; *S. v. Spurling,* 118 N. C., 1250; *S. v. Castle,* 133 N. C., 769. The refusal to instruct that the law presumed defendants were men of good character was therefore correct.

The comments of the solicitor were made merely in explanation of an argument of defendants' counsel and was entirely proper. Defendants cannot complain of their own wrong in provoking the discussion, as they started it. There was no harm done, anyhow.

The punishment was not unusual or excessive, but was mild as to some of the defendants, and certainly not immoderate as to any of them. They conspired to take the life of the policemen, who were, at the time, acting strictly within the line of their duty, and in doing so committed a crime of grave enormity. Besides, there are other matters which show that they belong to the criminal class and that they were
(191) abroad that night for no good purpose, all of which the judge might well consider in awarding punishment.

We may say, before closing, that we have not overlooked the cases cited by defendants' learned counsel (who have defended them with great skill and ability) upon the question of duplicity in the indictment,

viz., *S. v. Hall,* 97 N. C., 474; *S. v. Cooper,* 101 N. C., 684; and *S. v. Harris,* 106 N. C., 683. There distinct and separate offenses, having no necessary relation to each other and committed between different parties, were joined in one count. Not so here, for this assault was committed by the same parties upon Elliott and Moore—quite a different case—and it is more like the other authority cited, *S. v. Wilson,* 121 N. C., 650, in which the present *Chief Justice* distinguishes them.

We have carefully examined and reviewed the record, and there is no error that we have been able to find by diligent search.

No error.

Cited: S. v. Bridges, 178 N. C., 738; *S. v. Connor,* 179 N. C., 755; *S. v. Pugh,* 183 N. C., 802; *S. v. Redditt,* 189 N. C., 178; *Elmore v. R. R.,* 189 N. C., 668; *S. v. Martin,* 191 N. C., 406; *S. v. Ridings,* 193 N. C., 786; *S. v. Beal,* 199 N. C., 294; *S. v. Lea,* 203 N. C., 26, 27; *S. v. Everhardt,* 203 N. C., 614; *S. v. Whiteside,* 204 N. C., 712; *S. v. Anderson,* 208 N. C., 782, 786.

STATE v. H. C. WILLIAMS.

(Filed 9 December, 1914.)

1. Evidence—Dying Declarations—Opinions—Collective Facts—Trials—Questions for Jury.

In cases of homicide, dying declarations of the deceased are frequently made under conditions rendering it impossible for the declarant to state the circumstances in connection with his death in detail, and making it necessary to receive his statement as evidence of a collective fact, in proper instances; and *it is held,* that where the defendant and the deceased went together into the home of the defendant, where the deceased was killed with a pistol, and immediately after the shooting the deceased crawled from the house to the porch and fell to the ground and there made his dying statement that the defendant had shot him without cause, the statement is not objectionable as the opinion of the deceased, but competent as his statement of the fact, which at least should be submitted to the jury, under proper instructions when there is doubt whether the statement was the declarant's opinion or his statement of the fact.

2. Appeal and Error—Instructions—Presumptions.

The presumption is in favor of the correctness of the charge given to the jury by the trial judge, when his charge is not sent up in the record.

3. Appeal and Error—Objections and Exceptions—Unanswered and Leading Questions.

Where the defendant is on trial for homicide, and a witness has given his testimony, stated by him upon examination of the court to be all he

knew of the circumstances connected with the case, his statement will be taken as conclusive, nothing else appearing; and *it is further held* that the exceptions by defendant to the exclusion of unanswered questions in this case will not be held for reversible error, the questions being objectionable as leading and it not appearing what facts would have been elicited had they been answered.

4. Homicide—Trials—Evidence—Corroboration—Testimony Before Coroner—Appeal and Error—Harmless Error.

The defendant upon a trial for murder introduced the written testimony of his witness given before the coroner to corroborate his evidence given on the trial, some of which was not admitted by the trial judge, who held that the part excluded had not been testified to on the trial, and upon a comparison made in the Supreme Court on appeal, *it is held* no reversible error was committed, it appearing that, if erroneous, the excluded evidence was insufficient to furnish grounds for a new trial of the case.

5. Homicide — Self-defense — General Character for Violence—Previous Declarations of Deceased.

Upon the question of self-defense arising under the evidence on a trial for homicide, the general character of the deceased for violence is admissible in proper instances, and there is well considered authority that evidence of his acts of violence coming under the defendant's observation or of which he has been informed by the deceased is also competent; but where there is no evidence of this general character of the deceased for violence, or that the prisoner believed him to be a dangerous man, or stood in fear of him, and there is ample evidence to the contrary, the exclusion of the defendant's offered testimony that the deceased told him he had had a fight with a man in a hotel in Richmond, and had stabbed him twice, without further narration, or giving the time of its occurrence, will not be held for reversible error; and *it is further held* that the conduct of the deceased in stabbing the man, had it occurred, is not necessarily evidence of violence or of unlawful conduct.

6. Homicide—Evidence—Dying Declarations—Impeachment.

Where, upon a trial for murder, dying declarations of the deceased are admitted, they should be received as the testimony of any other witness, and their weight and credit are for the jury, and where they are sought to be impeached by the defendant's evidence, it is competent to corroborate the declarations by evidence of the good character of the deceased or by showing that he had made other similar statements.

7. Homicide—Drunkenness—Evidence—Corroboration.

When, on a trial for murder, testimony is competent which tends to show that the defendant was drinking at the time, evidence that he was playing, laughing, and scrambling in a store several hours before the homicide is competent as corroborative.

8. Homicide—Trials—Argument to Jury—Extrinsic Matters—Appeal and Error.

Where on a trial for homicide with a pistol the defendant has testified as to the place and relative positions of himself and the deceased, and expert witnesses introduced by the State have testified as to the range of the

bullets and their effect, etc., it is not error for the trial judge not to permit the defendant's attorney, in addressing the jury, to demonstrate by any disinterested witness in the courtroom that the expert witnesses introduced by the State corroborated the defendant's testimony; for while counsel should comment on the evidence, it does not include the right to introduce new elements into the trial, which rests largely in the sound discretion of the trial judge.

WALKER, J., dissenting.

APPEAL by defendant from *Shaw, J.*, at July Term, 1914, of (193) MECKLENBURG.

The defendant was indicted for the murder of Dillard Hooker. When the case was called for trial the solicitor did not put the defendant on trial for murder in the first degree, but asked for a conviction of murder in the second degree or manslaughter.

The defendant admitted the killing of Hooker with a pistol, and relied on the plea of self-defense, contending that he was justified in shooting the deceased on the ground that, at the time he shot, he was in danger of being killed himself or of receiving great bodily harm by the deceased.

The homicide occurred in the home of the defendant. There was evidence of a difficulty in the yard of the defendant; that the deceased and defendant went into the home of the defendant, where the deceased was shot; that immediately after the shooting the deceased crawled from the house onto the porch and fell to the ground, and there made his dying statement.

Evidence was introduced by the defendant in support of his plea of self-defense.

The defendant was convicted of manslaughter, and appealed from the sentence pronounced thereon.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Stewart & McRae for defendant.

ALLEN, J. The exceptions relied on and discussed in the briefs are to the exclusion and reception of evidence.

(1) Was the dying declaration of the deceased, that the defendant shot him without cause, competent?

The objection is to the latter part of the declaration, "without cause," and its admissibility depends on whether it is the estimate or opinion of the deceased of the conduct of the defendant or the statement of a fact.

If the former, it ought to have been excluded, and if the latter, it was properly admitted.

Dying declarations are received in cases of homicide from necessity, as otherwise many criminals would escape punishment, and they are frequently made under conditions which render it impossible for the declarant to state the circumstances in connection with the killing (194) in detail, and make necessary the acceptance of a statement in the form of a collective fact.

The facts here illustrate such conditions. The declarations of the deceased were made within a few minutes after the fatal shots were fired, while he was in a dying condition and apparently not able to give a minute and extended account of all the circumstances.

Mr. Chamberlayne in his valuable treatise on the law of evidence says (Vol. 4, secs. 2849 and 2853):

"If the judge is able rationally to conclude that a fact stated in a dying declaration is, in reality, one of the *res gestæ,* it will not be rejected because it takes the form of statement appropriate to the assertion of an act of reasoning. . . .

"A sufficient administrative necessity for accepting an inference or conclusion in a dying declaration is furnished where a large number of minute phenomena, often so intangible and interblending as to forbid effective individual statement, are given by the declarant in the form of a 'collective fact,' often the only way in which a speaker can well express himself. Thus, a declarant may properly state that a given shooting was an 'accident' or that he had been 'butchered' by the malpractice of a doctor, and so forth. Even where a considerable element of voluntary or intentional reasoning is present, the declaration may simply amount to the statement of a fact in a vigorous and striking way, summarizing a number of facts in a single vivid expression, *e.g.,* 'He shot me down like a dog.'"

In 21 Cyc., 988, many cases are cited in the note in support of the text, that: "A dying declaration by the victim of a homicide that the act was without provocation, or words of a like import, although very general, is as a rule held admissible as the statement of a collective fact and not a mere conclusion."

In *White v. The State,* 100 Ga., 659, the Court declares that: "The rule of law is that a dying declaration to be admissible must consist of a statement of a matter of fact, and a declaration which amounts to the mere expression of an opinion by the person making it should not be received in evidence. In the course of our examination of the authorities upon that subject we find a well reasoned case cited in the second volume of Taylor on Evidence, p. 470, sub-page 16, in which the doctrine is stated as follows: 'The declarant should state facts rather than conclusions.' *McBride v. People,* 5 Col. App., 91 (1894). 'Where a

declarant, however, used the expression, "He shot me down like a dog" (which is the identical expression complained of), the expression was held to be admissible. Declarations of a party *in extremis,* in order to be admissible, must be as to facts and not conclusions. They are permitted as to those things to which the deceased would have (195) been competent to testify if sworn in the case. But I do not think the expression of the deceased a conclusion. It was given as a part of his narrative relating to the affair, and I think it was merely intended to illustrate the lack of provocation and the wantonness in which the appellant did the act. It was descriptive of the manner in which the act was committed. It conveyed the idea that the appellant disregarded the claims of humanity, and, without giving him any warning, shot him. It was the statement of a fact made by way of illustration.' *S. v. Saunders,* 14 Ore., 300 (1886). So as to the declaration, 'It was done without any provocation on his part.' *Wroe v. State,* 20 O. St., 460 (1870). Or that deceased was 'butchered.' *S. v. Gile,* 8 Wash., 12 (1894). In the case of *Darby v. The State,* 79 Ga., 63, the dying declaration made by the deceased, that the defendant had cut him, and that he had done nothing to cause it, was objected to for the same reason as that urged in the present case against the admission of the declaration now under review; and it was held that the objection to its admission upon the ground that it stated a conclusion rather than a fact was properly overruled."

Where a decedent was asked what reason, if any, a man had for shooting him, and responded "Not any, that I know of," this was held to be admissible. *Boyle v. State,* 97 Ind., 322.

A dying declaration by a deceased person that he made no attempt to injure accused is admissible, being a statement of fact. *Lane v. State,* 151 Ind., 511.

The statement of deceased that "he was not doing a thing" is the statementt of a fact. *Pennington v. Com.* (Ky.), 68 S. W. Rep., 451.

A dying declaration, "S. cut me. He cut me for nothing. I never did anything to him," is not incompetent, as an opinion. *Jordan v. State,* 82 Ala., 1; *Sullivan v. State,* 102 Ala., 135.

A fact and not an opinion is stated in a dying declaration: "I have been stabbed by a man that I had no reason to expect a shot from. He had no reason to shoot me. There was no offense given." *S. v. Black,* 42 La. Ann., 861.

A statement that "They had no occasion to shoot me" is a statement of fact and not a mere inference or opinion of decedent. *Pierson v. State,* 21 Tex. App., 14.

The decisions in our own Court are to the same effect. In *S. v. Mills,*

91 N. C., 581, the declaration was "He shot me for nothing," and in *S. v. Watkins,* 159 N. C., 480, "I have done nothing to be shot for," and both declarations were held competent, and in the last case, *White v. State,* 100 Ga., 63, from which we have quoted, was cited with approval.

The two relevant facts within the scope of the dying declaration were that the defendant shot the deceased, and as to the conduct of the
(196) deceased, and if the killing was unprovoked and the deceased did nothing, there was no other way to describe his conduct except by saying so, "I did nothing," and the expression, "without cause," is but another form of conveying the same idea.

If, however, it was doubtful whether the declaration was the opinion of the deceased or the statement of a fact, it ought to have been received, and submitted to the jury under proper instructions *(S. v. Watkins, supra),* and as the charge is not in the record, and there is no exception to it, we would assume that the jury was fully informed as to its duties.

We are therefore of opinion there is no error in admitting the dying declaration.

(2) The defendant introduced S. C. Ross as a witness, who testified to a difficulty between the deceased and the defendant in the yard of the defendant, a short time before the killing. After making a statement purporting to cover what he saw and heard, he was asked five or six questions by the defendant, which were excluded.

The court then inquired of the witness:

Q. Do you recall anything you have omitted in your testimony? A. Yes, sir; one thing.

Q. All right. A. In driving up to where the men were, I saw Hooker come back on him and strike; I could not see whether he hit him or not, but Mrs. Williams caught his arm.

Q. Is that all? A. Oh, he kept on insisting there, trying to have Williams acknowledge he could kill him.

Q. You have told that before; anything that you have omitted that Hooker said or did? A. That is all.

The questions excluded were objectionable as leading, or there was a failure to show what facts would be elicited by permitting them to be answered, and in either aspect cannot constitute reversible error, and the examination by the court is also conclusive that the witness told all he knew.

The defendant also introduced the testimony of this witness before the coroner as corroborative evidence, which was admitted, except certain parts which, in the opinion of the court, were not testified to on the trial.

Counsel for the defendant in their brief institute a comparison between

the testimony of the witness before the coroner and upon the trial, as follows, the part excluded being in parentheses:

(1) Before the coroner, S. C. Ross testified that Hooker said: ("Damn you! I am going to kill you.") In the trial, S. C. Ross testified: "He kept on trying to make Mr. Williams acknowledge that he could kill him, and Williams did not say anything, and Hooker says, 'Damn you! I am going to kill you.' "

(2) Before the coroner, S. C. Ross testified: ("I told Hooker (197) to leave; that he was giving Mrs. Williams a lot of trouble.") In the trial, S. C. Ross testified: "Hooker came right along with us, and I says, 'You had better leave here, Hooker.' I asked Hooker to leave Williams and let him alone, but he went back to the bed."

(3) Before the coroner, witness Ross testified: ("Hooker was drunk, too, but not so helpless as Williams.") In the trial he testified: "Williams was, I considered, very drunk. Seeing the condition of the two men, I was afraid they would get into trouble again. Both men were drunk."

(4) Before the coroner, witness Ross testified: ("Hooker said, 'Yes, damn you, I could have killed you with the hold I had.") In the trial, witness Ross testified: "Hooker kept on trying to make Mr. Williams acknowledge that he could kill him."

(5) Before the coroner, witness Ross testified: ("I went to Mr. Shinn's and told him they were fighting.") In the trial, he testified: "I got in the buggy, and we went on home. We stopped at Mr. Shinn's, and I told him that Williams and Hooker had been fighting."

The first and most important of these comparisons is not sustained by the record, which shows that the witness testified on the trial that Hooker said "Damn you! I can kill you," and not "Damn you! I am going to kill you," and as to the others there is a substantial difference except as to the last, and as to that the witness said at the trial, in addition to the statement before the coroner, that he told Shinn that they were both drunk and Mrs. Williams was not able to take care of them.

If the excluded parts had been omitted, they would have afforded as many reasons for criticising the witness as for sustaining him, and are not of sufficient importance to justify disturbing the verdict.

(3) The defendant introduced evidence tending to sustain his plea of self-defense, and, while on the witness stand, offered to testify that the deceased "had told him prior to this time that he had a fight with a man in a hotel at Richmond and had stabbed him twice," which was excluded.

It is well established with us that evidence of the general character of the deceased for violence is admissible in cases of homicide when there is evidence of self-defense (*S. v. Turpin,* 77 N. C., 473; *S. v. Blackwell,*

162 N. C., 672); and there is also authority for the position, and with good reason, that the defendant may also offer evidence of acts of violence coming under his personal observation or of which he has been informed by the deceased (21 Cyc., 960; *People v. Harriss,* 95 Mich., 90; *United States v. Dansmore,* 75 Pac., 33; *S. v. Shadwell,* 22 Mont., 559; *S. v. Sale,* 119 Iowa, 3; *People v. Farrell,* 100 N. W., 264; *S. v. Beird,* 118 Iowa, 478; *Poer v. State,* 67 S. W., 501; *People v. Rodswold,* 177 N. Y., 425); but the evidence excluded does not come within either principle.

(198) The statement that he had a fight and stabbed his opponent twice is consistent with lawful conduct, and is not necessarily evidence of violence. In this case the defendant shot the deceased four times, and he insisted before the jury he had done no wrong.

There was no offer on the part of the defendant to tell all the deceased said, nor that no other statement was made by him.

It is not probable the deceased said, "I had a fight with a man in a hotel at Richmond and stabbed him twice," and nothing more, and he ought at least to have offered to detail the conversation or to say there was none.

There was no offer to prove the general character of the deceased for violence, and all the evidence introduced was that his character was good.

The time of making the statement is not given. It was prior to the homicide, but how long before?

This is material in determining its effect upon the mind of the defendant, and particularly so when it appears that the deceased had boarded with the defendant, and that they were friends up to the fatal encounter.

The defendant did not offer to prove that he believed the deceased to be violent, that he was in fear of him, or that the statement which he says was made to him entered in any way into his right of self-defense.

In the absence of some evidence of this character, a new trial should not be ordered on account of the refusal of the court to admit a statement, which could only be competent as evidence of violent disposition and that defendant knew it, when the statement is consistent with lawful conduct, the time and circumstances under which it was made are not given, the defendant did not offer to prove he believed the deceased to be violent or that he acted upon the statement, and he offered no evidence of his general character for violence.

These are the exceptions chiefly relied on, but we have considered all that are presented in the brief of counsel.

The dying declaration of the deceased was impeached by the evidence of the defendant, and it was therefore competent to corroborate it by evidence of good character or by showing that he had made other similar

statements. 21 Cyc., 994; *S. v. Thomason,* 46 N. C., 274; *S. v. Blackburn,* 80 N. C., 474.

The dying declarations of the deceased in a homicide case are received as the testimony of any other witness, and their weight and credit is for the jury. *S. v. Davis,* 134 N. C., 633.

"The same tests to determine their trustworthiness are applicable as are applied to the statements of a witness under examination on oath." Wharton's Criminal Evidence (10 Ed.), sec. 298.

The evidence of the witness Beatty that the defendant was playing and laughing and scrambling in a store several hours before the homicide was properly admitted to show the condition of the (199) defendant, it being in evidence that he was intoxicated; and the evidence of Brady was competent for the same purpose, to which it was restricted by the court.

There is nothing in the record to indicate what would have been the answer of the witness Norris to the question propounded to him, and for that reason the exception based on the refusal of the court to allow him to answer cannot be considered. *S. v. Leak,* 156 N. C., 643.

The last exception is that, in his argument to the jury, one of the counsel for the defendant proposed to take some disinterested person in the courtroom and demonstrate before the jury on that person the positions that the defendant and the deceased were in at the time of the shooting, as testified to by defendant, in order to show that the wounds would have been inflicted in the body of the deceased at the place and would have had the range or direction which they had as testified to by the doctors.

The defendant Williams, while on the stand as a witness in his own behalf, demonstrated before the jury the position he, the defendant, was in, and the position Hooker, the deceased, was in, and the way Hooker had hold of him when he fired the shots.

We cannot see in this that the defendant has been deprived of any substantial right.

The defendant was permitted to make his demonstration before the jury as a part of his evidence, and it then became the duty and right of counsel to comment on the evidence, but not to introduce new elements. Matters of this kind are left to the sound discretion of the presiding judge.

No error.

WALKER, J., dissenting: Being convinced, after a careful examination of the record, that material errors were committed at the trial, which prejudiced defendant, I cannot concur in the disposition of this

case. I will advert to only two or three rulings which I regard as erroneous.

It was important to the defendant that he confirm the testimony of the witness S. C. Ross, and he was entitled, for this purpose, to the entire examination of the same witness taken before the coroner, or at least to so much of it as tended to corroborate him. I cannot adopt the view of the Court in regard to this testimony. In several material respects there was substantial agreement between said examination and the witness' testimony before the court. This can easily be shown by a simple comparison of the two examinations; but my purpose is not to enter upon a minute consideration of the case, except as to one of the questions
(200) presented. As to the others, I merely state the grounds of my dissent without discussion. I cannot agree that the general trend of the testimony taken by the coroner, which the court excluded, was against defendant, and that its rejection, therefore, became harmless.

There was error, in my opinion, in permitting the witness W. S. Brady to testify that the defendant was drinking a few hours before the homicide was committed, and drew a gun on him, or pointed it at him. The solicitor stated that this testimony "was offered to show that the defendant was in such a drunken condition that he was liable to draw a gun on anybody and shoot them." The prisoner objected to the testimony, and excepted when his objection was overruled, and the testimony was admitted by the court. The witness Brady then testified, substantially, that an hour or more before the deceased was killed he stopped at the prisoner's store to leave a milk can, and when he returned for the milk can, and after some conversation with him, the prisoner asked witness to take a drink, and referred to a Mr. Myers, and he cursed a little. Witness then went to pick up the lines which his mule had jerked from his hands while he was talking to the prisoner, and as he was doing so the prisoner said, "Look out! Brady," and aimed his shotgun at him, and Mr. Hooker jerked prisoner back into the store. With reference to this testimony the court said, at the time the prisoner objected to the answer of the witness: "The court admits the evidence only, and it can be considered by the jury only, for the purpose, 'as bearing upon the condition of the defendant at that time, the witness having testified that the defendant was under the influence of intoxicating liquors.' This evidence is admitted only in corroboration of and bearing upon his testimony as to the condition of the defendant at that time, and the jury are so instructed." The witness had stated that, at the time he saw the prisoner, when he returned for the milk can, "he was under the influence of whiskey," at about 4:30 in the afternoon of 17 May. The only bear-

ing of this evidence upon the case would be to show, as the solicitor frankly admitted, that the prisoner, being under the influence of liquor, was "liable to use a gun," from which it might be inferred by the jury that he did use a gun and killed the deceased without sufficient legal excuse. For this purpose it was, to my mind, clearly incompetent and greatly prejudicial to the prisoner, as he introduced strong evidence to prove that he acted strictly in self-defense and under much provocation from the deceased on the prisoner's own premises and in the presence of his wife, who tried to induce him, in an entirely proper manner, to leave and avoid any further quarreling between him and her husband. Whether the prisoner's evidence was true or not, his wife told a very consistent and natural story of the altercation between Dillard Hooker and her husband, but it may have been discarded by the jury for the reason that Brady testified that he was drinking an hour or (201) so before the killing took place at the home of the prisoner, and therefore was "liable to use a gun." Where evidence is conflicting and the question of guilt becomes a close one, the slightest circumstance may turn the scales against the prisoner. The court admitted the evidence to corroborate the previous statement of the witness W. S. Brady, that the prisoner was drinking at 4:30 o'clock the same afternoon. In other words, his evidence as to what occurred at the store, including the handling of the gun, was allowed to be considered by the jury as tending to show that he was drunk. Well, suppose he was; how does the fact affect the question of his guilt, unless it is used for the purpose of asking the jury to infer that, being under the influence of liquor, he was apt to use a gun afterwards and kill the deceased, without just cause? It was not necessary in order to prove merely that he killed the deceased, for that fact was not only testified to by all the witnesses, but admitted. It could only have the effect of proving, beyond that fact, that the killing was apt to be unjustifiable, and especially is this so in view of what was said by the solicitor at the time he offered the testimony as to his purpose in doing so, the influence of which remark upon the jury was not explicitly or sufficiently removed by the court, in what it afterwards said, and after the answer of the witness had been given. We cannot be too careful to guard the rights of the prisoner under such circumstances, and especially where there is decided testimony as to his innocence, that is, that the act of killing was excusable in law, as done in self-defense. In the absence of a full and proper caution, the jury might well have concluded, from the remark of the solicitor, even when considered with the statement of the court restricting, to some extent, the use of the testimony, that the evidence had the tendency of showing that the prisoner used his gun at the house and killed the deceased without

sufficient cause. Such a remark as that, coming from the solicitor, must have made a deep impression upon the jury, not only because it emanated from him as the prosecuting officer, but because he was right when he thought and said that the testimony could only have the bearing indicated by him. Conceding the soundness of the principle, that evidence of intoxication, at the time of the homicide, may be competent and relevant under certain circumstances, the manner in which the testimony admitted in this case was introduced, without properly safeguarding the prisoner's rights in respect to it, was calculated to divert the minds of the jurors from the true issue to irrelevant matters, and, therefore, to prejudice the prisoner. I do not think that the caution of the judge was sufficient in this respect.

There was testimony of defendant's wife as to his condition just before deceased came to his house, which should have been admitted, especially in view of the evidence of the State as to his condition at the (202) time of the homicide and before that time. For these reasons, and others that might be added, I must withhold my assent to the conclusion of the Court.

I am not prepared to say that the dying declaration was admissible. If a man states that another man has shot him "for nothing," or "without cause," it is equivalent to a charge that he murdered him, and is an expression of an opinion as to the degree of the homicide, for a shooting "for nothing" or "without cause" is murder. But I do not place my dissent upon this ground, though I think the principle is well settled that the dying declaration must be confined to *facts* connected directly with the homicide, and that opinions or conclusions are incompetent and prejudicial.

This Court said in *S. v. Jefferson,* 125 N. C., 712: "The general rule is that testimony, before it is received in evidence, shall be on the oath of the witness and subject to the right of cross-examination. The nearness and certainty of death are just as strong an incentive to the telling of the truth as the solemnity of an oath, but you cannot subject the deceased and what he said as a dying declaration to the test of cross-examination. The exception to the general rule of evidence, therefore, in regard to dying declarations rests upon the grounds of public policy and the necessity of the thing. And as the exception can only be sustained on the grounds above mentioned, such evidence is restricted by the law to the act of killing and those facts and circumstances directly attending the act and forming a part of the *res gestæ,*" citing *S. v. Shelton,* 47 N. C., 360. And Underhill on Cr. Evidence, secs. 108 and 109, thus states the rule: "The declarations should not contain matter which would be excluded if the declarant were a witness. He is beyond the

reach of cross-examination to ascertain the grounds upon which his opinion may be based, and other reasons may exist which would exclude his opinion if he were a living witness. Opinions in dying declarations are inadmissible. It is indispensable that the dying declaration should consist solely of facts, and not of conclusions, mental impressions, or opinions. Thus, a statement that the deceased thought or believed the accused had shot him, or that he expected the accused would try to kill him, is inadmissible where the deceased did not see his assailant, but based his declarations wholly upon threats which had been made by the accused. But opinions in dying declarations are admissible whenever they would be received if the defendant himself were a witness. . . . The declaration is admissible only so far as it points directly to the facts constituting the *res gestæ* of the homicide; that is to say, to the act of killing and to the circumstances immediately attendant."

And the same phraseology is substantially used in 3 Rice on Evidence, p. 536: "Matters of mere opinion are inadmissible. Where the declarant merely states his opinion as to the cause of an injury, and such statement would not be received were the declarant sworn as a witness, it is equally inadmissible as a declaration *in articulo* (203) *mortis*. In such cases the familiar rule obtains the ascendancy, that the witness must testify to facts and not emit mere opinion," citing *Binns v. State,* 46 Ind., 311; *Wroe v. State,* 20 Ohio St., 460; *Whitley v. State,* 38 Ga., 50. And again at p. 537: "Declarations of the deceased, made when *in extremis,* which are not statements of fact which a living witness would have been permitted to testify to, but are merely expressions of belief and suspicions, are not competent evidence," citing *People v. Shaw,* 63 N. Y., 36. Refering to the dissenting opinion of *Mr. Justice Zollars,* in *Boyle v. State,* 105 Ind., 469 (55 Am. Rep., 218), Mr. Rice says, at pp. 537, 538: "Much of the foregoing discussion is embodied in the dissenting opinion of *Mr. Justice Zollars* of the Indiana Supreme Court of judicature in the case of *Boyle v. State,* 105 Ind., 469, 55 Am. Rep., 218, decided in 1885. It is seldom, indeed, that any opinion is so critical in its analysis, so exhaustive in its citations, or so logical in its conclusions. Any discussion of this subject which omits a careful consideration of this case must be regarded as grossly imperfect. The principal opinion was delivered by *Mr. Justice Elliott.* It is a very ingenious argument in favor of the prevailing view. But while perfectly aware that my function as a text-writer will not tolerate the least attempt to make a law, I submit the dissenting opinion of this exceedingly able Court contains the statement of the better view, both upon principle and authority." He further says, at p. 536, that decisions may be found which apparently support the contention that dying

declarations are admissible which were not clearly restricted to a statement of the vital *facts* immediately connected with the homicide, for the purpose of proving the *corpus delicti,* but which seemed also to contain an expression of opinion upon the facts; but he examines some of the cases and shows that they were dependent upon peculiar facts not directly involving the question, and were really admitted only to prove the *corpus delicti;* and in this connection he states that one feature of this peculiar grade of evidence must be clearly outlined. The *nisi prius* courts upon which ordinarily devolve, in the first instance, the trial of those cases which present questions as to the admission of dying declarations, are frequently misled, by the conflict in adjudication, and the plausibility of argument, into the admission of evidence that represents a conclusion or opinion of the declarant. And in *Shaw v. People,* 3 Hun., 372, it was said to be even more important to exclude an opinion, declared *in articulo mortis,* than in an ordinary case, where the witness may be subjected to a cross-examination and other tests to appraise the value of his opinion.

As I have already said, it is not necessary that my nonconcurrence with the Court should be based upon the incompetency of the dying declaration.

Cited: Renn v. R. R., 170 N. C., 142; *Bank v. Wysong & Miles Co.,* 177 N. C., 291; *S. v. Brinkley,* 183 N. C., 722; *S. v. Ashburn,* 187 N. C., 722; *S. v. Collins,* 189 N. C., 21; *S. v. Franklin,* 192 N. C., 724; *S. v. Beal,* 199 N. C., 296, 297.

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(204)

STATE v. R. T. DALTON ET AL.

(Filed 9 December, 1914.)

Indictment—Conspiracy—Competition—Systematic Abuse—Common Law—Interpretation of Statutes.

An indictment charging that the employees of a rival company in the sale of lawful commodities had combined together to break up their competitor's business by systematically following its salesmen from house to house and place to place and to so abuse, vilify, and harass them as to deter them in their lawful business and to break up their sales; that they falsely represented that their rival company was composed of a set of thieves and liars, endeavoring to cheat and defraud the people, etc., charges a conspiracy indictable at common law, which is not restricted or abridged by statute 33 Edward I, or repealed by chapter 41, Laws 1913; and a motion to quash the indictment should not be granted. *S. v. Van Pelt,* 136 N. C., 633, cited and distinguished.

STATE *v.* DALTON.

APPEAL by State from *Harding, J.*, at September Term, 1914, of LINCOLN.

The defendants were indicted in the following bill:

The grand jurors for the State upon their oaths do present, that R. T. Dalton, R. C. Manley, T. R. Lacey, G. W. Gardner, J. B. Haney, and A. G. Yelton, then claiming to be working for and employed by the Wrought Iron Range Company, with force and arms at and in this county, did unlawfully and willfully conspire together to break up or "bust up" a rival company, to wit, the St. Louis Steel Range Company of St. Louis, Mo., and did unlawfully and willfully conspire and agree together to interfere with and break up any sales made or sought to be made by C. F. Graves, Bud Canada, J. A. Vick, B. O. Dell, employees of and working for the said St. Louis Steel Range Company, and to abuse, vilify, and "knock" the said St. Louis Steel Range Company and its salesmen, agents, and servants, to the end that said sales could not be made and to the end that the public would cease to buy from the said St. Louis Steel Range Company any of its goods, wares, and merchandise, and did unlawfully and willfully conspire and agree together to so follow up and keep under constant and annoying surveillance the above named servants and employees of the said St. Louis Steel Range Company and to so abuse, vilify, and harass them that the said St. Louis Steel Range Company's employees would be deterred from working for said company, and would be prevented from making sales and prevented from carrying on their legitimate business in this State; and the said defendants, in order to carry out their said conspiracy as above related, did unlawfully and willfully follow up the said employees of said St. Louis Steel Range Company from town to town and from place to place, and from road to road, and from house to house, (205) and did keep the employees of the said St. Louis Steel Range Company (it being a company engaged in selling steel ranges by model through its salesmen and employees), and did keep them under constant and annoying surveillance and vilify and abuse them and their company to various persons throughout this county and State, and did vilify and abuse and make light of the goods, wares, and merchandise the said St. Louis employees were attempting to sell; and in furtherance of their said conspiracy the said defendants did at various times and places slander, vilify, and run down and abuse the St. Louis Steel Range Company and say to various persons that the said St. Louis Steel Range Company was composed of a set of liars and thieves and that the agents and employees of the said St. Louis Steel Range Company were a set of liars and thieves who were trying to cheat and defraud the people, and

that they (the defendants) were out to protect the people from being defrauded by the agents and employees of the said St. Louis Steel Range Company, which said statements so made by the defendants were slanderous and false and injurious to said St. Louis Steel Range Company and to its agents and employees, and which said false statements were made in furtherance of their said conspiracy to interfere with sales of said St. Louis Steel Range Company or with sales the agents and servants and employees of said St. Louis Steel Range Company were making or trying to make, all to the end that the defendants might, if possible, drive the St. Louis Steel Range Company and its agents and employees from the business field and leave it clear for the agents and employees of the Wrought Iron Range Company; and they further say that said acts and conspiracy were done at and in Lincoln County, N. C., and at other places in this State, on or about the.....day of June, 1914, and were done contrary to law and against the peace and dignity of the State.

NEWLAND, *Solicitor.*

The defendants moved to quash the bill because it charged no criminal offense, which was granted, and the State appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

C. A. Jonas and W. C. Feimster for defendants.

CLARK, C. J. There was error in quashing the bill. It charged a conspiracy at common law, and this offense is not restricted or abridged by the statute of 33 Edward I., *S. v. Howard,* 129 N. C., 584; nor does chapter 41, Laws 1913, generally known as the "Anti-Trust Law," repeal the common law in this respect. A conspiracy is generally defined to be "an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way."

(206) The defendants rely upon *S. v. Van Pelt,* 136 N. C., 633, where this Court held that it was not a conspiracy for laborers to notify an employer that he would not be considered in sympathy with organized labor if he employed others than union men, nor if he retained nonunion men with whom he had already contracted a year in advance; and upon refusal of such employer to discharge nonunion men and refusing to agree to employ only union men, notice had been given that at a meeting of the carpenters and joiners the attitude of the employer was declared unfair towards organized labor, and that no union carpenter would work any material from his shop after a given date.

That case has no bearing upon the present. The opinion in *Van Pelt's case, supra,* is a very full discussion of the rights of laborers by *Mr. Justice Connor,* and it was held that the conduct above cited was not unlawful and did not constitute a conspiracy. It was said that "Organized labor or labor organizations are not unlawful. The prosecutor had no legal right to demand that he should be considered in sympathy with organized labor; therefore, he was not to be deprived of any legal right if he preferred to employ nonunion men, and the defendants had a legal right to consider him unsympathetic with organized labor if he exercised such right." The Court there pointed out that there was no intimidation by numbers or otherwise or any violence or fraud.

The Court in that case said: "May not men organize to promote their common interests, and, when such interests conflict with other interests, resort to lawful and peaceful means to secure the best results? It is clear that they may. Where, then, is the line which separates conduct which is lawful from that which is unlawful? The answer comes from *Chief Justice Shaw,* one of the wisest and most learned of American jurists: 'If it is to be carried into effect by fair or honorable or lawful means, it is, to say the least, innocent. If by falsehood or force, it may be stamped with the character of a criminal conspiracy.' "

In the present case the charge in the bill is of a conspiracy whose object was to break up a rival company and to drive it from the business field and leave it clear for the agents and employees of the company for whom the defendants were working, and that this conspiracy was to be carried out by the following means: To break up the sales made by the agents of the rival company; to abuse that company; to vilify it; to follow up its agents from town to town, from road to road, from house to house, and vilify and abuse them; to slander, vilify, and run down that company; to charge falsely that such rival company was composed of a set of thieves and liars; and to say falsely that the agents of that company were a set of thieves and liars who were trying to cheat and defraud the people.

A combination to use such means, reeking with fraud and (207) falsehood, was a conspiracy at common law, and indictable as such. There is nothing in the opinion in *S. v. Van Pelt, supra,* which would protect from punishment the conspiracy to use such means for such a purpose. In *Van Pelt's case, supra,* there was simply a meeting of union laborers who requested an employer to employ only union labor, and, when he refused to do so, gave notice that they considered him not in sympathy with union labor. There was no intimidation, no false representations, no agreement to systematically break up the sales or business of such employer, nor to track down his agents with abuse

and vilification, nor to charge him as a thief and liar, nor that his agents were thieves and liars trying to cheat and defraud the people. The charge in the present bill has no analogy to the charge made by the indictment in *S. v. Van Pelt, supra.*

The acts here charged constituted a conspiracy indictable at common law, and the order quashing the bill was improvidently allowed. A combination to injure the business of another by a resort to systematic falsehood and misrepresentations, as here charged, has not been made lawful by any statute nor recognized as permissible by the decision of any court. The judgment quashing the bill is

Reversed.

Cited: S. v. Martin, 191 N. C., 406; *S. v. Ritter,* 197 N. C., 115; *S. v. Wrenn,* 198 N. C., 263.

STATE v. SOUTHERN EXPRESS COMPANY.

(Filed 16 December, 1914.)

Intoxicating Liquors—Carriers—Transportation Forbidden—Lawful Use—Interpretation of Statutes.

The transportation by the carrier of intoxicating liquors into the county of Burke, where such is prohibited for certain purposes, and delivering it to the consignee for his private use, will not make the carrier guilty of the offense created by the statute, the act not prohibiting its importation for personal use. Public Laws 1907, chs. 24 and 806.

APPEAL by the State from *Justice, J.,* at August Term, 1914, of BURKE.

The defendant was tried in the Superior Court upon an appeal from the police court upon a warrant charging it with delivering intoxicating liquors to one J. W. Garrison in Burke County in violation of chapters 24 and 806 of the Public Laws of 1907, which prohibits the importation of intoxicating liquors into that county for certain purposes. The case was heard on a special verdict. The judge of the Superior Court pronounced the defendant not guilty upon the special verdict.

The State excepted to the ruling of the court, and appealed to the Supreme Court.

(208) *Attorney-General Bickett and Assistant Attorney-General Calvert for the State.*

S. J. Ervin, R. C. Allison for defendant.

PER CURIAM. The verdict in part states that the liquor was ordered and shipped from the city of Roanoke in the State of Virginia, and "That the said spirituous liquors were ordered by the said John W. Garrison of the said dealer at Roanoke for the personal private use of the said John W. Garrison, and were not intended for sale or other unlawful use, and were not in fact sold, but were used and consumed by the said Garrison himself."

The statute under which the defendant is indicted is substantially the same as the one construed in *Express Co. v. High Point,* 167 N. C., 103. In his brief the learned Attorney-General admits that on the authority of that case and under the construction placed upon that, a similar statute, the judgment of the Superior Court was correct.

Affirmed.

STATE v. ED. C. CRAFT ET AL.

(Filed 16 December, 1914.)

1. **Criminal Law—Conspiracy—Necessaries of Food—Common Law—Reasonable Profits.**

An agreement among dealers in a necessary article of food, to raise its price, is an indictable offense at the common law, and the evidence in this case being that dealers controlling 60 per cent of the supply of milk in a town having by a written agreement raised its price, testimony is irrelevant that a dealer not a party to the agreement had also raised the price of his milk to his customers, or whether the agreement was reasonable or necessary for the article to yield a profit in its sale.

2. **Same—Evidence.**

Upon trial for conspiracy among dealers to sell milk in a town at an advanced price, it is proper to show by competent testimony of a witness that the price was consequently advanced.

3. **Criminal Law—Indictment—Proof—Immaterial Variance.**

A variance between the charge of an indictment that the defendants conspired together to raise the price of milk to 13 cents per quart, and the proof that it was raised to 12½ cents per quart, is immaterial, the fact that the price was raised in consequence of the agreement being controlling.

4. **Criminal Law—Indictment, Form of—Interpretation of Statutes.**

An indictment is sufficient in form under Revisal, 3254, which charges the offense "in a plain, intelligible, and sufficient manner"; and where the indictment is for an offense at common law it will not be held fatally defective that the indictment charged the offense as being "against the form of the statute and also against the peace and dignity of the State."

5. **Criminal Law—Conspiracy to Raise Price—Intent—Evidence.**

Upon the trial for a conspiracy to raise the price of milk in a commu-

nity, the only question presented is whether the defendants had so agreed, and if, in consequence, they raised the price, the intent to raise the price being the criminal intent which makes the offense.

6. Criminal Law—Admissions—Instructions—Directing Verdict.

When upon the trial for conspiracy among dealers to raise the price of milk in a certain community the defendants admit entering into the agreement and the consequent raising of the price, it is proper, and not objectionable as directing a verdict, for the judge to relate the admission to the jury and instruct them that thereunder the defendants would be guilty.

7. Criminal Law—Conspiracy to Raise Price—Common Law—Statutory Offense—Interpretation of Statutes—Appeal and Error—Harmless Error.

A conspiracy among dealers to raise the price of a necessary article of food being indictable under the common law, it is not reversible error for the trial judge to exclusively so regard it in the conduct of the trial and erroneously instruct the jury that it was not a statutory offense, though in fact it was so made by chapter 41, Laws 1913, secs. 1, 2, and 3.

(209) APPEAL by defendants from *Cooke, J.*, at May Term, 1914, of NEW HANOVER.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Woodus Kellum and Herbert McClammy for defendants.

CLARK, C. J. The indictment charges that Ed. C. Craft and others (naming them), "being dealers and distributors of milk and carrying on and conducting such business severally and independently each from the other, but controlling and handling in the aggregate a large supply of the fresh milk sold for human consumption and used within the city of Wilmington and county of New Hanover, did, on or about 20 October, 1913, within the State and county aforesaid, knowingly, wickedly, and unlawfully conspire, contract, and agree among themselves, and with each other, not to sell fresh milk to consumers at retail for less than a certain price, to wit, the sum of 13 cents per quart, with a view to raise the price of such article of necessity, and by such conspiracy and agreement to unfairly stimulate the market price of such article in which they were dealing, and with a view to lessen and destroy full and free competition in the sale thereof, . . . and in pursuance of the aforesaid conspiracy, understanding, and agreement, did subsequently,
(210) to wit, on or about 1 November, 1913, severally increase the price of their milk sold at retail to consumers within the city and county aforesaid from 10 cents per quart to 13 cents per quart."

A verdict of not guilty was entered against one of the defendants,

George W. Branch, who then testified for the State that he and the other defendants signed the following paper, which afterwards appeared in the *Morning Star*. The paper which was put in evidence is as follows:

"*To the Public:* We, the undersigned dairymen of New Hanover County, desire to notify our customers and patrons and the public generally that on and after 1 November, 1913, it will be impossible to furnish milk to our customers for less than 12½ cents per quart for bottle milk at retail, and milk in cans at 40 cents per gallon. We deplore the issuance of this notice more than our customers do to receive it, but on account of the high cost of labor and of the enormous prices of hay and grain making it impossible to sell milk at the present price. We deplore the fact that conditions compel us to pursue this course, but we are compelled to issue this notice or get out of business, as we are losing money each day we continue in the same. We desire, however, to state that as soon as labor becomes cheaper and the price of grain and hay is decreased, we will lower the price of milk in proportion. Thanking our customers for past favors and assuring them of our high appreciation of the same, wishing to continue to serve them in the future, we beg to remain, Respectfully."

(Here follow the signatures of Edward C. Craft and the other defendants.)

Branch further testified that prior to that time he had charged 10 cents per quart for milk and afterwards he charged 12½ cents, and that he heard the other defendants say after the paper was signed that they sold milk at 12½ cents.

The defendants are not indicted for raising the price of milk, which each of them had the right to do, if done without agreement and combination with others; nor are they indicted for agreeing to create a monopoly and crush competitors; but they are charged with conspiring and agreeing to raise the price of milk.

Such a combination was indictable at common law. The subject is one of vital interest at the present time, and has thus been discussed by *Chief Justice White* in *Standard Oil Co. v. United States,* 221 U. S. (at p. 58), where he says for the Court: "Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts, or other acts of individuals or corporations, led as a matter of public policy to the prohibition, or treat- (211) ing as illegal, all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the

contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." To the same effect is the opinion in *U. S. v. American Tobacco Co.*, 221 U. S., at p. 179.

The authorities are thus summed up, 27 Cyc., 891: "From the earliest times it was considered a serious matter if several combined to control trade or enhance prices." It is also said, 8 Cyc., 634, citing authorities: "It is an indictable conspiracy at common law for persons dealing in a commodity which is one of the necessaries of life to bind themselves under a penalty not to sell such commodity at less than a designated price." To same purport, Spelling on Trusts, sec. 52.

Exception 2 was to the exclusion of the question whether a milk dealer, McEachern, not one of the defendants, sold his milk from 12 cents to 15 cents. Exception 3 was to the exclusion of the question how many milk dealers the witness knew in New Hanover County. Exception 4 was to the exclusion of the question whether the witness was capable of forming an opinion satisfactory to himself whether 12½ cents was a reasonable price. Exceptions 5 and 6 are to the exclusion of the inquiry whether there was a dairyman engaged in the business in that county who had land sufficient to make enough food for his cattle to eat.

A conspiracy to raise the prices of the necessaries of life being a crime at common law, it could be no defense to show that another person than one of the conspirators sold the same commodity at as high a price as these defendants had agreed upon, or that the witness might think the price agreed on a reasonable one, or that the article could not be produced profitably at less than the price agreed on, in view of the conditions under which the defendants were carrying on the business. The indictment is not for raising the price, but for the combination and agreement to do so.

Exceptions 7 and 8 are to permitting the witness to say that he had heard the defendants say after the agreement was signed that they sold milk thereafter at 12½ cents. This was competent. Besides,
(212) the judge states in the case on appeal: "The defendants admitted that in consequence of the said agreement, they raised the price of milk from 10 cents to 12½ cents a quart."

The exception for an alleged variance between the indictment and proof, in that the allegation was that the defendants agreed to raise the price of milk to 13 cents and the proof showed that they sold at 12½ cents, cannot be sustained. The gist of the charge is the unlawful agreement and combination to raise the price, and the proof is that the defendants did so agree, and in consequence of such agreement did raise the price. Whether the agreement and raise was to 13 cents or to 12½ cents is immaterial. "A variance will not result where the allegations and proof, although variant, are of the same legal signification." 22 Cyc., 456, citing among others *S. v. Brown,* 82 N. C., 585. An immaterial variance in an indictment is not fatal. *S. v. R. R.,* 149 N. C., 508; *S. v. Ridge,* 125 N. C., 655.

The exception to the conclusion of the indictment, "against the form of the statute," cannot be sustained. In fact, the indictment concludes both "against the form of the statute and also against the peace and dignity of the State." But we have long outgrown such matters as that, and it is held that the conclusion is a mere matter of form and surplusage. *S. v. Kirkman,* 104 N. C., 911. Especially is this so (as is said in *S. v. Kirkman, supra*) since the statute, now Revisal, 3254, which makes the bill "sufficient in form, for all intents and purposes, if it expresses the *charge* against the defendant in a plain, intelligible, and explicit manner," and, if that is done, forbids that the bill should either be "quashed or judgment arrested by reason of any informality or refinement." *S. v. Kirkman, supra,* has been repeatedly cited since with approval, *S. v. Harris,* 106 N. C., 683; *S. v. Arnold,* 107 N. C., 863; *S. v. Peters, ibid.,* 882; *S. v. Peeples,* 108 N. C., 768; *S. v. Call,* 121 N. C., 643; *S. v. Hester,* 122 N. C., 1047.

The evidence was that about 60 per cent of the output of milk for retailing in Wilmington was controlled by the defendants. The court properly refused the motion to nonsuit. The defendants also asked the court to hold that the jury could not convict unless they were satisfied that it was the intention of the defendants to violate the law; but the court held that it was not a question of intent, and that it was not for the jury to consider the question of intent; that the only question to be considered was whether or not the defendants signed the agreement and in consequence of the agreement raised the price of milk. In this there was no error. It has been repeatedly held that when an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which makes the offense. *S. v. McLean,* 121 N. C., 589; *S. v. Smith,* 93 N. C., 516; *S. v. Heaton,* 77 N. C., 505; *S. v. Presnell,* 34 N. C., 103.

(213) The Court charged the jury: "I have not the making of the law. I can only enforce it. My interpretation of the law is this: The defendants are indicted under the common law—we have no statute that covers it—and at common law a combination of this kind between parties and individuals which has been read to you, and it being admitted in consequence of that agreement the price of milk was advanced from 10 cents to 12½ cents, I tell you upon the agreement and the admission that the defendants are guilty. You can take the case and return your verdict." The jury retired and afterwards returned a verdict of guilty against each of the defendants. The court imposed a fine of $10 on each.

The evidence was uncontradicted that the defendants signed the agreement to raise the price of milk; that together they controlled 60 per cent of the output of that necessary article in Wilmington, and it was admitted by them that in consequence of the said agreement they raised the price of milk from 10 cents to 12½ cents per quart. The court did not "direct a verdict" to be entered, but told the jury that such agreement and admission of the defendants would make the defendants guilty. The jury took the case and later returned their verdict in accordance with the opinion of the court upon these facts, which were not controverted. This the court could do (*S. v. Riley,* 113 N. C., 648, where the distinction is pointed out).

In *Swift v. United States,* 196 U. S., 375, which was an action to enjoin violations of the Federal Anti-Trust Act with respect to sales of fresh meat, the Court said: "The defendants cannot be ordered to compete, but they properly can be forbidden to give directions, or make agreements, not to compete."

"A combination between independent dealers to prevent competition between themselves in the sale of an article of prime necessity is in the contemplation of law an act inimical to trade or commerce, without regard to what may be done under and in pursuance of it, and although the object of such combination was merely the due protection of the parties against ruinous rivalry, and no attempt was made to charge undue or excessive prices, where it appears that the parties acted under such agreement, an indictment for conspiracy is sustainable." *People v. Sheldon,* 139 N. Y., 251. That was an indictment against retail coal dealers for entering into an agreement to organize a coal exchange and fix prices, below which no member was permitted to sell.

In *Coal Co. v. People,* 214 Ill., 421, it was held: "A combination between independent producers of coal to prevent competition in its sale

and to regulate and fix the price at which coal should be sold in the State of Illinois is inimical to trade and commerce, detrimental to the public, and unlawful, and amounts to a common-law conspiracy, regardless of what may be done in furtherance of the conspiracy."

In *Harris v. Commonwealth,* 113 Va., 746; Anno. Cas., 1913, (214) E. 597, the Court held the same principle as above, but ruled that insurance not being an article of merchandise, or manufacture, nor one of the necessaries of life, nor of prime necessity within the letter or spirit of the law against engrossing, an indictment for a conspiracy to raise insurance rates could not be maintained in the absence of a statute making it a criminal offense. The decision, however, fully recognizes the rule that a combination in restraint of trade in the necessaries of life is a conspiracy for an unlawful purpose at common law and punishable as such.

In *Sanford v. People,* 121 Ill. App., 619, it was held that a combination to enable members thereof to dictate prices in a necessary article (in that case the sale of coal to consumers) was in violation of the common law and of the State statute against trusts.

In *S. v. Dreany,* 65 Kan., 292, though the indictment was dismissed on the ground that there was no evidence to show that the defendants had entered into an unlawful agreement to fix prices to be paid for grain in a certain town, it was recognized that this was an offense at common law.

This whole subject has been so fully discussed in the *Standard Oil* and *American Tobacco Company cases,* both in 221 U. S. and above cited, and in other cases before the United States Supreme Court, that it would be useless repetition to go further.

The solicitor stated that he was proceeding at common law, and the judge also told the jury that this was an offense only at common law, and that we have no statute on the subject. Their attention probably was not called to chapter 41, Laws 1913. Section 1 of that chapter provides: "Every contract, combination in the form of trusts or otherwise, or conspiracy in the restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal." This section further makes it indictable. Section 2 provides: "Any act, contract, combination in the form of trusts, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of section 1 of this act." Section 3 makes all such contracts, combinations, and conspiracies unreasonable and illegal.

The defendants, however, cannot take advantage of the fact that the

judge and solicitor considered the action of the defendants illegal only from the standpoint of the common law.

Upon consideration of the whole case we find

No error.

Cited: Sea Food Co. v. Way, 169 N. C., 687.

(215)

STATE v. ROBERT HANNON.

(Filed 9 December, 1914.)

1. Abandonment—Indictment Found—Two Years—Renewal of Relationship.

The crime of willful abandonment by the husband of his wife is not a continuing offense, day by day, and where there has been a complete act of abandonment and no renewal of the marital association, the act must have occurred within two years next before indictment found. Revisal, sec. 3355.

2. Same—Evidence—Conviction.

Upon this trial for willful abandonment by the husband of his wife, the evidence on behalf of the State tended to show that the defendant abandoned his wife something over three years next before bill found, and while they had not lived together since, she had had a warrant issued for this offense within the two years, whereupon he went to see her in South Carolina, gave her $5 for her support, and promised to come back here, get a house for her, and in pursuance of this promise she had the indictment withdrawn; that there were two children, both begotten by the defendant, the younger of which was not more than five months old. *Held:* Sufficient upon the question of a renewal of the marital obligation by the defendant within the two years to support a verdict of conviction. Revisal, sec. 3355.

3. Appeal and Error—Trials—Instructions—Record.

Objection that the court did not properly advert to the plaintiff's evidence upon a certain phase of this case under the principles declared in *S. v. Hopkins,* 130 N. C., 647, will not be considered on appeal, no special prayers for instruction thereon having been offered, and the charge of the court not appearing in full in the record so as to show that the court had not instructed properly thereon.

APPEAL by defendant from *Long, J.,* and a jury, at April Term, 1914, of POLK.

Indictment for abandonment under section 3355, Revisal.

Verdict, "Guilty." Judgment, and defendant excepted and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Spainhour & Mull for defendant.

PER CURIAM. It was urged for error, first, that the indictment should have been dismissed on his motion because there was no proof of abandonment within two years before bill found; second, that the court misdirected the jury as to a renewal of the marital association after the first act of abandonment and within the two years.

The decisions in this State are to the effect that the crime of willful abandonment is not a continuing offense, day by day, but if there has been a complete act of abandonment and no renewal of the (216) association, the act must have occurred within two years next before indictment found.

On that question there was evidence on the part of the State tending to show that the defendant abandoned his wife something over three years next before bill found, and they had not lived together since, but that they saw each other frequently in Polk County; prosecutrix, since the abandonment, being in Polk County part of the time and part of the time in South Carolina with her mother; that she had two children, one of them being a baby five months old, and that the defendant was the father of both children; that prosecutrix had a warrant issued for defendant for this offense in October of the preceding year and defendant came to her in South Carolina, where she then was, and gave her $5 for her support and told her he was going back home and get a house and send for witness, and she, pursuant to promise then made, wrote a note to the justice to withdraw the warrant; that defendant had failed to keep his promise to provide a home and had since failed to send for or live with witness or in any way contribute to her support.

Upon this testimony the court declined to dismiss the proceedings, and, among other things, charged the jury: "That while the charge was for abandonment, and the State had the burden of showing that the abandonment occurred within the two-year statutory period prior to the finding of the bill of indictment, yet if the jury should find from the evidence, and be satisfied beyond a reasonable doubt, that the defendant promised while in Spartanburg to come home and secure a house and send for his wife, which was within the statutory period, this in law amounted to a new promise to support, and if the jury should further find that he thereafter failed to provide and support his wife and refused to longer live with her, it would be their duty to return a verdict of guilty."

To the above instruction by the court to the jury, the defendant excepted, and this constitutes the defendant's third exception.

The court further instructed the jury as follows: "That if they should find beyond a reasonable doubt from the evidence that the defendant had failed and refused to live with his wife and provide a support for her and their children, and that such abandonment was within the two-year period next prior to the finding of the bill of indictment, or if the jury should find beyond a reasonable doubt from the evidence that there was a new promise, whether the promise was made or renewed in South Carolina or not; and after such new promise, if the jury should further find that the defendant refused to live with and provide a support for his wife and children, the burden being on the State to satisfy the jury thereof beyond a reasonable doubt, then it would be the duty of the jury to return a verdict of guilty."

(217) The charge of his Honor was proper, that the promise of renewal of association on the part of the husband and payment of $5 towards her support would amount to a renewal of the obligation, and on a subsequent failure and within the two years an indictment would lie. *S. v. Davis,* 79 N. C., 603. The position finds support in the fact that the testimony of the State tends to show the resumption of the marital association, prosecutrix having testified that the child, now at the breast and not more than five months old, was begotten by the defendant.

The objection that the evidence of the defendant tended to establish adultery on the part of the wife, and that his Honor did not properly advert to this position in his charge, under the principles declared in *S. v. Hopkins,* 130 N. C., 647, is not open to defendant on this appeal. There was no prayer for instruction for defendant to that effect, and the charge not being set out in full, there is nothing to show that his Honor did not adequately and correctly charge on this phase of the evidence.

There is

No error.

Cited: S. v. Beam, 181 N. C., 598; *S. v. Bell,* 184 N. C., 709; *S. v. Hooker,* 186 N. C., 763; *S. v. Sneed,* 197 N. C., 670; *S. v. Jones,* 201 N. C., 426; *S. v. Hinson,* 209 N. C., 190.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1915

LOCKVILLE POWER CORPORATION v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 3 March, 1915.)

1. Corporations—Deeds and Conveyances—Execution.

A registered copy of a deed purporting to be that of a corporation, and appearing in form to be such, reciting that it was made "in pursuance of a resolution passed by its stockholders" on a certain date, signed by the president and two stockholders, with the corporate seal attached, and witnessed and executed and registered in 1876, *is held* to be sufficiently executed as a corporate act, under the common law and the statute then in force. Code, sec. 695; Rev. Code, ch. 26, sec. 22.

2. Same—Corporate Seals—Presumptions.

A corporate deed executed by the proper officers of the corporation and bearing its seal is presumptive evidence that the seal was affixed by the proper authority. The deed in question was executed in 1876 by the president and two stockholders of the corporation, witnessed, and the seal appeared to have been affixed thereto. *Held:* It was a sufficient execution under the laws then existing.

3. Same—Probate.

A probate officer, after reciting the State, county, probate court, and date, by certifying that the witness to a corporation deed, made in 1876, was the "subscribing witness to the foregoing conveyance, and made oath according to law that he witnessed the execution of the same by the parties for the purposes therein set forth," etc., raises a presumption of correct probate, inclusive of the authority of the attesting witness, which will be taken as valid in the absence of evidence to the contrary.

4. Corporations—Deeds and Conveyances—Presumptions—Corporate Seals —Registrations.

The failure of the register of deeds to copy the seal of the corporation on his books, or make an imitation copy thereon, does not render the conveyance of the lands made in 1876 invalid where the recitals in the deed signify that the seal was in fact attached, it appears upon the original, and the books show the name of the corporation appearing in brackets therein at its proper location.

5 Limitations of Actions—Deeds and Conveyances—Defective Execution —"Color."

Adverse possession is sufficient to ripen title under "color" and applies where there is a defect in the execution of the instrument relied on, or it has been improperly admitted to probate.

6. Trusts and Trustees—Deeds and Conveyances—Beneficiaries—Execution—Married.

Where in a deed in trust to lands the title is conveyed absolutely and in fee to the trustee, the deed of the trustee will pass the title to the lands, without the execution of the instrument by the beneficiaries or others, and is competent evidence of the grantee's title; and objection that the wives of the beneficiaries had not also joined in the conveyance is untenable, especially when it appears from the deed that the husbands executed the deed for the sole purpose of saving the trustee harmless.

7. Husband and Wife—Deeds and Conveyances—Execution of Feme Covert—Estate Conveyed—Title—Evidence.

The failure of the wife to execute with her husband a deed to his lands affects only the amount of the estate conveyed, and to that extent is evidence of the grantee's title, except where the conveyance by the husband is of his duly "allotted" homestead.

(220) APPEAL by defendant from *Connor, J.*, at August Term, 1914, of CHATHAM.

H. A. London & Son and Manning & Kitchin for plaintiff.
James H. Pou and Hayes & Horton for defendant.

CLARK, C. J. This was an action to recover damages by reason of the defendant's dam backing water on the plaintiff's land and water power at Lockville. The jury found that the plaintiff was the owner of the land and water power and that the defendant's Buckhorn dam wrongfully ponded water within 200 feet of the plaintiff's mill site at Lockville, and awarded damages therefor.

The defendant's main contention was the insufficient execution and probate of two deeds offered in evidence by the plaintiff. One deed was from the Deep River Manufacturing Company to the American Iron and Steel Company, 15 July, 1876, and the other from the Virginia Trust Company to the plaintiff, dated 4 September, 1906.

The plaintiff offered in evidence the registered copy of the deed of the Deep River Manufacturing Company to the American Iron and Steel Company, dated 15 July, 1876, and registered in Chatham County, where the land lay, on 9 October, 1876.

Two objections were made to the competency of this deed in (221) evidence. (1) That it was not properly executed as the deed of a corporation. (2) That the proof of its execution was not such as to authorize its probate and registration.

This instrument on its face recites: "This deed executed 15 July, 1876, by the Deep River Manufacturing Company, party of the first part," etc., and, "This deed is made in pursuance of a resolution of the Deep River Manufacturing Company passed by its stockholders on 3 July, 1876." It appears, therefore, from the instrument itself that it was intended as a deed and that its execution was authorized by a resolution of its stockholders. It is signed by the president and two stockholders. It is in the form of a deed and its corporate seal is attached. The execution of the deed was sufficient at common law and under the statute then in force. Code, sec. 685; Rev. Code, ch. 26, sec. 22; *Bason v. Mining Co.*, 90 N. C., 417.

In the latter case the Court cites with approval Morawitz on Corporations, sec. 169: "If a contract purporting to be sealed with the seal of a corporation is offered in evidence, and it is proved to have been signed and executed by the proper agent, the presumption is that the seal was also regularly affixed by the proper authority, and a contract under seal executed by an agent within the scope of his apparent powers will be held valid and binding upon the corporation until evidence to the contrary has been adduced." The statute then in force provided: "Any corporation may convey land and all other property transferable by deed of bargain and sale or other proper deed, sealed with the common seal and signed by the president or presiding member, or trustee, and two other members of the corporation and attested by a witness." This deed was signed by the president of the corporation and two stockholders, with the common seal affixed, and it was attested by a witness.

Bason v. Mining Co., supra, has been cited and approved, *Clayton v. Cagle,* 97 N. C., 300; *Shaffer v. Hahn,* 111 N. C., 1; *Heath v. Cotton Mills,* 115 N. C., 202; *Clark v. Hodge,* 116 N. C., 761; *Barcello v. Hapgood,* 118 N. C., 712; *Withrell v. Murphy,* 154 N. C., 82.

The probate of the deed is as follows (after reciting the State and county, probate court, and date): "Personally appeared before me, W. F. Foushee, probate judge for said county, J. H. Wissler, a subscribing witness to the foregoing conveyance, and made oath according to law that he witnessed the execution of same by the parties for the purposes

therein set forth. Let this deed and certificate be registered. William F. Foushee, Probate Judge."

In *Quinnerly v. Quinnerly,* 114 N. C., 145, it is said: "There was no evidence to show that the probate here was insufficient. The presumption is that it was properly taken. In *Starke v. Etheridge,* 71 (222) N. C., 240, it is said: 'The probate of a deed is but a memorial that the attesting witness so swore to the *factum* of the instrument by the parties whose act it purports to be. The officer who takes the probate does not look into the instrument or to the interests acquired under it, and as the probate is *ex parte,* it does not conclude.' The probate of this deed not having been impeached by any evidence, it is conclusive of sufficient and proper proof." This is followed, *Moore v. Quickel,* 159 N. C., 129; *Kleybolte v. Timber Co.,* 151 N. C., 635; *Cozad v. McAden,* 150 N. C., 206; *Cochran v. Improvement Co.,* 127 N. C., 386.

It is also objected that the register of deeds failed to copy the seal or to make an attempted imitation thereof on his book. He did, however, put on the book in brackets in lieu of the seal, which he did not attempt to imitate, the words "Deep River Manufacturing Company, North Carolina," which, taken together with the recitals in the deed, must have been intended to signify that there was a seal. The original deed in evidence bears the seal, duly affixed. In *Aycock v. R. R.,* 89 N. C., 321, the Court said: "As the purpose of requiring registration is to give notice of the terms of the deed, and this is fully accomplished in the registry, we can see no reason why some scroll or attempted imitation of the form of the seal should be required in addition to the words spoken in the grant." To same purport, *Heath v. Cotton Mills, supra.*

Even if there had been a defect in the execution of the deed, it was color of title which made the grantee's title perfect by continuous adverse possession under known and visible boundaries from the date of the deed to the date of the sale by the grantee therein to the Virginia Trust Company in February, 1899. The evidence is full and complete as to the continuous and adverse possession of the property under that deed by the plaintiff and those under whom it claims. In *Norwood v. Totten,* 166 N. C., 648, it was held that a defectively executed deed could be used in evidence as color of title. To the same point, *Seals v. Seals,* 165 N. C., 409; *Simmons v. Box Co.,* 153 N. C., 257. A deed is good as color of title, though improperly admitted to probate. *Brown v. Brown,* 106 N. C., 451; *Davis v. Higgins,* 91 N. C., 382.

The defendant also excepted to the introduction of the deed from the Virginia Trust Company and others to the plaintiff, dated 4 September, 1906, because the wives of the beneficiaries who signed that deed jointly

with the Virginia Trust Company did not join in its execution with their husbands. This cannot defeat the reception of the deed as evidence, for if it had any effect it would merely touch the amount of the estate conveyed by the deed. It was not necessary for the wives to sign, because their husbands joined in the deed, not for the purpose of conveying title to the property, but, as stated in the deed itself, in order to indemnify the Virginia Trust Company. The words which they used in the deed are as follows: "In consideration of the Virginia Trust (223) Company executing this conveyance, the said parties of the second part agree to indemnify and save harmless the Virginia Trust Company against any liability it may have incurred, or any claims and demands that may be asserted against it, by reason of its having accepted or held the title to the land or other property, hereinbefore described, as trustees for the parties of the second part, or those under whom they claim as beneficial owners, or by reason of its having executed this conveyance."

The deed from the American Iron and Steel Company to the Virginia Trust Company was an absolute deed in fee simple without any trust, express or implied, and the legal title to the property was vested absolutely and without conditions in the Virginia Trust Company, and that company certainly could convey a valid title to its grantee without any others joining in the execution of the deed. The objection of the defendant to this deed is upon the ground of the declaration therein that certain parties named paid the purchase money for the property.

Even if the parties joining in the deed executed by the Virginia Trust Company had been vested with the legal title, their execution of the deed would have conveyed their title subject only to the contingent right of dower of their wives. The joinder and privy examination of the wife is not necessary to a conveyance by the husband of his realty except in a deed of his duly "allotted" homestead. Const., Art. X, sec. 8; *Mayho v. Cotton,* 69 N. C., 289; *Joyner v. Sugg,* 132 N. C., 580; *Bruce v. Strickland,* 81 N. C., 267.

Most of the other exceptions taken on the trial have been abandoned, as they have not been brought forward in the defendant's brief (Rule 34 of this Court, 164 N. C., 551), and it does not seem to us that the other exceptions require discussion.

No error.

Cited: Dalrymple v. Cole, 170 N. C., 107; *Finance Co. v. Cotton Mills,* 182 N. C., 410; *Bailey v. Hassell,* 184 N. C., 456; *Brown v. Ruffin,* 189 N. C., 267; *McClure v. Crow,* 196 N. C., 660, 662; *Hayes v. Ferguson,* 206 N. C., 415.

WINBORNE GUANO COMPANY v. PLYMOUTH MERCANTILE COMPANY.

(Filed 17 February, 1915.)

1. Vendor and Purchaser—Contracts—Certain Quantity "or More."

A contract to purchase a certain quantity of guano, "or more," by a fixed date, to be shipped out by the seller as ordered, is not too indefinite in its terms to be enforcible by the seller as to the quantity definitely agreed upon.

2. Contracts—Evidence—Other Contracts.

Where in a suit upon contract for the sale of goods the purchaser denies the terms thereof, it is not competent for him to show that the contract was different from the one alleged, by evidence that the seller had made a different contract for the sale of his wares with other persons. *Ins. Co. v. Knight*, 160 N. C., 592, cited and distinguished.

3. Trials—Evidence—Nonsuit.

Upon a motion to nonsuit, the defendant's evidence favorable to him cannot be considered, but only that which is favorable to the plaintiff.

4. Appeal and Error—Briefs—Exceptions Abandoned—Rules of Court.

An exception mentioned only incidentally and without discussion in the brief, will be taken as abandoned, under Rule 34 of the Supreme Court.

5. Trials—Instructions—Requests—Appeal and Error—Presumptions.

Exceptions to the refusal of the trial judge to give prayers for instruction to the jury, asked, though appearing to be proper upon the evidence in the case, will not be held as error on appeal when the charge of the trial judge does not appear in the record and there are no exceptions thereto; for it will be presumed that the charge as given was a proper and correct one, and substantially covered the request for instruction, the exact language being immaterial.

(224) APPEAL by defendant from *Carter, J.*, at September Term, 1914, of CHOWAN.

Pruden & Pruden for plaintiff.
W. M. Bond, Jr., and E. G. Bond for defendant.

WALKER, J. This action was brought by plaintiff to recover damages for breach of contract in refusing to take certain fertilizers which had been sold to defendant. The latter agreed with plaintiff, on 5 January, 1913, to buy from him "100 bags or more" of different kinds of fertilizers, named in the contract, at prices therein fixed, to be delivered "f. o. b. cars at Norfolk, Va., freight to be added. Payable 1 May, 1913, to be covered by note or cash within thirty days from time of shipment," and to be shipped, as wanted, to 1 May, 1913, upon signed orders from

defendant. According to the terms of the agreement, as we construe it, defendant bought the fertilizers and all were to be shipped by 1 May, 1913, and in lots as ordered.

Defendant contends that this contract was too uncertain and indefinite in its phraseology to be enforcible, as no particular quantity of fertilizer is specified; but we think this is an erroneous view of it, as defendant was bound thereby to take at least one hundred bags by the first day of May, and this is all for which the jury assessed the damages, as is apparent from the evidence and verdict.

It was not competent to prove that W. F. Spruill had a similar understanding and agreement with the plaintiff, for the purpose of showing that defendant had the same kind of agreement with the plaintiff. It does not follow that if a contract is made with one person, a contract of the same character was made with another. The case of *Ins. Co. v. Knight,* 160 N. C., 592, does not apply, as there the evidence (225) was admitted to prove like transactions by the agent with others, for the purpose of showing his fraudulent intent, which is an exception to the general rule.

The motion to nonsuit was properly disallowed, as the court could not consider any of defendant's testimony in its favor, but only that of the plaintiff and such parts of the defendant's as tended to establish plaintiff's right to recover.

The first prayer of defendant for instructions is mentioned incidentally in its brief, but not discussed. It will, therefore, be taken as abandoned, under Rule 34 of this Court (164 N. C., 551). *Watkins v. Lawson,* 166 N. C., 216. The second prayer misinterprets the contract. The defendant was bound thereby to take all of the guano by 1 May, 1913; but it could do so in such quantities as were designated in its written orders.

It was testified by C. M. Tetterton, manager of the defendant company, which was owned by Conway Newman, that there was an oral agreement with the plaintiff "that the contract about the guano should not be binding until defendant had calls from customers and should order it out, and it was signed on the strength of this understanding, and there were no such calls from customers and no orders for the guano were therefore given." This evidence was not objected to, and we must infer that it was submitted to the jury. As the charge was not sent up, we must presume that the judge instructed the jury correctly in regard to all matters involved, including the effect of the alleged oral agreement, as to the operation of the contract and its binding effect, and especially so in the absence of any exception to the charge. *Elliott v. R. R.,* 166 N. C., 481; *Wacksmuth v. R. R.,* 157 N. C., 34; *Mizzell v. Mfg. Co.,* 158

N. C., 265. In the *Wacksmuth case, supra,* it was said: "The charge of the judge is not set out, but as there is no exception to it, we must assume that he fully explained to the jury the significance of the issue and the bearing of the evidence." This being so, a reasonable interpretation of the verdict shows that the jury decided against the defendant as to the existence of any such agreement. At any rate, defendant had the full benefit of this evidence before the jury, and cannot, therefore, complain.

If the judge refused any instruction in the form requested by counsel, it does not follow that he did not give it substantially, at least, in his charge, and we must assume that he did, in default of an inspection of the charge and of any exception thereto. We cannot say that the jury were not fully instructed, in the absence of any knowledge of the charge. The presumption here is in favor of the correctness of the trial below.

(226) If a prayer is refused, but the charge, nevertheless, is sufficiently responsive to it, though not given in its exact language, there is no ground for exception. *Carter v. R. R.,* 165 N. C., 244.

Upon a careful review of the whole record, no error has been discovered.

No error.

Cited: Lamb v. Perry, 169 N. C., 442; *Reynolds v. Express Co.,* 172 N. C., 494; *Ashford v. Davis,* 185 N. C., 90; *Michaux v. Rubber Co.,* 190 N. C., 619.

J. C. THOMPSON v. JOHN L. ROPER LUMBER COMPANY.

(Filed 17 February, 1915.)

1. Judicial Sales—Destroyed Records—Deeds and Conveyances—Recitals—Secondary Evidence—Trials.

Recitals in a deed executed in pursuance of a judicial decree or in a sheriff's deed upon execution sale are only secondary evidence of the facts recited, and where it is claimed by the party relying thereon that the court record referred to has been destroyed, the destruction of the original record must be clearly proved by him before the secondary evidence can be regarded.

2. Destroyed Records—Trials—Evidence.

Where the party claiming title to lands relies upon the destruction of court records affecting it and the recitals of the record in the deed made in pursuance thereof, the destruction of such records is not sufficiently shown by the testimony of the clerk of the court, in whose office the records were required to be kept, that he had ineffectually searched in his

office for the original papers, without saying to what extent; that he satisfied himself they could not easily be found, and was unable to say whether they could be found or not.

3. Judicial Sales—Executors and Administrators—Docket Entries—Evidence.

Docket entries relied on by a party to show his title to the lands in dispute, under a deed from an administrator to sell the lands to make assets, are too meager to furnish evidence of the proceedings and record, when they do not show whose administrator the grantor was, nor whose heirs were the defendants, nor refer in any manner to the lands sold under the proceedings.

4. Judicial Sales—Deeds and Conveyances—Dead Grantee—Payment by Purchaser—Equitable Title—Heirs at Law—Action—Payment in Fact—Presumptions—Separate Findings.

A deed executed to a purchaser of lands sold under judgment of court, after his death, is void; but upon proof of the payment of the purchase price bid at the sale an equitable estate would vest in his heirs, upon which they maintain their action. In this case there being circumstantial evidence that the purchase price was paid, it is suggested that separate findings be had upon the questions of payment in fact and payment by presumption from lapse of time, should the case again be tried.

APPEAL by plaintiff from *Carter, J.*, at September Term, 1914, of PASQUOTANK.

Civil action to try title to land. The plaintiff relies upon a (227) chain of paper title, originating with four grants to Jonathan Herring, with which the plaintiff seeks to connect himself by mesne conveyances. In deraigning his title the plaintiff is compelled to show title to the *locus in quo* in William B. Shephard and the heirs of Ann Pettigrew, whose heirs at law or devisees the individual defendants admittedly are. In further deraigning his title the plaintiff is compelled to rely upon two deeds, necessary links in his chain of title, to wit: First, a deed of date 6 September, 1853, from Ehringhaus, clerk and master to Joseph Prichard, and further purporting to have been executed under the authority of a decree in a certain special proceeding to sell said lands for partition, instituted by William B. Shephard and the heirs of Ann Pettigrew at Spring Term, 1850, of Pasquotank County Court of Equity; a certain paper-writing, dated March, 1854, purporting to be a deed from James Taylor, administrator of Joseph Prichard, to Matchett Taylor. The plaintiff contends that, even if the deed from the clerk and master to Joseph Prichard be void, still the equitable title to the *locus in quo* vested in Joseph Prichard by virtue of his purchase at the master's sale.

It appears from the evidence introduced by the plaintiff that at the time of the execution of said deed, to wit, 6 September, 1853, Joseph Prichard was dead.

The deed of James Taylor, administrator, contains the usual recitals showing a sale to make assets, but the proceedings and records under which it was made were not introduced.

To establish the loss or destruction of such original record and proceeding, the plaintiff relies on the evidence of G. R. Little, clerk of the court of Pasquotank County, who testified as follows: "I hold in my hands some papers marked 'Account of sale and inventory, 1853,' which I found in the files in my office where such accounts are kept. One of these accounts is entitled The Estate of Joseph Prichard, deceased, in account with James Taylor, administrator, interest calculated up to 1 September, 1853. I have made search for the petition of James Taylor, administrator of Joseph Prichard, to sell the lands of his intestate for assets, but did not find them. I have found some entries on the petition docket and the appearance docket. I have seen no original papers. I made a search to satisfy myself that it could not be found easily. I don't know whether counsel understand or not; most of the records about this date are down there in such a condition that I am unable to tell whether they can be found or not. They have not been filed and indexed, and from the search I made I was unable to find them. The record which I referred to just now was the docket record."

The plaintiff further offered certain docket entries, from the appearance and civil docket, December Term, 1852, of the court of pleas and quarter sessions of Pasquotank County, as follows:

DOCKET ENTRY NO. 2.

(228) "No. 8. Petition to make realty assets. James Taylor, administrator, to the court and against the heirs at law. Report made and confirmed. Cost paid."

At the conclusion of the evidence his Honor entered judgment of nonsuit, and the plaintiff excepted and appealed.

Ward & Grimes, Ward & Thompson, Winston & Biggs for plaintiff.

J. Kenyon Wilson and Small, MacLean, Bragaw & Rodman for defendant Roper Lumber Company.

Pruden & Pruden and P. W. McMullan for individual defendants.

ALLEN, J. The deed from Taylor, administrator, and the judicial proceedings authorizing its execution are necessary links in the chain of title of the plaintiffs, and unless established by competent evidence the judgment of nonsuit must be affirmed.

The deed was introduced in evidence, but the judicial proceedings were not produced, the plaintiff relying on the recitals in the deed to prove their existence and contents.

It is well established that the recitals in a deed executed pursuant to a judicial decree, or by a sheriff upon an execution sale, are evidence of the facts recited, but they are only secondary evidence, and before being admitted for that purpose the loss or destruction of the original record must be clearly proven. *Isley v. Boon,* 109 N. C., 555; *Person v. Roberts,* 159 N. C., 168.

The law has also fixed the standard by which the loss or destruction of the original record must be established.

In *Byrd v. Collins,* 159 N. C., 641, the Court quoted from *Avery v. Stewart,* 134 N. C., 287, and applied the rule that "If the instrument is lost, the party is required to give some evidence that such a paper once existed, though slight evidence is sufficient for this purpose, and that a *bona fide* and diligent search has been unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits such proof. What degree of diligence in the search is necessary it is not easy to define, as each case depends much on its peculiar circumstances; and the question whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents is to be determined by the court and not by the jury. But it seems that in general the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest and which are accessible to him."

Applying this rule, it is manifest that the plaintiff has not met (229) its requirements. The clerk who searched for the original papers does not say how much time he spent in the search nor that no papers can be found, but that he satisfied himself they could not be found "easily" and that he is "unable to tell whether they can be found or not."

The docket entry, standing alone, is also too meager to furnish evidence of the proceedings and the record.

It does not show whose administrator Taylor was, nor whose heirs were defendants, nor is there any reference to the land sold.

The deed to Prichard, which was objected to, is void, as contended by the defendant, because the grantee named was dead at the time of its execution (*Neal v. Nelson,* 117 N. C., 394), but upon proof of payment of the purchase price bid at the sale an equitable estate would be vested in the heirs of the purchaser, and it is well settled in this State that an action may be maintained on an equitable title (*Condry v. Cheshire,* 88

N. C., 375; *Brown v. Hutchinson,* 155 N. C., 207); and in our opinion there was circumstantial evidence of payment.

If the controversy should again be litigated it would be well to have separate findings upon the question of payment in fact and payment by presumption from lapse of time.

Affirmed.

Cited: Butler v. Butler, 169 N. C., 589; *Cedar Works v. Shepard,* 181 N. C., 15; *Sermons v. Allen,* 184 N. C., 129; *Mahoney v. Osborne,* 189 N. C., 451; *Sears v. Braswell,* 197 N. C., 524.

W. C. STARLING, ADMINISTRATOR, v. SELMA COTTON MILLS.

(Filed 3 March, 1915.)

1. Master and Servant—Children—Negligence—Trials—Nonsuit.

In an action to recover for the death of a child 5 years of age, caused by drowning in a reservoir of the defendant cotton manufacturing plant, there was evidence tending to show that the reservoir contained 7 or 8 feet of water, coming within a few inches of the top, and that the intestate fell in while endeavoring to get a drink of water, and met his death; that the reservoir was situated near the mill and the tenement houses of the defendant's employees, in one of which lived the father of the intestate, and where their children usually played, upon a grassy place shaded by trees; that a fence 3½ or 4 feet high had been placed around the reservoir, which had rotted in places, causing openings therein large enough to admit of the passage of the children, through one of which the intestate had gone, upon this occasion, to get water, and that to the top of the wall on which the fence was situated was a gradual upward slope from the children's playground. *Held:* Sufficient to be submitted to the jury upon the issue of defendant's actionable negligence.

2. Master and Servant—Children—Negligence—Trespasser.

A 5-year-old child of an employee of a cotton mill, while on the playground used by the children of employees, in attempting to get a cup of water from a reservoir used in connection with the plant, cannot be considered a trespasser, in an action brought by his administrator to recover damages against the defendant for its negligence in not properly safeguarding the reservoir, resulting in the drowning of the intestate.

3. Contributory Negligence—Children—Trials—Questions of Law.

Under the circumstances of this case it is held that a 5-year-old boy is too young to be guilty of contributory negligence.

4. Judgments—Nonsuit—Res Judicata.

A judgment of nonsuit is not *res judicata* in a subsequent action brought on the same subject-matter.

STARLING *v.* COTTON MILLS.

APPEAL by plaintiff from *Connor, J.*, at September Term, 1914, (230) of JOHNSTON.

Manning & Kitchin for plaintiff.
A. Jones & Son and Douglass & Douglass for defendant.

CLARK, C. J. This is an appeal from a judgment of nonsuit. The plaintiff's intestate, a bright little boy 5 years of age, was drowned in a reservoir on defendant's premises, Saturday afternoon, 20 February, 1909. The reservoir was about 50 feet around, with a brick wall around it. It was 2 or 3 inches from the top of the brick wall to the water on the inside. Rev. Mr. Morris testified that there had been a fence around the reservoir and that there was still "a piece of one there at the time of the drowning of the little boy, Alma Starling." He testified that the fence was put up with post-oak posts, skinned and the bark taken off, and slatted up between the posts, which were 8 feet apart, with slats fastened with small nails. These slats were 3 inches apart at the bottom and wider apart going up till they were 8 inches apart at the top. The fence was 3½ or 4 feet high. This reservoir was close to the mill and near the tenement houses of the operatives, and their small children played around it almost every day, rolling their hoops up and down the platform on the side of the reservoir. The father of Alma Starling, who was a mill operative, lived 210 feet from the reservoir. The witness testified further: "The fence around the reservoir was decayed and rotted and falling down. Some of it had fallen off. There were several places around the reservoir where the slats had fallen off, mostly on the side of the street where they had hauled coal. The slats had fallen off at the bottom. There was one hole in the fence I could crawl through. That hole was something like 10 feet from the place where the body was found. There were three places where the fence had rotted down. I had talked with Mr. Rose, the superintendent, about the condition of the fence, and heard him speak about it. It had been in that condition for some time. Pretty soon after this drowning I got orders to put the fence up. The reservoir was about 15 feet from the mill. There was a passageway between the reservoir and the mill. There is a sloping earth bank on the outside that leads up to the top of the (231) wall on which the fence was built." The water on the inside, he said, came within 2 or 3 inches of the top of this wall. The posts were 8 feet apart and the wall was 16 or 18 inches broad at the top. The slope of the wall on the outside was gradual.

There is also evidence that small children were playing about the reservoir and all around it every day. The reservoir was 25 or 30 steps

from the front end of the mill. Small children of varying ages played around the reservoir, where there was a grassy place and trees for the children to play.

One of the little companions of the deceased boy testified that Alma went through the hole in the fence to get some water to drink in the tin cup, and fell in and was drowned; that he easily went through the hole near the bottom of the fence, which was 12 to 18 inches wide.

There were several witnesses, who testified to the same effect, that the reservoir, which was 7 or 8 feet deep, was surrounded by a fence which had been suffered to become dilapidated, with many holes through it, and that children 5 or 6 years old and under were in the habit of playing around the reservoir, and that the management of the mill knew of it.

It does not admit of debate that the fact that such a dangerous place was unguarded by a secure fence, where children of that age were allowed to play, was culpable negligence on the part of the officers of the defendant. The very fact that a fence had been put up of itself shows that these authorities were aware of the danger. To permit it to become dilapidated was negligence. It may be that if the defendant had put on evidence a different state of facts could have been shown, or matters in excuse. But upon the evidence before us it was clearly error to grant a nonsuit.

This case has no resemblance to *Briscoe v. Power Co.*, 148 N. C., 396. That decision was put upon the ground that the child was a trespasser and of an age to be guilty of contributory negligence. But even in that case it was said that when children are trespassers liability will be enforced in many cases where there would be no liability if the injury had been sustained by persons of maturer age. The humane judge who wrote that opinion says, on p. 411: "An infant who enters upon premises, having no legal right to do so, either by permission, invitation, or license, or relation to the premises or its owner, is as essentially a trespasser as an adult; but if, to gratify a childish curiosity or in obedience to a childish propensity excited by the character of the structure or other conditions, he goes thereon, and is injured by the failure of the owner to properly guard or cover the dangerous conditions which he has created, the owner is liable for such injuries, provided the facts (232) are such as to impose the duty of anticipation or prevision; that is, whether under all the circumstances he should have contemplated that children would be attracted or allured to go upon his premises and sustain injury."

But in this case these children were not trespassers. They were 5 or 6 years old and were at their usual playground, where they went every day, which fact was necessarily known to the management of the mill.

This playground was in immediate proximity to the reservoir and to the mill, and the officials knew the danger of the children falling in there either in their play or in attempting to get water to drink, as this little boy did. The outside bank was sloping and the children could climb up easily and would be tempted to do so naturally. On the inside the water came up within 2 or 3 inches of the top, and the wall on the inside was perpendicular, with the water 7 or 8 feet deep. A more dangerous situation could not have been devised. The management of the mill were aware of the danger, as is shown by their putting a fence around it. Indeed, the danger was self-evident. The children were those of the operatives of the mill and were, so to speak, on their own grounds. They were not trespassers certainly. There is much evidence that the fence was dilapidated and direct testimony that the little boy went through a hole in the fence near the ground. There was evidence that his playmate told him that it was dangerous, but the child was too young to be guilty of contributory negligence.

The fact that a nonsuit had been formerly taken is not *res judicata. Hood v. Tel. Co.*, 135 N. C., 622, and cases there cited; *Helms v. Tel. Co.*, 143 N. C., 386; *Tussey v. Owen*, 147 N. C., 335; *Lumber Co. v. Harrison*, 148 N. C., 333. Nor can we sustain the motion that a cause of action is not stated.

The judgment of nonsuit is

Reversed.

Cited: Starling v. Cotton Mills, 171 N. C., 222; *Gurley v. Power Co.*, 172 N. C., 697; *Butner v. Lumber Co.*, 180 N. C., 619; *Butner v. Brown*, 182 N. C., 700; *Hoggard v. R. R.*, 194 N. C., 260; *Hampton v. Spinning Co.*, 198 N. C., 237; *Cooper v. Crisco*, 201 N. C., 742; *Boyd v. R. R.*, 207 N. C., 397.

JOHN W. MARTIN, ADMININISTRATOR, v. C. C. McDONALD.

(Filed 17 February, 1915.)

Vendor and Purchaser — Personal Property — Implied Warranty—Bank Stock—Assessment.

One who offers personal property to another for sale impliedly warrants that there are no liens or encumbrances on the title which will affect its value; and the acceptance of an offer of sale of National bank stock cannot be enforced when the proposed purchaser was unaware at the time that the comptroller of the currency had ordered an assessment made upon the shares for the purpose of making up a deficiency in the capital stock of the bank.

(233) APPEAL by defendant from *Carter, J.*, at November Term, 1914, of PASQUOTANK.

Civil action. There was a verdict and judgment for the defendant. The plaintiff appealed.

Aydlett & Simpson for plaintiff.
Jones & Bailey, Ward & Thompson for defendant.

BROWN, J. This action is brought to recover for a breach of contract in the sale and purchase of ten shares of stock of the American National Bank of Asheville. The contract is evidenced by two telegrams, as follows:

ELIZABETH CITY, N. C., April 26, 1912.

C. C. MCDONALD,
Raleigh, N. C.
Will you give sixty for Asheville stock? (Signed) KRAMER.

The defendant replied:

H. G. KRAMER, RALEIGH, N. C., April 26, 1912.
Elizabeth City, N. C.
Yes; will give you sixty. (Signed) C. C. MCDONALD.

The plaintiff on the same day assigned the stock and sent it with two drafts to the defendant at Raleigh. The defendant refused to pay the drafts and returned the stock. The plaintiff afterwards sold the stock for $200 and instituted this suit to recover the difference, to wit, $400.

The undisputed fact is that at the time the defendant accepted the plaintiff's offer the stock had been assessed by the United States Government $40 per share, which fact was unknown to the defendant. This assessment was made by order of the comptroller on 18 April, 1912, for the purpose of making up a deficiency in the capital of the bank.

The defendant learned of this assessment after he had accepted the plaintiff's offer, but before receiving and paying for the stock. We are of opinion that his Honor was correct in holding upon the admitted evidence that the defendant was not compelled to take and pay for the stock.

It is elementary that in sales of personal property there is an implied warranty of a good title upon the part of the vendor, and this warranty extends to and protects against liens, charges, and encumbrances by which the title is rendered imperfect and the value depreciated thereby. 1 Parsons Contracts, 574; *Garrett v. Goodnow*, 32 L. R. A., 321; Benja-

min on Sales (6 Ed.), by Bennett, 627 *et seq.*, and note 11, page 631; *Andres v. Lee,* 21 N. C., 318; *Sparks v. Messick,* 65 N. C., 440; *Hodges v. Wilkinson,* 111 N. C., 56; 2 Mechem Sales, sec. 1304; (234) *Clevelenger v. Lewis,* 16 L. R. A. (N. C.), 410; *Peoples Bank v. Kentz,* 99 Pa., 344; 44 Am. Rep., 112; *Allen v. Pegram,* 16 Iowa, 163.

In *McClure v. Central Trust Co.,* 165 N. Y., 108, 53 L. R. A., 153, in speaking of the sale of corporate stock with defective title, the Court says: "We think it was a condition of the sale, whether called an 'implied warranty' or any other name, that the defendant was to deliver stock free from lien, for that alone would meet the description of the thing sold under the circumstances surrounding the parties when the sale was made. Shares of stock so covered with liens as to be of no value are not what the parties meant, for such shares would be worth no more than if the signatures to the certificates had been forged, although but for the liens the stock would have been worth the sum paid for it. *The substance of the thing sold was not stock of any particular market value, but unencumbered stock, of the same value as free shares, and such as persons of ordinary intelligence would understand was meant by the general description of stock. By a 'share of stock' the parties did not mean half a share or any fraction of a share representing an equity of redemption, but an entire share not cut down by a charge.*"

It seems to be well settled that the existence of a valid lien upon the stock is such a defect in the title as will avoid the buyer's liability, and in an action for damages, brought by the seller, the buyer may avoid the contract by showing that there was a valid lien on the property. 35 Cyc., 160, 585, and 156.

No error.

IN RE WILL OF W. H. BATEMAN.

(Filed 17 February, 1915.)

1. Wills—Caveat—Laches.

The right to caveat a will may be lost by laches of the caveators in failing for a number of years to file the caveat, as where they knew of the probate of the will, lived in the same county or adjoining county to that of the probate, that the beneficiaries of the will had promptly entered into possession of the property as rightful claimants and had continued therein for twenty-six years.

2. Same—Married Women—Interpretation of Statutes—Limitations of Actions.

The laches which will defeat the right of an heir at law of the deceased to file a caveat to his will will now also defeat the right of such who is

a married woman, for she is put to her action by Revisal, sec. 408, though the statute of limitations was not repealed as to married women until 1899 (ch. 78). Under the seven years statute of 1907 (Pell's Revisal, sec. 3135) a married woman is required to bring her action or file her caveat within three years after becoming discovert.

(235) APPEAL by Mary Patrick, caveator, from *Carter, J.*, at December Term, 1914, of TYRRELL.

I. M. Meekins for caveator.
Mark Majette and Pruden & Pruden for propounders.

CLARK, C. J. The intestate, Wilson H. Bateman, died in 1886, leaving a last will and testament dated 21 June, 1886, which was duly probated 8 October of the same year, and one of the devisees qualified as administrator. Caveat to this will was filed 17 December, 1912, more than twenty1six years after the probate of the will.

The caveator, Mary Patrick, at the time of the death of her brother, the testator, Wilson H. Bateman, was living within 2½ miles of him in the same county, and continued to live there from the death of the testator to the present time, except two years when she lived in the adjoining county of Pasquotank. She knew of the probate of the will and the qualification of the administrator; that the devisees had taken possession of the property devised, and that they and those who claim under them have remained in such possession up to the present time.

It also appears from the record that almost every one of the other heirs of the testator who would have shared with the caveator and the devisees in the will as tenants in common, if there had been no will, were residents of Tyrrell County and knew of the execution and probate of the same.

The caveator, though a married woman at the death of her brother, has been a widow since 1907, and this caveat was filed in 1912. The record also shows that the devisees named in the will have sold to third persons for value much of the property devised to them, and these in turn have sold to others, who are the present owners and who have acquired the property for valuable consideration. No effort was made to set aside this will by the caveator till the filing of this caveat.

In re Beauchamp's Will, 146 N. C., 254, the Court held that the caveat under similar circumstances to these was barred by the *laches,* and *In re Dupree's Will,* 163 N. C., 256, acquiescence and unreasonable delay for twenty-three years—a shorter period than in this case—were held to bar the caveat attempted to be filed. We can add nothing to what has been said in those two cases, which are exactly in point.

The Court called attention in those cases to the fact that until the act of 1907, ch. 862, now Pell's Revisal, 3135, there was no statute of limitations, and that the caveat was barred by reason of the laches. Though the caveator was a married woman, she was authorized to bring an action by Revisal, 408 (1), and therefore is liable for her laches, though by some strange oversight the statute of limitations as to married women was not repealed until chapter 78, Laws 1899. Even under the seven years statute of limitations of 1907, Pell's Revisal, 3135, (236) the plaintiff would have been required to bring an action or file a caveat within three years after becoming discovert, which she did in 1907. *In re Will of Lloyd,* 161 N. C., 557.

The judgment dismissing the action is

Affirmed.

Cited: Pritchard v. Williams, 175 N. C., 331; *In re Will of Witherington,* 186 N. C., 153; *Mills v. Mills,* 195 N. C., 599.

J. B. WEBB v. J. H. LEROY ET AL.

(Filed 17 February, 1915.)

1. Pleadings—Principal and Agent—Deputy—Acts of Agent—Demurrer.

Where the complaint alleges that the defendant is the fish commissioner of the State and that his deputy, attended with persons to assist him, removed the plaintiff's fishing nets and deprived him of his property, etc., erroneously believing the nets were setting west of a certain line, in violation of law, a demurrer is bad which attempts to raise the question of liability of the fish commissioner for the acts of his deputy, it being a fair inference that the deputy was acting under his orders and instructions.

2. Pleadings — Principal and Agent — Deputy — Acts of Agent—Charge Against Principal.

Allegations in an action against the State Fish Commissioner for damages, that the action of his deputy was wrongful in seizing the plaintiff's fish nets, etc., and that the commissioner wrongfully converted them to his own use, are direct charges of a personal responsibility of the commissioner himself, for the wrongs alleged.

APPEAL by plaintiff from *Carter, J.,* at Fall Term, 1914, of CHOWAN.

Civil action, heard upon complaint and demurrer. The court sustained the demurrer, and the plaintiff appealed.

Pruden & Pruden and S. Brown Shepherd for plaintiff.
W. S. Privatt and Ward & Thompson for defendant.

BROWN, J. The motion of the plaintiff made in this Court to amend the summons and complaint so that the suit may be brought in the name of the State upon the relation of the plaintiff, as well as by the plaintiff individually, is allowed. The complaint alleges that "the defendant LeRoy is fish commissioner for the State of North Carolina and executed the bond sued on in the sum of $5,000, with the defendant United States Fidelity and Guaranty Company as surety; that on 23 March, 1913, the plaintiff was the owner of thirteen shad nets which were set to the east of a certain line in Albemarle sound in all respects in conformity to the laws of the State; that on or about 23 March, 1913, the defendant
(237) LeRoy, by his deputy, Thomas P. Leary, attended by persons to assist him, took up the said nets and removed them from the place where they were setting, and deprived the plaintiff of his property, right and use in the same; that said deputy did this believing the said nets were setting west of said line in violation of the law."

The point attempted to be raised by the demurrer is the liability of the fish commissioner for the act of his deputy. We do not think, in view of the allegations of this complaint, which upon demurrer must be taken to be true, the point can be thus raised.

The complaint further alleges "that the action of the defendants and all of them in and respect to the said nets set out in the last preceding section was wrongful and unlawful, and the said defendant LeRoy, commissioner, by seizing and selling the said nets, purporting to act under the law, wrongfully converted the same to his own use."

By these allegations the plaintiff charges the direct personal responsibility of the defendant LeRoy in seizing and selling the nets and converting the same to his own use. It is further a fair inference from the entire complaint that the deputy was acting under the orders and instructions of the commissioner.

For these reasons we think his Honor erred in sustaining the demurrer and dismissing the action.

Reversed.

PERRY C. TYLER v. J. AND E. MAHONEY.

(Filed 24 February, 1915.)

Attachment—Damages to Property—Sheriff—Principal and Agent—Liability of Attaching—Creditor.

Where one wrongfully and without probable cause sues out an attachment on crops of another, the defendant in that action may, by an independent action, recover from the plaintiff therein, as a matter of law, such damages to the crops attached as may have been caused by the sheriff while it was in his possession, in executing the writ, the sheriff being regarded as his agent to execute the mandate issued at his instance.

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

Winston & Matthews for plaintiff.
Winborne & Winborne for defendants.

CLARK, C. J. This is an action to recover damages to his crops by an attachment levied in an action brought by the defendants against the plaintiff in 1903. That action was before this Court, *Ma-* (238) *honey v. Tyler,* 136 N. C., 40, when it was held that though the attachment had been wrongfully sued out, the defendant in that case could not recover damages therein, but must bring an independent action for that purpose. That was done by this action, which was before this Court, *Tyler v. Mahoney,* 166 N. C., 509. This Court held therein that it was not necessary to prove malice in order to recover damages, saying: "The effect of proving malice would be to authorize the jury, in case they saw fit, to award punitive damages; but it is not necessary to consider this question, as punitive damages are disclaimed in specific terms in the brief of the counsel for the plaintiff."

On the new trial the jury found upon the issues submitted to them that the defendants wrongfully sued out the attachment without probable cause, and that by the negligence of the sheriff the crops of the plaintiff were damaged thereby to the extent of $500. The fourth issue, "What sum, if anything, is plaintiff Tyler entitled to recover of the defendant Mahoney?" the court answered, as a legal inference, from the responses to the other issues, "Nothing."

This raises the only question presented by this appeal, and that is whether the plaintiff who wrongfully sues out a writ of attachment, which is levied upon the property of the defendant therein, is liable to such defendant for damages to the property caused by the sheriff while in possession of the property.

The plaintiff is not proceeding against the sheriff, nor against the attachment bond, but against these defendants, who were the plaintiffs in the wrongful attachment, because they put in motion the proceedings in which their crops were taken wrongfully and damaged.

The plaintiff herein having been put out of the possession of his property by abuse of the process of the law which was invoked by these defendants, they are responsible to the plaintiff (the defendant in that action) for the damage which he sustained thereby. The sheriff was their agent to execute the mandate of the court, issued at their instance. If the sheriff acted negligently, he might also be responsible, and the sureties on the attachment bond are also responsible, for the amount of the damage done. The plaintiff has not chosen to pursue either of these, as he might have done, but he has limited his demand to the principals at whose instance the process of the law was wrongfully put in motion.

In *Mahoney v. Tyler,* 136 N. C., 40, the only question was whether the defendant Tyler could proceed by motion in the cause to recover his damages for wrongfully suing out the attachment, or must resort to a separate civil action, and the latter was held to be his proper remedy. This suit was brought in consequence of what was there decided. It was also held that by motion in that cause Tyler could require the
(239) return of any property in the hands of the sheriff, if he desired to pursue that course. In this action he recovers all damages suffered by reason of defendant's tortious act. 4 Cyc., 880.

We are of opinion that the defendants are responsible to the plaintiff for the damage done to his crops by the sheriff in executing the attachment, that was wrongfully sued out against him, as the jury find. In response to the fourth issue the judge should have held that as a matter of law the defendants were liable to the plaintiff in the amount of the damage found to have been sustained by the crops while in the custody of the sheriff, as found in the third issue, to wit, "$500 and interest from the date of the attachment." *Allen v. Greenlee,* 13 N. C., 370; *Abrams v. Pender,* 44 N. C., 260; *Sneeden v. Harris,* 109 N. C., 349; *R. R. v. Hardware Co.,* 135 N. C., 73; *s. c.,* 138 N. C., 175; *s. c.,* 143 N. C., 54.

The case will be remanded, to the end that the judgment may be so entered in the court below.

Reversed.

Cited: Shute v. Shute, 180 N. C., 391; *Flowers v. Spears,* 190 N. C., 752; *Williams v. Perkins,* 192 N. C., 177.

W. T. SHANNONHOUSE ET AL. v. P. W. MCMULLAN ET AL.

(Filed 17 February, 1915.)

Deeds and Conveyances—Judicial Sales—Timber Deeds—Period for Cutting—Remaining Timber—Owners of Land—Subsequent Purchase—Merger.

After the expiration of the period of time allowed for cutting timber conveyed separate from the land has elapsed, the title to the remaining timber thereon revests in the owner of the land; and where at a judicial sale of the timber the commissioner states that interest on the purchase price allowed in the deed for further extension beyond the original period would belong to the present owners of the land, they may not object that no security for this interest was given to them, when the purchasers of the timber at the sale have subsequently purchased the land itself, for then the title to the timber and the land has merged in them. As to whether the statement made by the commissioner at the sale is enforcible, quære.

APPEAL by plaintiffs from *Bond, J.*, at September Term, 1914, of PASQUOTANK.

Proceeding for the sale of certain timber interests and of certain lands for partition. The timber on the lands was first sold with the right to cut the same in five years, and with the privilege of extending the time of cutting three years upon the payment annually of 6 per cent on the purchase price.

The land was then sold, the commissioners making the sale stating that the interest payable for the extension period would belong to the present owners and not to the purchasers.

The defendants bought the timber and the land, and the only (240) question in dispute is whether the original owners of the land are entitled to have the amount to be paid for the extension period secured to them. His Honor ruled against the contention of the defendants, and they excepted and appealed.

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

ALLEN, J., after stating the case: The timber on certain land was sold at judicial sale, with the right to the purchaser to have five years in which to cut the same, and with a further extension of three years upon the payment annually of 6 per cent on the purchase price, and at the time of the sale it was stated by the commissioners that the interest payable for the extension period would belong to the present owners of the land, and not to the purchasers.

The land was then sold and was bought by the same persons who bought the timber, and the contention of the former owners is that they are entitled to have the interest for the extension period secured to them.

The difficulty about this position is that there is no necessity, upon the facts before us, to exercise the privilege of extending the time for cutting, and the extension period can never arise, and consequently no interest will be due therefor.

In *Hornthal v. Howcott,* 154 N. C., 228, the owner of the land conveyed the timber with the right to cut in four years, and then conveyed the land, and it was held that the grantee of the land was the owner of all the timber not cut within the time stipulated; and in *Bateman v. Lumber Co.,* 154 N. C., 248, in which there was an extension clause, that the notice that the privilege of extending the time would be exercised must be given to the grantee of the land.

Applying these principles, if the timber should not be cut in five years it would then belong absolutely to the defendants as purchasers of the land, and they could cut it when they wished to do so.

In other words, when the defendants bought the land they also bought the right to extend the time for cutting, and the latter was merged in the title to the land, and therefore no interest can become due.

We have dealt with the case upon the assumption that the statement made by the commissioners would ordinarily be enforcible, but we do not so decide.

Affirmed.

Cited: Carroll v. Batson, 196 N. C., 170.

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(241)

S. A. SAVAGE ET AL. v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 17 February, 1915.)

1. Waters—Lateral Ditches—Insufficient Culvert—Diversion of Water.

Where the water from the lateral ditch along the right of way of a defendant railroad overflows the lands of the plaintiff because of a culvert under the roadbed insufficient to carry off the flow from the ditch, the issue presented is one of fact as to the diversion of the water from its natural flow, and if the damages are thus caused, the defendant is answerable.

2. Same — Permanent Damages — Continuous Damages — Limitations of Actions.

The five-year statute of limitations [Rev., 394 (2)] does not apply to damages for the diversion of water from a lateral ditch along the roadbed of a railroad company, caused by an insufficient culvert to carry it under the roadbed, until the culvert became insufficient.

APPEAL by defendant from *Carter, J.*, at August Term, 1914, of GATES.

Ward & Grimes for plaintiff.
W. B. Rodman and J. K. Wilson for defendant.

CLARK, C. J. This is an action to recover damages for ponding water on the land and crops of the plaintiff. The east side of plaintiff's field drains toward the railroad and into the lateral ditches along its track. Formerly the lead ditch went under the roadbed, but the defendant let this culvert fill up. This turned the water to the south along the railroad and its lateral ditch along the plaintiff's field has filled up until its bottom is higher than the plaintiff's ditch. The answer of the defendant contends that the plaintiff's ditch is too low, and it also pleads the statute of limitations.

There is no question of accelerating or increasing the flow of the water. But it is simply a question of fact as to whether the water has been diverted, and the jury find on the issues that the water was diverted to the damage of the plaintiff, as alleged. The defendant contends that the culvert was filled up when the plaintiff bought the land and that as the defendant had neglected to clean out the culvert for ten years, it was protected by the statute of limitations.

The defendant's brief properly states that the question raised by this appeal is, "When does the statute of limitations begin to run?" There was evidence that the culvert had been stopped up some ten years. The court charged the jury that the plaintiff was entitled to recover for such damages, if any, done to the plaintiff's land and crop by the water ponded back by the defendant within three years before action begun. This is not an action for permanent damages from stopping up the ditch and culvert, but for damages for the recurring over- (242) flows from time to time, and his Honor's instruction was correct. This damage was not caused by "the construction of said road or the repairs thereto," and the five years statute, Rev., 394 (2), does not apply. This case is substantially like *Spilman v. Nav. Co.*, 74 N. C., 675, and *Barcliff v. R. R.* (the same defendant), *post* 268.

No error.

Cited: Dayton v. Asheville, 185 N. C., 15.

GEORGE W. BOWEN, ADMINISTRATOR OF DEBORAH STOCKS,
v. E. L. DAUGHERTY ET AL.

(Filed 17 February, 1915.)

1. Contracts — Married Women — Necessaries — Husband's Liability — Promise of Wife—Indebitatus Assumpsit.

The common-law rule that the husband is liable for the funeral expenses of his deceased wife and for "necessaries" during their married life is not affected by chapter 109, Laws 1911, authorizing a married woman to contract and deal as if she were unmarried, with certain reservations, when there is nothing to show an express promise to pay on her part, or that the articles were sold on her credit or under such circumstances as to make her exclusively or primarily liable according to the equitable principles of *indebitatus assumpsit.*

2. Estates—Creditors—Distributions—Interpretation of Statutes.

Revisal, sec. 87, is only designed to recognize priorities among the creditors of the deceased and to establish the order of payment between claimants who have valid debts against the deceased, and was never intended to create a liability which did not otherwise exist.

3. Contracts—Married Women—Separate Estate—Necessaries—Funeral Expenses—Husband's Liability—Interpretation of Statutes.

If the wife, having a separate estate, predecease her husband, and the latter dies with property amply sufficient to pay his debts and funeral expenses, and those of his wife for necessaries, and leaves a will disposing of all of his property, the funeral and other necessary expenses of the wife are chargeable to the husband's estate, as an expense for which he is liable under the common law and in preference to the beneficiaries under the husband's will, in the absence of proof that the wife had in some way assumed personal liability therefor. Ch. 109, Laws 1911; Revisal, sec. 87.

CLARK, C. J., concurring; BROWN, J., did not sit or participate in the decision of this case.

APPEAL by defendants from *Bond, J.,* at August Term, 1914, of WASHINGTON.

Petition to sell land for assets, instituted before the clerk Superior Court and transferred to civil-issue docket on denial of any and all indebtedness.

(243) On the hearing it was properly made to appear that Mrs. Deborah Stocks, formerly the wife of John Stocks, died intestate, December, 1913, leaving a tract of land and very little or no personal property, and that petitioner, G. W. Bowen, duly qualified as administrator and instituted present proceedings to sell her land for assets to pay debts; that claims had been presented amounting to more than $300, consisting of funeral and burial expenses, tombstone, doctor's bills and

nursing during her last illness, the latter part of 1913, from September to 31 December.

"Third. That all of the said accounts were made since an act was passed giving married women the right to contract and were made between September, 1913, and 31 December 1913, the period covered by the last illness of the said Mrs. Stocks.

"Fourth. That at the time of the death of Mrs. Stocks and during the time that said accounts were contracted the said Mrs. Stocks and her husband were living together as man and wife, and the said Mr. Stocks was at home during said period.

"Fifth. John Stocks, husband of Deborah Stocks, died shortly after the death of Deborah Stocks, leaving a last will and testament by which he devised and bequeathed all of his property to Mrs. Kitty Brown (one of the claimants) for life, and after her death to the children of Mrs. Kitty Brown, and appointed Mrs. Kitty Brown executrix, and that the said Mrs. Kitty Brown has duly qualified as executrix of said will.

"Sixth. That Mrs. Deborah Stocks did not leave sufficient personal property to pay the claims above referred to, but did leave sufficient real estate, if her estate is liable therefor.

"Seventh. That John Stocks, her husband, left sufficient property to pay all of the above claims, if they are properly chargeable against his estate, in addition to all other debts of his estate.

"Eighth. That all of the items in all of the above claims were necessary to the comfort, the proper care and proper apparel of the deceased lady, and that the amount due the two Mrs. Browns, if anything, for nursing, were also necessary for the comfort and proper care of the said Mrs. Stocks during her illness.

"Ninth. That Mrs. Deborah Stocks left no children, but did leave sisters, nephews, and nieces, all of whom have been properly made parties defendant to this proceeding.

"Tenth. That there was no evidence of any express contract on the part of Mrs. Stocks for any of the supplies, etc., or medical attention, etc., nursing, etc., represented by the claims filed."

On these facts, the court below being of opinion that the real estate of the deceased wife was liable, there was verdict establishing indebtedness and judgment directing that the clerk proceed accordingly in the proper administration of the estate.

Defendants, having duly excepted, appealed.

Louis W. Gaylord for plaintiff. (244)
Rouse & Land and E. R. Wooten for defendant.

HOKE, J., after stating the case: At common law the husband was liable for the funeral expenses of his deceased wife and for "necessaries" during their married life; the term including "the cost of clothing, food, ordinary household supplies, medical attendance, expenses of sickness, etc., as well as articles of comfort suitable to the condition and style in which the parties were accustomed to live." *Smyley v. Reese,* 53 Ala., 89; *Kethrer v. Nelson,* 146 Ky., 7; *Estate of Eva Walsch, decd.,* 166 Pa. St., 204; *Cunningham v. Erwin,* 7 Leary and Rawle, 247; *Sears v. Giddy,* 41 Mich., 590; *Stonesifer v. Shriver,* 100 Md., 854; 21 Cyc., pp. 1219-1224.

As a general rule, neither the wife nor her estate was legally liable for such claims, though courts, empowered to administer her estate on equitable principles, have enforced them in certain instances (*In re McMyne,* L. R. 1886, Chan. Div., 575), a position which has been allowed to obtain, in this country, where the husband has failed to pay and, being insolvent, payment from him or his estate could not be enforced. *Carpenter v. Hazelrig,* 103 Ky., 538; *Gould v. Moulahan,* 53 N. J. Eq., 341; *Fogg v. Holhook,* 88 Me., 169-80; 33 L. R. A., 660, and note.

This being the law formerly existent here, the Legislature enacted the statute known as the Martin act (ch. 109, Laws 1911) and which provided, in effect, that except in conveyances of her real estate and in case of contracts with her husband, a married woman was authorized to contract and deal as if she were unmarried; and it is chiefly contended that, under and by virtue of the provision of this statute, the wife and her estate have become absolutely and primarily liable for the claims filed in this proceeding.

The law having removed the inability of married women, in ordinary instances, to bind themselves by contract, they can be held liable under their express agreement and when the goods are sold to them on their credit. This was held in *Lipinsky v. Revell,* 167 N. C., 508, and undoubtedly in proper instances married women may now be held liable in the common counts in assumpsit. *Kinkson v. Williams,* 41 N. J. L., 35; *Ackley v. Westerfeldt,* 86 N. Y., 448; Stewart on Husband and Wife, secs. 375 and 381. But, in the absence of such express promise and of any evidence tending to show that credit was given to her or of any facts or circumstances to make her exclusively or primarily liable under the general equitable principles of *indebitatus assumpsit,* we see no reason, before or since the statute, why a debt of the husband should be imputed to the wife. True, the general rule is that when goods are supplied or services rendered by one person for another, the law
(245) implies a promise to pay what they are reasonably worth; but the principle, in our opinion, should not control when the goods were

acquired or services rendered under circumstances which created a recognized liability in some one else. In such case there should be additional proof showing an express promise or, as stated, facts and circumstances bringing the demand under the equitable principles of *indebitatus assumpsit.* This, we think, is the correct view as to the effect of the statute in such cases, and the position is in accord with authoritative decisions on the subject in other States. *Moore v. Copely,* 165 Pa. St., 294; *Nelson v. Spaulding,* 11 Ind. App., 453; *Nelson v. O'Neal,* 11 Ind. App., 296; *Wilson v. Herbert,* 41 N. J. L., 243.

We are aware of a number of decisions, and by courts of eminent ability and learning, to the effect that the estate of the deceased wife is primarily liable on claims of this kind by reason of their statutes as to the proper administration of estates, and which provide, in differing terms, that debts for funeral expenses, medical bills, and services within a stated period, etc., shall be paid, etc. *Estate of Skillman,* 146 Iowa, 601; *Schneider's Estate v. Brüer,* 129 Wis., 446; *Constantides v. Walsh,* 146 Mass., 281; *McLellan v. Felson,* 44 Ohio St., 184.

It may be that, owing to special phraseology of these statutes, a position of that kind can be upheld, but, so far as our own enactment is concerned (Revisal 1905, sec. 87), we do not hesitate to hold that the statute is only designed to recognize priorities and to establish the order of payment as between claimants who have valid debts against the estate, and was never intended by the lawmakers to create a liability which did not otherwise exist.

As heretofore stated, if the husband, liable for indebtedness of this kind, should fail to pay, or, his estate being insolvent, payment could not be enforced, authority is to the effect that an equity might arise to the creditor enabling him to collect from the wife's estate; but otherwise, and except under conditions formerly referred to, the debt is and continues to be that of the husband and enforcible against him or his estate.

From the case on appeal it appears that all of these claims are for funeral expenses or for necessaries, and that these last were supplied to the wife when she was living with her husband and without any express promise on her part to pay for same, and, further, that the husband died shortly after the wife, leaving an estate sufficient to pay all of his debts, including those involved in this proceeding, and that he devised his property to Kitty Brown for life and, after her death, to her children, she being one of the principal claimants against the wife's estate. Applying the principles, as above stated, we are of opinion that there was error in holding the wife's estate liable, and the judgment to that effect must be

Reversed.

(246) CLARK, C. J., concurring: The statute, ch. 109, Laws 1911, known as the "Martin act," in no wise enlarges or restricts the common-law liability of the husband for the support of his wife.

While that statute authorizes a married woman to contract and deal as if she were unmarried, and while chapter 13, Laws 1913, authorizes her to receive and collect her earnings and damages for wrongs done her, either to her person or property, neither of these acts relieves her husband of his common-law liability for her support nor renders her liable therefor except in such cases as she shall have contracted obligations upon her own responsibility.

The husband does not become liable as surety for his wife's contracts, nor responsible for debts contracted by her, except for her support, as above stated. And she is not made responsible for articles bought for such support except where by contract, express or by her conduct she leads the seller reasonably to understand that she is assuming individual responsibility. In the latter case the husband would still remain liable, and the seller can recover against either or both.

BROWN, J., did not participate in the decision of this case.

Cited: Grocery Co. v. Bails, 177 N. C., 299; *Batts v. Batts,* 198 N. C., 396; *Brown v. Brown,* 199 N. C., 475; *Fertilizer Co. v. Bourne,* 205 N. C., 339.

JOSEPHINE WATERS v. WILEY M. KEAR.

(Filed 17 February, 1915.)

Waters — Upper Proprietor — Diversion — Drainage Ditches — Irrelevant Evidence—Condemnation—Drainage Act.

Where the upper proprietor of lands has diverted the natural flow of the water thereon to the damage of the lower proprietor, the latter may then recover his damages caused thereby, and it is no defense to show that he might have reduced his damages by cutting drainage ditches on his own land or by agreeing that the upper proprietor should cut them. The defendant's remedy, if any, was by proceedings for condemnation under the Drainage Act.

APPEAL by both plaintiff and defendant from *Bond, J.,* at October Term, 1914, of BEAUFORT.

Ward & Grimes for plaintiff.
Daniel & Warren for defendant.

CLARK, C. J. This is an action for damages to plaintiff's crops and her land by the diversion of surface water. The jury found upon the issues submitted that the defendant wrongfully diverted the water upon the lands of the plaintiff; that her crops had been damaged, (247) within three years before action brought and down to the trial, $150, and that the permanent damage to her land was $65.

The court submitted as additional issues what it would have cost the plaintiff to have cut certain ditches, marked on the map, which would have prevented the diverted water from injuring the plaintiff's lands and crops, and whether the defendant offered to cut a ditch through plaintiff's land which would have prevented the injury, and which the plaintiff refused to let the defendant cut. The jury having found that the water was wrongfully diverted by the defendant upon the plaintiff's land, these latter issues and the findings thereon are irrelevant. If the water was wrongfully diverted, it may be that it would have been good neighborship and possibly good policy for the plaintiff to have permitted the defendant to have cut a ditch through her land, and thus have avoided any damage from the wrongful diversion of the water, if it would have had that effect. But the defendant had no legal right to require this, and the plaintiff was not required to assent to the defendant cutting a ditch through her land (which she doubtless had her reason for not wishing to be put there) simply to relieve the defendant from the consequences of his wrongful act.

The defendant's remedy in such case, if any, was to have had the right of way condemned through the plaintiff's land under the Drainage Act. He certainly had the remedy in his own hands of abandoning the diversion of the water and draining the water off according to its natural flow. A somewhat similar state of facts is presented and discussed in *Barcliff v. R. R., post* 268.

The court below should have rendered judgment in favor of the plaintiff, in accordance with the verdict on the second and third issues, for $215.

The case will be remanded, to the end that judgment may be so entered. This renders it unnecessary to discuss the defendant's appeal.

In defendant's appeal, No error.

In plaintiff's appeal, Reversed.

Cited: Cardwell v. R. R., 171 N. C., 367; *Borden v. Power Co.,* 174 N. C., 74.

(248)

S. FLEMING v. WASHINGTON AND VANDEMERE RAILROAD COMPANY.

(Filed 17 February, 1915.)

1. Railroads—Killing of Animals—Interpretation of Statutes—Negligence—Presumptions—Legal Excuse.

Unless some legal excuse is shown for not bringing an action against a railroad company for the killing of the plaintiff's cow by the defendant's train within six months from the time of the killing, there is no presumption of negligence on the defendant's part under the statute, Revisal, sec. 2645; and the statement of some one not having authority to speak for the railroad company, that it was not necessary to bring the action within the period of time stated, is not a sufficient or legal excuse for the delay.

2. Railroads—Killing of Animals—Interpretation of Statutes—Negligence—Evidence—Rebuttal—Trials—Nonsuit.

The presumption of negligence on the part of a railroad company in killing an animal on its track by its train may be rebutted; and where the plaintiff has introduced, as his own witness, the defendant's engineer who was on the engine at the time of the killing, and who testifies, in effect, that with proper care the killing of the animal could not have been avoided under the circumstances, particularizing the details, and there being no further evidence in the plaintiff's behalf, a judgment of nonsuit is properly allowed.

3. Railroads—Killing of Animals—Negligence—Expressions of Opinion—Res Gestæ.

The expression of an unidentified person that the defendant railroad company had been guilty of negligence in running upon and killing with its train the defendant's cow, made after the occurrence, is incompetent as tending to show that the killing was negligently done, as his privity with defendant and his authority to bind it had not been shown, and as it was a statement of a past transaction, and not a part of the *res gestæ*.

4. New Trials—Newly Discovered Evidence—Court's Discretion—Appeal and Error.

The refusal of the trial judge to grant a motion for a new trial, based on newly discovered evidence, is a matter addressed to his discretion, and is not reviewable on appeal.

APPEAL by plaintiff from *Bond, J.*, at October Term, 1914, of BEAUFORT.

This action was brought to recover the value of a cow which plaintiff alleges was killed on the defendant's track by its negligence. The plaintiff testified for himself, that he found the cow on the right of way of the railroad company about two days after the injury. He then called as a witness the engineer of the defendant railroad company, who testified that on the night of 27 August, 1910, he was running an engine of the defendant railroad company; that it was very dark and raining; that the

railroad-bed was in good condition and that the engine was properly equipped with headlight and brakes, and was in good condition generally; that he was keeping a very careful lookout and saw (249) some cows on the track about a hundred yards ahead of him; that he was running at the time about 25 miles per hour; that as soon as he saw the cows he sounded the whistle and applied the brakes, and in fact did everything he could to keep from striking them, but that he did strike one cow and knocked her off the track; that it was impossible to stop the train sooner because of the slippery condition of the rails, due to the rain. The cow was killed 27 August, 1910, and this action was commenced 19 April, 1912. Plaintiff proposed to account for the delay in bringing his action by proving that some one who was connected with the defendant told him that a suit would not be necessary, but there was no proof, nor offer to prove, who made the statement, or, if it was made, that the person had any authority from the defendant to make it. The evidence was excluded, and the court, on motion, nonsuited the plaintiff, and he appealed.

L. M. Scott for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

WALKER, J., after stating the facts: The judgment of the court was manifestly correct. There was no presumption or *prima facie* case of negligence, under the statute, Revisal, sec. 2645, as the action was not commenced within six months after the animal was killed, and it is provided therein that "no person shall be allowed the benefit of this section unless he shall bring his suit within six months after his cause of action shall have accrued." He offered no legal excuse for his delay in suing. That some one, without authority to represent the railroad, told him that an action would not be necessary, was no excuse. The defendant is not responsible for the statements or opinions of any one not authorized to speak for it. Besides, the plaintiff's delay continued for more than two years without any explanation. Why, if he was relying upon the statement of his informant, did he not press the matter to a conclusion sooner than he did, and if settlement was refused, then bring his suit? Excluding the presumption from consideration, as inapplicable, the case is brought directly within the decision in *Seawell v. R. R.*, 106 N. C., 272, which is very much like this case. The facts, as stated by the engineer, who was plaintiff's own witness, show that he complied in every respect with the most rigid and exacting rule, as laid down by this Court, in regard to the duty of an engineer to keep a proper lookout for obstructions on the track, and as said by *Justice Davis* in *Seawell's case, supra:*

"If the facts testified to by the engineer be accepted as true, there was no negligence on the part of defendant." The cases of *Forbes v. R. R.*, 76 N. C., 454; *Winston v. R. R.*, 90 N. C., 66, and *Proctor v. R. R.*, 72 N. C., 579, strongly support this view, and hold that even when
(250) an action is brought within the six months, it makes out only a *prima facie* case and is not conclusive, and that upon evidence similar to that in this case, and not more favorable to the defendant, there is no negligence, and consequently no liability.

The statement of the unidentified person was not any evidence of negligence, and no more competent to prove it than it is to show a legal excuse for the delay. It was simply the expression of an opinion emanating from one not in privity with defendant and having no authority to bind it in any way, so far as appears. In one of its aspects—that is, as proof of negligence—it was the statement of a past transaction, and not a part of the *res gestæ*, and for that reason doubly incompetent. *Rumbough v. Improvement Co.*, 112 N. C., 752; *McEntyre v. Cotton Mills*, 132 N. C., 598; *Robertson v. Lumber Co.*, 165 N. C., 4.

The motion for a new trial, based upon the ground of newly discovered evidence, was addressed to the discretion of the judge, and, having been denied by him the decision is not reviewable here. *Flowers v. Alford*, 111 N. C., 248; *Munden v. Casey*, 93 N. C., 97.

No error.

Cited: Sanford v. Junior Order, 176 N. C., 446; *S. v. Casey*, 201 N. C., 623.

BEATRICE COOK v. HIGHLAND HOSPITAL AND ROBERT S. CARROLL.

(Filed 24 February, 1915.)

1. False Imprisonment—Asylums—Insane Persons—Inducements—Contracts—Rules of Institution—Damages.

Where under inducement that a hospital is a private sanitarium for the nervous sick, which furnishes to its patrons, for hire, luxurious accommodations and elegant diet, baths, etc., a patron admittedly sane signs a contract to abide by and be subject to its rules, unaware and without notice that the institution was in fact a private asylum for the insane, the agreement cannot give the institution the right to detain her against her will in a scantily furnished room on meager diet, and to coerce her into submission by placing her in a padded cell near those of shrieking maniacs, subject her to rough treatment, and to cut her off from communication with her family; and such detention being unlawful, actual damages are recoverable.

2. False Imprisonment—Good Faith—Punitive Damages.

As to whether the question of good faith will be a defense to a recovery of punitive damages for unlawful detention or imprisonment, *quære.*

3. False Imprisonment—Insane Asylums—Rules—Infringement—Duty of Authorities.

Where one has been induced to enter into a private insane asylum for hire, while sane, not knowing its character, and has signed an agreement to submit to its rules, the recourse of the authorities of the institution is to discharge her for infringement of the rules, and not forcibly detain and coerce her into submission; and should she, while confined, become too dangerous to be set at large, it becomes the duty of the authorities to notify her relatives.

4. Appeal and Error—Damages.

Where the jury have assessed the plaintiff's actual damages for being unlawfully detained in a private insane asylum by its authorities, and the amount has been approved by the trial judge, it is not reviewable on appeal.

5. Appeal and Error—Jurors—Misconduct—Findings of Fact.

The findings of fact by the trial judge in this case as to the alleged misconduct of a juror is not reviewable. *Lewis v. Fountain, post,* 277.

APPEAL by defendant from *Cline, J.,* August Term, 1914, of (251) BUNCOMBE.

This was an action to recover damages on account of the unlawful detention of the plaintiff by the defendants in the defendant hospital operated by the defendant Carroll, and for assaults committed on her and neglect of her while in the hospital, which acts are alleged to have been wrongful and committed willfully, wantonly, and maliciously by the defendants.

The defendants denied that any wrongful acts were committed by them, as alleged by the plaintiff, but aver that she regularly entered herself as a patient and agreed to be governed by the rules and regulations of the hospital; that she was nervous and not capable mentally of caring for herself, and that what was done was in accordance with the rules and regulations of the institution, and denied that she was assaulted or neglected while under their care.

The jury found for their verdict that the defendants wrongfully imprisoned the plaintiff and restrained her of her liberty, as alleged in the complaint, and that this was done wantonly, willfully, and maliciously by the defendants, who also wantonly, willfully, and maliciously assaulted her, as alleged in the complaint, and awarded compensatory damages, but no punitive damages. The defendants moved to set aside the verdict upon the ground of misconduct by a juror, but the court found upon the evidence that there was no misconduct as alleged, and denied the motion

and entered judgment for plaintiff upon the verdict. Appeal by defendants.

Jones & Williams and Oliver & Oliver (of Savannah, Ga.) for plaintiff.

Martin, Rollins & Wright for defendants.

CLARK, C. J. The plaintiff was a young woman, about to be married, who came to Asheville, N. C., from Savannah, Ga., to rid her (252) system of malaria and for recreation and rest. She was somewhat delicate and nervous, but the evidence is that her mind was perfectly clear. Having heard of the Highland Hospital, operated by Dr. Carroll, as a sanitarium, she entered that institution after visiting it, but it was concealed from her that it was in effect a private asylum. The defendant Carroll gave her two pamphlets, one entitled "Diets," describing most delicious and appetizing foods. The other contained a description of sixty different "baths," most elegant and luxurious, and offering most enticing inducements to patients. These pamphlets filed in the record are the *ne plus ultra* of all that is elegant and luxurious in bathing and diets.

According to the evidence of the plaintiff and her sister, she entered the institution upon these representations and with no other thought than that she would be free to leave at will, could communicate freely with her family, and would receive the baths and diet mentioned in the pamphlets. She contracted for and received a front corner room, and her married sister returned to the hotel. This was on Sunday, 4 August, 1912. On the next day she was informed that she would not be permitted to see her married sister nor communicate with her, and was told that she must have her breasts massaged and her hair shampooed. She testified that her hair had been shampooed just before leaving home and she was suffering from cold, sore throat, and earache, and that her physical condition just at that time forbade her being subjected to being massaged, and she protested against both. The nurses gave this information to the defendant Carroll, but he gave imperative orders that the plaintiff "must be massaged and shampooed." Her evidence is that in obedience to this order two or three nurses took the plaintiff forcibly from her bed, while lightly clad, raised her forcibly from the floor, when she fell upon it, carried her to the bathroom, massaged her breasts and shampooed her hair against her will. The plaintiff then demanded to leave the hospital, and to see her sister, and announced that she would not remain. The defendant Carroll was informed of this. He thereupon gave orders that the plaintiff was not to see her sister or leave the hospital. According

to the defendant's testimony, the plaintiff stated that she would jump out of the window before she would stay there without seeing her sister. The defendant Carroll thereupon directed that she should be moved into a protected room or padded cell located in the rear, with diamond-shaped wire meshing on the inside and iron bars on the outside, a locked door, and an electric light at the ceiling inclosed with wire and operated from the outside. This room had scant furniture and, according to the report of the nurses, was infested with roaches.

Adjoining this locked cell were raving lunatics shrieking to be let out. On each of the days prior to this time and after the plaintiff was taken to the barred and locked cell, the plaintiff's married sister paid visits to the hospital, but was kept in ignorance of the treatment (253) given to the plaintiff and was not permitted to see her. The plaintiff was kept immured in the cell, above described, adjoining raving insane people, while her married sister returned to Savannah, carrying assurance from the defendant Carroll to the family that the plaintiff was progressing nicely.

After five days the plaintiff was removed from the locked and barred cell to another back room, where she was restrained of her liberty against her will and prevented from communicating with any member of her family for more than three weeks, making thirty-two days in all, until her mother, after receiving a pathetic letter written by the plaintiff, who had bribed a colored maid to secure a pencil and mail a letter, came to the sanitarium and demanded her daughter.

The "Highland Hospital" was incorporated, but the defendant Robert S. Carroll was in sole and exclusive charge, and, together with his wife, owned ninety-nine shares out of the one hundred shares of the capital stock. During the entire time the plaintiff was in the hospital the defendant Carroll visited her only three times, according to the plaintiff's testimony, or five times according to the defendant's testimony. The plaintiff was paying $35 per week for board and was charged $15 per week extra for half the time of a trained nurse who was only a student and who was being paid only $8 per month by the defendants. The plaintiff was subjected to compulsory hypodermic injections twice every day during her stay, against her protest. Her breasts were forcibly massaged each day in such a forcible manner that she groaned under the treatment.

Instead of the luxurious diet described in the pamphlet, the food given the plaintiff was 3 ounces of milk and 1 ounce of lithia water eight times a day at the beginning, which was increased to 6 ounces of milk, 1½ ounces of cream, and two raw crated eggs. She was read "Why Worry" and "Those Nerves" constantly during her stay. The defendant Carroll

wrote only one letter to her family during the thirty-two days she was immured under his control. The plaintiff's arm was injured by the force used in dragging her to the bathroom to such an extent that she complained of it constantly during her stay in the hospital. She testified that she was such a physical wreck by reason of her treatment that she could not make her wedding clothes after her return home, and that she could not hold her baby after it was born. She graphically describes her agony of mind during her illegal restraint among lunatics, in a private asylum, in a distant State, far from home and friends, without means of communication with her family, without money and clothes with which to escape, being forcibly detained against her will and having entered the institution, according to her testimony, without
(254) knowledge of its nature and being duped into supposing that it was a rest cure, with luxurious diet and baths. She testifies that she returned home a nervous wreck, requiring careful treatment for many months and indelibly stamped with her experience as a prisoner in a madhouse.

The defendants in their evidence deny the mistreatment, allege that the plaintiff was nervous and hysterical, but admit that she was restrained of her liberty; that she was placed in the "protected" room and afterwards removed to another "protected" room; that her hair was shampooed, though she earnestly resisted, and that she was restrained of her liberty and kept in the institution against her will, and that the family were not informed of that fact. The defendant Carroll testified that he restrained her and kept her in the institution against her will; that her lack of self-control had reached hysteria, which was that she was "impulsive and would do unreasonable things." He did not testify that she was insane, but said that hysteria is "the borderland between sanity and insanity."

The judge properly told the jury, "If the plaintiff was 24 years of age, unmarried, and was there in the hospital, and she subsequently applied to the authorities of the hospital for, and demanded, her release—demanded that she be allowed to go from the institution and be allowed and suffered to leave there, and after such demand made, if you find it, and that it was communicated by the nurses, or through the proper channels, to Dr. Carroll, and after that, that she, either by words or by locking doors or by anything that comes up to the definition of imprisonment that I have given you, was imprisoned, so that she was unable to carry out her desires and wishes in that regard, then if you find these facts, after that, the court charges you as a matter of law that she would be wrongfully imprisoned and restrained of her liberty.

"If you were to find that she was in the institution and that she was

demanding to be released, which was properly communicated to the hospital authorities, but if you were to further find to your satisfaction that she was so nervous from any ailment or disease and so irrational that there was reasonable probability that if so released at the time she would do herself some bodily harm, under such circumstances the hospital would have the right to detain her, and restrain her, under the law of necessity and humanity, until that condition as to the reasonable apprehension of doing herself bodily harm had passed. And within that rule or limitation it would not be a wrongful and unlawful imprisonment.

"Now, it is for you, gentlemen, to say from the testimony, the facts you find, how this matter is. Even though she went in under this paper, and if you find, as she contends, that she was perfectly rational and knew what she was doing, what she wanted and didn't want, and she wanted to leave the institution, and expressed it to the hospital authorities, and the hospital authorities knew of that fact, and (255) then after that restrained her of her liberty, then it would be in law, as I am holding, wrongful detention, unless they were justified in restraining her under those rules of humanity and regard for her welfare, as I have just given you."

There was a conflict of evidence as to the treatment that the plaintiff received, but there is no controversy that the plaintiff was detained in the defendant's hospital against her will; confined for thirty-two days; that she was confined a considerable part of the time in a locked and barred cell; that she was denied all communication with her friends and subjected to having her hair shampooed and to massage of delicate portions of her body and to hypodermic injections daily against her will.

The defendants contend that they had a right to do these things because the plaintiff signed an agreement upon her entrance that she would be subject to the rules and regulations of the institution, and that she could not be set at liberty without danger to herself. The judge submitted this latter phase to the jury, who found against it. Besides, the defendants did not account for the fact that though the plaintiff's sister visited the institution, they gave her no information as to plaintiff's condition and treatment, and that during the whole thirty-two days that the plaintiff was restrained by them of her liberty and subjected to physical treatment against her protest, no information was given by the institution to her relatives, though this was practicable during the entire time by wire or long-distance phone.

The judge properly told the jury that the plaintiff could not thus surrender control of herself to another by signing a paper at her entrance into the institution. 4 Cyc., 365; *In re Lambert,* 55 L. R. A., 856; *In re Baker,* 29 How. (Pr.), 488. The main defense relied upon by the de-

fendants is that if they acted in good faith there would be no liability upon their part. Whether or not this would be a defense to a recovery of punitive damages we need not discuss, for the jury in their verdict denied the plaintiff, on the issue submitted for that purpose, any recovery of punitive damages.

"Good faith" is not a defense to the recovery of compensatory damages when the jury find that there was illegal restraint of liberty, and compulsory massage and hypodermic injections and other physical treatment upon a defenseless woman who was in the absolute power of the defendants and kept immured under lock and key and with barred windows, without information given by them to her family of her condition and she denied all communication with them.

It is unnecessary to discuss in detail the exceptions taken, for they are all covered by what we have said.

(256) The plaintiff was not committed as insane, and if she had been the defendants do not account for the fact that they accepted her as sane by signing the agreement with her upon her entrance into the institution. If she subsequently became insane, it was the duty of the institution to have at once notified her mother and sister. The testimony of the defendants, however, is that she was not insane. Evidently, the defendant Carroll believed that he had absolute control of the plaintiff and the right to imprison her if she opposed his orders or will, and the right to impose on her whatever treatment he thought best, and that the family need not be consulted any more than the plaintiff herself. The effect of being at the head of such institution is very often—too often—to render the person in charge callous and autocratic, and in his own opinion irresponsible to any one.

In this land the law guarantees liberty to every one, subject to restraint only in the modes provided by the law, and even then there is the right to review the conduct of those in charge of those deprived of their liberty. The plaintiff was not committed to the care of the defendants by any legal proceedings adjudging her insane, and her signing the paper agreeing to be subject to the rules and regulations of the institution was not irrevocable. It did not subject her to the irresponsible power and control of the defendant. This is the whole controversy, and requires no further discussion.

If the plaintiff did not abide by her agreement to obey the rules and regulations of the institution the remedy of the defendants was to discharge her or, if her condition forbade this, to notify her relatives (neither of which they did), and not to imprison her and to force her to do their will.

As to the amount of compensatory damages due the plaintiff by reason

of her illegal detention, and the physical ill-treatment that she received, the jury have assessed the amount and it has been approved by the trial judge, and is not reviewable by us. *Norton v. R. R.*, 122 N. C., 910; *Benton v. R. R., ibid.*, 1007, and citations; *Boney v. R. R.*, 145 N. C., 248.

The horrors of the imprisonment of a sane person in a private madhouse (and one is not the less such because it may be advertised as a "sanitarium") have never been more graphically related or probably more truthfully than by Charles Reade in "Hard Cash." Like the novels of Charles Dickens, it has aided to correct evils which till then oppressed and afflicted society without hindrance from those who administered the law.

The finding by the judge of the facts upon the motion for misconduct of the jury was based upon the evidence and is not reviewable by us, and his conclusion of law thereupon to refuse the motion was correct. *Lewis v. Fountain, post,* 277, and cases there cited.

No error.

Cited: S. v. Trull, 169 N. C., 368; *Parker v. R. R.*, 181 N. C., 101; *Tyree v. Tudor,* 183 N. C., 347.

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(257)

J. B. CAHOON v. D. O. BRINKLEY.

(Filed 17 February, 1915.)

1. Trials—Nonsuit—Motion Before Verdict.

Where no counterclaim is pleaded or proved the plaintiff may take a voluntary nonsuit at any time before verdict rendered.

2. Trials—Nonsuit—Counterclaim Pleadings—Notes—Payment—Chattel Mortgage.

In an action upon a note with chattel mortgage security, where payment of the note is alleged in defense, the effect of the allegation of payment is not one setting up a counterclaim, or raising an issue thereof, the payment of the note automatically canceling the mortgage security, and plaintiff's motion for voluntary nonsuit should be granted when made in time.

APPEAL by plaintiff from *Bond, J.*, at August Term, 1914, of WASHINGTON.

Civil action, tried upon these issues:

1. Did the Plymouth Brick and Tile Manufacturing Company own the property described in complaint when the note and paper for $325 was given to A. L. Owens? Answer: "No."

2. Has the $325 note given to A. L. Owens been paid or discharged? Answer:.....

3. Did the plaintiff and E. P. Cahoon fraudulently conspire together to hold said Owens' note and purported mortgage as the property of J. B. Cahoon, after it had been paid or discharged, to defeat the claim of D. O. Brinkley? Answer:.....

4. Was the property described in said paper made to A. L. Owens worth, when D. O. Brinkley sold it, as much as the amount of said Owens' note and interest on it? Answer: "Yes."

5. Was the paper-writing made to A. L. Owens by said Plymouth Brick and Tile Manufacturing Company so executed, probated, and registered as to make it a valid lien on the property, if said manufacturing company owned the property at time such paper was given? Answer: "No."

6. What sum, if anything, is plaintiff entitled to recover of defendant, D. O. Brinkley? Answer: "Nothing."

The plaintiff appealed.

Gaylord & Gaylord for the plaintiff.
Ward & Grimes, W. M. Bond, Jr., for the defendant.

BROWN, J. The first assignment of error is because the court refused to allow the plaintiff to submit to a voluntary nonsuit. The facts are as follows: The jury retired to the jury room about 5:30 p.m. and
(258) stayed out until about 9 p. m. They were then called into the jury box in presence of counsel for both sides, about 9 p. m., and when called in were asked by the court if they had agreed on the first three issues, and they answered "No." The court then asked if they thought by staying together in the jury room a few minutes longer they could agree on any one of the three. One juror replied he thought they all had agreed, or could agree, on the first issue. The court told them to go to their room and write the answer to the first issue if they had agreed or could agree. They started toward the jury room and the counsel for the plaintiff arose and said the plaintiff would take a nonsuit. Defendant objected, and further stated that they had pleaded a counterclaim and demand for affirmative relief, that the plaintiff's claim, etc., be canceled, and the court said it would deny right to nonsuit under the circumstances, and the plaintiff excepted.

We think this was error. The answer of the defendant, as we read it, sets up practically a plea of payment, which if found in favor of the defendant automatically cancels the note and the security. We have not been cited to any statutory provision which authorizes or requires the

cancellation of chattel mortgages on record, as is provided in the case of mortgages upon real estate. Even if there is such a provision, when the debt is decreed by the judgment of the court to be paid, the security for the debt is automatically discharged and released. Besides, there was no issue tendered by the defendant or submitted to the jury based upon any counterclaim.

The plaintiff had a right to submit to a judgment of nonsuit, inasmuch as no verdict had been rendered. It is to be noted that the jury in this case had not agreed on any one issue, and no verdict had been rendered on either issue. Under such circumstances it is well settled, in the absence of a properly pleaded counterclaim, that the plaintiff had a right to submit to a nonsuit and go out of court. *Strause v. Sawyer,* 133 N. C., 64; *Sharpe v. Sowers,* 152 N. C., 379.

The judgment of the Superior Court is reversed and the cause is remanded with instructions to enter a judgment of nonsuit.

Reversed.

Cited: Oil Co. v. Shore, 171 N. C., 56; *In re Baker,* 187 N. C., 258; *Light Co. v. Brinkley,* 209 N. C., 561.

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L. T. COTTINGHAM v. MARYLAND MOTOR CAR INSURANCE COMPANY.

(Filed 17 February, 1915.)

1. Insurance—Automobiles—Stipulations of Policy—Mortgages—Cancellation—Suspended Insurance.

Where the owner of an unencumbered automobile insures it under a statutory form of policy, stipulating, among other things, that the policy would be void if the interest of the assured be other than unconditional or sole ownership, or if the property be or become encumbered by a chattel mortgage, and thereafter gives a mortgage thereon which is canceled four days before the destruction of the machine by fire, this loss coming within the terms of the policy, the cancellation of the mortgage revives the original status of the policy, the temporary violation of the stipulation being immaterial, and puts the policy again in force, the effect of the mortgage being to invalidate the policy during the continuance of the lien, or to suspend the obligation of the insurance company during the violation of the stipulation. Revisal, secs. 4806, 4808.

2. Insurance, Fire—Standard Form—How Construed—Interpretation of Statutes.

The terms of a standard form of policy of fire insurance, though adopted by statute, are construed against the insurer and in favor of the insured.

3. Insurance, Fire—Stipulations—Mortgages—Revival of Policy—Inducements to Destroy—Fraudulent Misrepresentations.

The principle upon which the validity of a policy of fire insurance is revived after a lien on the property, made in violation of its provisions, has been satisfied, cannot be regarded as an inducement of the insured to destroy the property insured, or as false and material representations which will vitiate it. *Schas v. Ins. Co.*, 166 N. C., 55, and that line of cases, cited and distinguished.

APPEAL by plaintiff from *Shaw, J.*, at September Term, 1914, of MECKLENBURG.

Stewart & McRae for plaintiff.
Cameron Morrison and J. M. McLain for defendant.

CLARK, C. J. On 11 June, 1913, the defendant insured the automobile of the plaintiff against loss by fire for the term of one year, and the plaintiff paid the premium of $25 therefor.

On 19 September, 1913, the plaintiff executed a deed of trust on a number of horses, wagons, and other property, including the automobile. The deed of trust was paid off and canceled of record, on 22 September, only three days after its execution. On 26 September, four days thereafter, the automobile was destroyed by fire. The defendant filed an answer, but when the case was called for trial demurred to the complaint on the ground that the policy contained this provision: "This

(260) policy, unless otherwise provided by agreement indorsed hereon in writing by an authorized agent of the company, shall be void if the interest of the assured be other than unconditional and sole ownership, or if the property hereby insured be or become encumbered by a chattel mortgage, or if any change, other than by death of the assured, take place in the interest or title of the property hereby insured, whether by legal process or judgment or by voluntary act of the assured or otherwise."

The court sustained the demurrer and the plaintiff appealed. The loss occurred as above stated, after the deed of trust was paid off and canceled.

2 Cooley Ins., 1780, citing many cases, says: "The general rule that a breach of the condition against encumbrance is ground for forfeiture must be modified where the encumbrance is merely temporary and is not in existence at the time of the loss. It may be regarded as settled by the weight of authority that the effect of the encumbrance is merely to suspend the risk, and on cancellation or discharge of the encumbrance the policy is revived."

Elliott on Insurance, sec. 205, collating the authorities, also says:

"The weight of authority seems to support the view that a violation of a condition that works a forfeiture of the policy merely suspends the insurance during the violation, and if the violation is discontinued during the life of the policy and does not exist at the time of the loss, the policy revives and the company is liable, although it had never consented to the violation of the policy, and the violation was such that the company could, had it known of it at the time, have declared a forfeiture therefor." To same purport, Phillips on Insurance, sec. 975, and 1 May Insurance (3 Ed.), sec. 101; 2 A. and E., 288, and note.

A case almost exactly in point is *Strause v. Ins. Co.*, 128 N. C., 64, where the defendant set up a defense that the mill was operated at night, contrary to the provisions of the policy, and this Court said: "The fire occurred more than three months thereafter and was in no wise traceable, so far as the evidence shows, to the work at night, which had long ceased."

Revisal, 4806, provides: "All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein; and all contracts of insurance, the application for which is taken within this State, shall be deemed to have been made within this State and shall be subject to the laws thereof."

Revisal, 4808, is as follows: "All statements or descriptions in any application for a policy of insurance or in the policy itself shall be deemed and held representations and not warranties; nor shall any representation, unless material or fraudulent, prevent a recovery on the policy."

The purpose of Revisal, 4808, was to prevent insurance com- (261) panies from escaping the payment of honest losses upon technicalities and strict construction of contracts.

In construing these sections in *McCarty v. Ins. Co.*, 126 N. C., 820, where at the time of issuance of policy there was a deed in trust to secure a debt of which the insurance company did not have notice and where the policy provided that it should be void if the interests of the insured be not truly stated, this Court quoted with approval from *Albert v. Ins. Co.*, 122 N. C., 92, as follows: "This law applies to all policies of insurance, both of fire and life; and unless such misrepresentations materially contribute to the loss, or fraudulently evade the payment of the increased premiums, they do not vitiate the policy. Ordinarily, these are questions of fact for the jury and not for the court."

In the present case the deed of trust given by the plaintiff embraced horses, wagons, and other property besides the automobile. This mortgage was paid off before the loss and was not material to the risk or fraudulent. The title of the plaintiff at the time of the loss was the

same as at the time of the delivery of the policy. The deed in trust in no wise contributed to the loss or in any way affected the risk. *Weddington v. Ins. Co.*, 141 N. C., 234; *Watson v. Ins. Co.*, 159 N. C., 638, and *Roper v. Ins. Co.*, 161 N. C., 151, differ from this case vitally. In them the breach of the condition existed at the time of the loss. The law laid down in those cases had reference to the facts therein and has no bearing on this case.

In *Born v. Ins. Co.*, 110 Iowa, 379, it is held that giving a mortgage under the circumstances of the present case is a temporary breach of the policy, and when the breach was removed the policy was revived. In that case the mortgage given on the property was paid off and the fire occurred afterwards, and the Court said: "The theory upon which an existing mortgage is held to be a violation of a clause in the policy against an increase of risk is that it increases the risk. . . . At the time of the loss the personal property in question was in the possession and ownership of the plaintiff, free from the encumbrance of the mortgage and covered by his valid policy of insurance. Therefore he is entitled to recover for the loss thereof," citing *Wilkins v. Ins. Co.*, 30 Ohio State, 317.

On the rehearing of *Born v. Ins. Co.*, 120 Iowa, 299, the Court reaffirmed its former ruling. The *Born case, supra,* is reported 80 Am. St., 300, with full annotations, and the editor reaches this conclusion: "The general rule to be deduced from the weight of authority is that the violation of a condition in a policy of insurance which works a forfeiture thereof merely suspends the insurance during the violation, and that if such violation is discontinued during the life of the policy and is
(262) nonexistent at the time of the loss, the policy revives, the insurance is restored, and the insurer is liable, although he has never consented to a violation of the conditions in the policy and such violation has been such that the insurer could, had he known of it at the time, have declared a forfeiture therefor."

Ins. Co. v. Toney, 1 Ga. App., 492, holds that a breach of condition suspends the policy during the existence of the breach, and the removal of the breach revives the policy. In that case the policy contains this provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days." The house did become vacant, but was reoccupied before the loss occurred.

It is thus declared by Cooley on Insurance, Elliott on Insurance, and the notes to the 80 Am. St. Reports, at p. 305, that the "weight of authority" is as above stated, and an examination of the authorities sus-

tains that view, though Vance on Insurance, 433, says that the weight of authority is otherwise.

Among many cases, besides the above, sustaining the proposition that the removal of the breach revives the policy when it is removed previous to the loss and has in no wise contributed to it, are *Lounsbury v. Ins. Co.*, 8 Conn., 459, 21 Am. Dec., 686; *Ins. Co. v. Lawrence,* 4 Metc. (Ky.), 9, 81 Am. Dec., 521; *Joyce v. Ins. Co.,* 45 Me., 168, 71 Am. Dec., 536; *Ins. Co. v. Kimberly,* 34 Md., 234, 6 Am. Reports, 325; *Garrison v. Ins. Co.,* 56 N. J. Law, 235; *Ins. Co. v. Shoe Factory,* 80 Penn. St., 407; *Hinckley v. Ins. Co.,* 140 Mass., at p. 47, 54 Am. Rep., 445; *McKibban v. Ins. Co.,* 114 Iowa, 41; *Warehouse Co. v. Ins. Co.,* 163 Ill., 256.

The contrary view in Vance on Insurance, *supra,* is largely based upon *Ins. Co. v. Coos County,* 151 U. S., 452. But that case has no application here. There the policy contained a provision that it should become void if without notice and permission "mechanics are employed in building, altering, or repairing the premises." It was found that such building and repairing increased the risk, and though the work was completed before the fire occurred and in no wise contributed to the fire, yet the alterations were very material and were in existence at the time of the fire. In that case there was a forbidden physical alteration made, which continued down to the fire. In the present case there was simply a mortgage, in no wise affecting the physical condition of the property, and which was canceled of record within three days and before the fire.

There are many other cases which support those which we have already cited that when such temporary encumbrance was removed before the fire it did not invalidate the risk, as there was no mortgage outstanding at the time of the fire. In *Ins. Co. v. Toney, supra,* above cited, the Court, summing up the authorities, says: "The common people who insure should not be entrapped by a harsh construc- (263) tion of a technical word. The insurance is revived by occupancy, though suspended during the vacancy. . . . So much for the authorities in support of the position announced by this Court. We are also very clear that this position is more in consonance with justice and sound reasoning. . . . It would be a harsh and unjust rule to hold that a condition which in no wise contributes to the loss should work a forfeiture of the insurance. The principle of the old legal maxim, *'Cessante ratione legis cessat ipsa lex,'* would seem to be applicable. . . . No maxim of construction of contracts is better established or has been more generally approved than that of Lord Coke, 'He who considers merely the letter of an instrument goes but skin deep into the meaning,' and too minute a stress should not be laid on the strict and precise signification of words, to the destruction of the intention of the

parties and the spirit of the contract." To this quotation of the Court from Lord Coke the counsel for the plaintiff in this case adds this citation from St. Paul: "The letter killeth, but the spirit giveth life." II Cor., ch. 3, v. 6.

In *Tompkins v. Ins. Co.*, 22 App. Div. (N. Y.), 380, where the policy provided that it should be entirely void if the property became mortgaged, and where the property was mortgaged, but the mortgage was paid off before the loss, the New York Court says: "The defendant contends that the policy was voided by the giving of the first mortgage. The court below found and we have held that the second mortgage extinguished the first. Even if the policy would have been void and inoperative during the life of the first mortgage, it revived on the death of that mortgage. This principle is well settled in the analogous case of a marine policy, which contains a limit of the waters within which the vessel is insured. If the vessel leaves the limited waters and is lost, the insurer is not liable, but the liability reattaches on the return of the vessel to limits. *Hennessee v. Ins. Co.*, 28 Hun. So here, although the policy was suspended during the existence of the first mortgage, it was revived when that mortgage ceased to exist, by the substitution of the second mortgage."

In *Hinckley v. Ins. Co.*, 140 Mass., 38, where the defense was that the insured property was temporarily put to an illegal use, contrary to the terms of the policy, the Court in construing the word "void," says: "But, irrespective of this consideration, it is not the necessary meaning of the word 'void,' as used in policies of insurance, that it shall under all circumstances imply an absolute and permanent avoidance of a policy which had once begun to run. But the meaning of the word is sufficiently satisfied by reading it as void or inoperative *for the time being.*"

It will be noted that this is the standard form of policy established by statute, and Phillips on Insurance, sec. 975, says: "After the policy has begun to run so the premium has become due it assuredly is but (264) equitable that a temporary noncompliance should have effect only during its continuance. To carry it further is to inflict a penalty on the assured and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it."

In *Warehouse Co. v. Ins. Co.*, 76 S. C., 76, 10 L. R. A. (N. S.), 737, where the defense was that the hazard was increased contrary to the terms of the policy which made it void, the Court says: "The contract of insurance must, like other contracts, be enforced according to its terms. In construing such contracts, however, courts should endeavor to ascertain from the language used, in the light of the surrounding cir-

cumstances and the nature of the business, the safeguards which the parties intended to place around themselves. It may be reasonable to suppose an insurance company would desire to reserve the valuable right of canceling a policy, even on a temporary increase of hazard, if known to it at the time, because such change might result in loss; but it is not reasonable to impute to it a purpose or desire to curtail its own revenue by canceling a policy on account of the temporary increase of hazard which has come to an end without loss, and from which it could not possibly suffer detriment. Hence there may be ground for holding a temporary increase of hazard forbidden by the policy to avoid insurance without action or even knowledge on the part of the company, when the loss resulted from that cause. But there is no ground for such an inference when the increase of hazard came to an end without loss. The greater weight of authority supports this conclusion."

The last line in the above quotation reiterates what is said above by Cooley, Phillips, May, and Elliott in their works on insurance, and is a correct statement.

Silver v. Assurance Corporation, 61 Wash., 593, also sustains the proposition that the removal of the temporary breach of the condition revives the policy. Also *Ins. Co. v. Pitts,* 88 Miss., 587, 7 L. R. A. (N. S.), 627.

In Nebraska, where a policy contained a provision making it void if the property should be mortgaged, it was held that the payment of the mortgage revived the policy. *Ins. Co. v. Schreck,* 27 Neb., 527; *Ins. Co. v. Dierks,* 43 Neb., 473; *Johansen v. Ins. Co.,* 54 Neb., 548.

McClure v. Ins. Co., 88 Atl. (Penn.), 921, holds the same general principles as the authorities above cited. In that case the defense was that certain prohibited articles were kept upon the premises. The policy provided that it should be void if they were. The Court held that if they were removed before the fire and in no wise contributed to the loss, the policy was revived.

Independent of the overwhelming weight of authority, there can be no reason to release the insurance company from liability for a loss which accrued after the forbidden mortgage was canceled, the (265) mortgage having in no wise any connection with the loss.

The terms of a policy of insurance are construed against the insurer and in favor of the insured, and this is true although a standard form of policy has been adopted under legislative enactment. *Gazzam v. Ins. Co.,* 155 N. C., 330.

The stipulation that the policy shall be void if the property "be or become encumbered by chattel mortgage" was inserted for the benefit of the insurer upon the idea that if the owner of the property was per-

mitted to insure and then mortgage the property that it would be an inducement to him to destroy the property by fire, and if the stipulation is given effect so that this purpose and intent of the parties can be carried out, there is no reason for extending it further. In other words, it was the intent of the parties to prevent an increase of the risk to the insurer, and this can be amply protected by holding that the policy is only void if the mortgage is in force at the time of the loss. Instead of increasing the risk, this interpretation of the contract decreases it, because while the mortgage is in existence there is no liability on the part of the insurance company, and if a loss then ensues there can be no recovery, and when the mortgage is canceled the insurer assumes no responsibility that it was not liable for when the policy was first issued.

Nor is this construction against public policy as offering an inducement to the insured to destroy his property, because if destroyed while the mortgage is in force the total loss falls on him. See, also, 9 A. and E. Anno. Cases, 54, 11 A. and E. Anno. Cases, 780, and cases cited.

Our cases on the subject, which are collected in *Roper v. Ins. Co., supra,* were decided correctly, because in them the stipulation was violated at the time of loss and it was properly decided that the policy was void.

Nor is this construction in conflict with the cases of *Fishblate v. Fidelity Co.,* 140 N. C., 589; *Bryant v. Ins. Co.,* 147 N. C., 181; *Alexander v. Ins. Co.,* 150 N. C., 536; *Gardner v. Ins. Co.,* 163 N. C., 367, and *Schas v. Ins. Co.,* 166 N. C., 55, where a representation, actually false and material, was held to vitiate the policy, although the misrepresented fact may not have contributed to the loss, for the insurance company is entitled to know the facts about which inquiry is made, in order to decide whether it will enter into the contract or not, and those things are material for it to know, which would naturally affect its judgment or decision as to making the contract, or which, by its inquiries, it has made material, the company being the judge of what it should know in order to determine whether or not it will issue the policy.

The demurrer should have been overruled.

Reversed.

Cited: Crowell v. Ins. Co., 169 N. C., 38; *Johnson v. Ins. Co.,* 172 N. C., 146; *Smith v. Ins. Co.,* 175 N. C., 317; *Landreth v. Assurance Co.,* 199 N. C., 185; *Barefoot v. Ins. Co.,* 204 N. C., 302; *Womack v. Ins. Co.,* 206 N. C., 448.

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JOSEPH E. OWENS AND WIFE v. J. W. MUNDEN.

(Filed 17 February, 1915.)

Register of Deeds—Marriage Licenses—Persons Under 18—Written Consent—Stepfather.

Revisal, sec. 2088, requiring the register of deeds, before issuing a license for the marriage of a person under 18 years of age, to obtain the written consent of the father or mother, etc., construed to be in the order named (*Littleton v. Haar*, 158 N. C., 566), does not include within its terms the stepfather of the applicant; and where the father is dead, the written consent of the mother meets the statutory requirement.

APPEAL by plaintiff from *Carter, J.*, at September Term, 1914, of PASQUOTANK.

Action against a register of deeds to recover the penalty for issuing a license for the marriage of a girl under 18 years of age without the written consent required by the statute.

The plaintiff is the stepfather of Julia Irene Jones, formerly Julia Irene Barber the plaintiff having married her mother in 1903. From the time of said marriage until her own marriage to Jones, with the exception of two very short intervals, Julia Irene lived with the plaintiff and her mother as a member of the family, the plaintiff feeding her, clothing her, and treating her as if she were his own child. Julia Irene was married to Claude Jones in 1913, when only 16 years of age. The license for this marriage was issued by the defendant. It was admitted that prior to the issuance of such license the defendant had been, in writing, notified by plaintiff that said Julia Irene was only 16 years old and forbidden to issue a license for her marriage. It was further admitted that at the time of issuing said license defendant had in his possession the written consent to such marriage of Julia Irene's mother, plaintiff's wife, who also resided with plaintiff. The usual issues were submitted. The judge charged the jury peremptorily to answer the first issue "No" and the second issue "Nothing." Plaintiff excepted and appealed.

P. W. McMullan for plaintiff.
Ward & Thompson and J. Kenyon Wilson for defendant.

ALLEN, J. The Revisal, sec. 2088, provides that where either party to a proposed marriage is under 18 years of age and resides with the father, or mother, or uncle, or aunt, or brother, or elder sister, . . . the register of deeds shall not issue a license for such marriage until the

consent in writing of the relation with whom such infant resides, or, if he or she resides at a school of the person by whom the minor was placed at school, "and under whose custody or control he or she is," shall (267) be delivered to him, and the written consent shall be filed and preserved by the register; and it was held in *Littleton v. Haar*, 158 N. C., 566, that the consent of the persons named in the statute, and in the order named, should be obtained, the effect of the decision being that if the child is living with father and mother, the written consent of the father is necessary, and if with the mother, the father being dead, that her consent is sufficient.

If so, the only question presented by the appeal is whether the word "father" includes the stepfather within the meaning of the statute, and gives the stepfather the right to dispose of the daughter in marriage to the exclusion of the mother.

The two words, "father" and "stepfather," are in general use and well understood, and the difference in the relationship of the two to the child, and the marked distinction between their duties and liabilities, are well known.

If, therefore, we should hold that the stepfather has a prior right to the mother, we would have to insert in the statute a word not used by the General Assembly and having a meaning different from any word in the statute.

A stepfather is defined to be "The husband of one's mother who is not one's father" (31 Cyc., 1275, 26 A. and E. Enc. L., 784, Rapalje and Lawrence L. Dictionary), and this was approved in *Thornberry v. Am. Straw Co.*, 141 Ind., 443, where the Court, after quoting the definition, says, in construing a statute giving a right of action to the father if living, and if not, to the mother: "The word 'father,' therefore, does not mean stepfather, nor does the word 'child' mean stepchild, even when the same is used in wills, where the rules of construction are not so strict as those governing the statute in controversy."

In *Hennesy v. Brewing Co.*, 145 Mo., 105, the same question was decided, the Court denying the right of action in the stepfather for the wrongful death of his stepson under a statute conferring the right of action on the father and mother.

We are therefore of opinion that the word "father" used in the statute does not include stepfather, and that the written consent of the mother, the father being dead, authorized the issuing of the license.

No error.

R. C. BARCLIFF v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 17 February, 1915.)

1. Waters—Upper Proprietor—Diverting Flow—Damages.

An upper proprietor can increase and accelerate the flow of water from his lands without liability to the lower proprietor for damages; but when the flow of water is diverted to the detriment of the lower proprietor, he may recover for the damages consequently caused to his lands.

2. Same—Swamp Lands—Drainage—Insufficient Culvert.

Where the track of a railroad company passes through a large area of low, boggy, and undrained land, and to drain the same the company cuts ditches through the rim of the basin, to carry off the water to an existing ditch, which empties the water into a ditch along the county road, carrying it further along to where the last ditch crosses the road through a culvert; and thereafter enlarges the various ditches so as to carry off more of the water, but fails to enlarge the culvert whereby the increase of water finds an insufficient outlet and ponds water back upon the plaintiff's land, to his damage: *Held:* The drainage of the lands by the defendant, in this manner, and diverting its flow with an insufficient culvert, caused an injury to the plaintiff's land for which the defendant is responsible in damages.

3. Same—Limitation of Action.

Where an upper proprietor has drained, by the use of ditches ultimately emptying through a culvert, under a railroad embankment, an area of his low, swampy lands, and thereafter enlarges the ditches so as to carry such additional quantity of waste as to render the culvert inadequate and pond water upon the lands of the lower proprietor, the latter's cause of action did not accrue until the ditches were so enlarged, and the statute of limitations did not commence to run till then.

4. Same—Continuing Damages—Presumption of Grant—Permanent Damages.

Where the upper proprietor has caused damages to the lands of the lower proprietor by diverting the surface waters from their natural flow, the latter, in his action, is entitled to recover such damages as accrued within three years prior to the commencement of the action, unless there is a presumption of a grant from twenty years acquiescence, or permanent damages in an action brought within five years after the act complained of.

5. Waters—Upper Proprietor—Diverting Water—Rights of Lower Proprietor—Diminishing Damages.

The lower proprietor, upon whose lands the upper proprietor has diverted the flow of water to his damage, is not required to avoid the damage by digging drainage ditches to carry off the water.

APPEAL by defendant from *Carter, J.*, at November Term, 1914, of PASQUOTANK.

Thomas J. Markham and Aydlett & Simpson for plaintiff.
J. Kenyon Wilson for defendant.

(269) CLARK, C. J. This is an action for damages for diverting surface water from the right of way of the defendant and ponding it back upon the plaintiff. The defendant in building its roadbed in 1881 passed through several thousand acres of low, boggy, and uncleared land, a portion of which formed a basin in which all water falling on this area and surrounding lands accumulated and stood until it passed off by percolation or evaporation. The defendant, in order to maintain its roadbed through this basin, found it necessary to drain somewhere, and for that purpose cut two 6-foot lateral ditches along its right of way, and then, in order that the water on the eastern side might be carried through to the western side, it put a culvert under its roadbed whereby the water which would have drained east if at all was carried to the western side. To let it out of this basin the defendant secured the use of an old ditch known as the "Terry" ditch, and, cutting a connecting ditch 125 yards from its right of way through the rim of the basin, drained the diverted water down the "Terry" ditch some 800 yards to the county road ditch, and thence along the road 180 yards to where the ditch crossed the county road through a culvert. In 1911 the defendant enlarged these ditches from their right of way to the county road and along the county road to an 8-foot ditch, but left the culvert at the county road not enlarged, and did not extend the ditch beyond the county road.

The motion to nonsuit was properly denied. The principle is well settled that an upper proprietor can increase and accelerate the flow of water from his land, but such flow of water must not be diverted to the detriment of the lower proprietor. *Briscoe v. Parker,* 145 N. C., 14; *Mizzell v. McGowan,* 125 N. C., 439; *Hocutt v. R. R.,* 124 N. C., 214. There is evidence tending to show that the increased flow of the water collected by the defendant's ditches and carried down through the other ditches to the culvert at the county road was there impeded and backed up, overflowing and damaging the plaintiff's land, because the culvert was not enlarged with the enlargement of the ditches above it. The water thus carried down to said culvert and there backed up on the plaintiff's land was not water which would have flowed, if at all, eastward, and was brought under the defendant's roadbed and thence let out by a ditch cut through the rim of the basin, down the ditches above mentioned. This was a diversion of water to the plaintiff's injury.

"The defendant has no right to collect surface water into a ditch not adequate to receive it and thus flood and injure the lands of another."

Staton v. R. R., 109 N. C., 337; *Jenkins v. R. R.*, 110 N. C., 438. This is not the case of draining into a natural waterway increasing its flow, which defendant had a right to do, but is a case of collecting surface water into an inadequate ditch, which did not reach a natural watercourse, diverting it and leading it down to a point where by reason of the insufficient exit it was backed up and overflowed (270) the plaintiff's land. *Mizzell v. McGowan*, 120 N. C., 134; *Briscoe v. Parker, supra; Davenport v. R. R.*, 148 N. C., 285.

In *Brown v. R. R.*, 165 N. C., 392, the Court said that the higher owner "cannot artificially increase the natural quantity of water or change its natural manner of flow by collecting it in a ditch and discharging it upon the servient land at a different place or in a different manner from its natural discharge."

This cause of action did not accrue till 1911, when the enlargement of the ditch and the defendant's failure to lengthen and enlarge the same at the mouth caused the flooding. No damage had accrued to plaintiff till that time and no action could have been maintained. The injury was not caused by the ditches dug in 1881, but by the deepening and enlarging of them in 1911, whereby the additional water was carried down and was stopped by the failure to enlarge the culvert at the public road and to carry the ditch farther on. It is true, the ditches dug in 1881 diverted the water, but it was carried by the plaintiff's land, and the exit being sufficient the water was not ponded back on him and he suffered no damage. The statute of limitations began to run, therefore, only with the enlargement of the ditches in 1911 and the overflow then caused by the insufficient exit afforded by the culvert. *Roberts v. Baldwin*, 155 N. C., 276; *Parks v. R. R.*, 143 N. C., 289; *Hocutt v. R. R., supra.*

The diversion of the water began in 1881, but, having caused no damage to plaintiff, he could not bring an action for damages. If the acceleration in 1911 was of a natural flow, this would not give a ground of action, but it is the acceleration of diverted water which caused the damage.

The plaintiff is entitled to recover such damages as accrued within three years prior to the commencement of this action, or he could recover permanent damages in an action brought therefor within five years after the enlargement of the ditch and the ponding back of the diverted water by the insufficient culvert, unless by acquiescence for twenty years the presumption of a grant or easement had arisen. *Roberts v. Baldwin*, 151 N. C., 408.

The lower proprietor is not required to avoid damages to his land in such case by digging ditches to carry off surface water wrongfully

diverted from its natural flow by the upper proprietor to his damage. *Roberts v. Baldwin,* 155 N. C., 276; *Waters v. Kear, ante,* 246.

No error.

Cited: Caldwell v. R. R., 171 N. C., 367; *Borden v. Power Co.,* 174 N. C., 74; *Yowmans v. Hendersonville,* 175 N. C., 577; *Barcliff v. R. R.,* 176 N. C., 41; *Dayton v. Asheville,* 185 N. C., 15; *Smith v. Winston-Salem,* 189 N. C., 180; *Eller v. Greensboro,* 190 N. C., 720; *Ragan v. Thomasville,* 196 N. C., 262; *Winchester v. Byers,* 196 N. C., 384; *Peacock v. Greensboro,* 196 N. C., 416.

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J. A. BRITTAIN ET AL. v. MATILDA TAYLOR ET AL.

(Filed 17 February, 1915.)

1. **Deeds and Conveyances—Conditions Subsequent—Breach—Forfeiture.**

Where a conveyance of land, which is made upon consideration of support and maintenance of the grantor for life, expressly provides that "the deed shall be null and void" upon the failure of the grantee to perform the services named therein, the obligation of the grantee to perform them is a condition subsequent which will work a forfeiture upon his failure to do so, and will not be construed as a covenant, for the breach of which damages are alone recoverable, constituting a charge upon the land.

2. **Same—Cessation of Estate—Revesting of Estate.**

In construing deeds and contracts, that method should be followed, if practicable, which will give effect to every part; and where it thus appears that the grantor has conveyed his land in consideration of support and maintenance for life, as a condition subsequent, upon the performance of which the grantee's estate is made to depend, and the latter fails to perform the services required, the estate will cease in the grantee and revest in the grantor at his election.

3. **Deeds and Conveyances—Conditions Subsequent—Forfeiture—Grantor's Possession—Presumptions.**

Where a grantor retains possession of the land conveyed upon a condition subsequent, he is presumed to hold for the purpose of enforcing the forfeiture had it occurred, and he then chose so to do; and being already in possession, the question as to the necessity of an entry for the purpose of enforcing the forfeiture for a breach of the condition cannot arise.

4. **Same—Acts of Grantor—Waiver.**

The mere silence of a grantor remaining in possession of the lands conveyed by him, after the breach by the grantee of a condition subsequent, or any indulgence then granted by him to the grantee, will not have the effect of a waiver of his right, when such has not prejudiced the grantee or induced him to do something which will work to his detriment if the

forfeiture is enforced, though his acts and conduct may be evidence of an agreement not to take advantage of the forfeiture, or of an affirmation of the continuance of the estate in the grantee.

5. Same—Trials—Questions for Jury—Courts—Matters of Law.

The question as to the waiver of the forfeiture of an estate granted upon a condition subsequent, where there has been a breach thereof, which is generally one of intention, may sometimes be declared as a matter of law, but it is usually an inference of fact for the jury.

6. Deeds and Conveyances—Conditions Subsequent—Actions—Heirs at Law.

The grantor of lands upon a condition subsequent, during his life, and his heirs or privies in blood after his death, may take advantage of the breach of the condition and may bring suit to declare the estate forfeited, and to recover the lands.

7. Deeds and Conveyances—Conditions Subsequent—Breach—Pleadings—Demurrer.

The allegations of the complaint in this action to recover lands for the breach of a condition subsequent, brought by the heirs at law of the grantor, imply that the grantor remained in possession during her life and that the plaintiffs have had the possession since her death, and upon the said allegations, considered as a whole, the Court will not hold, as matter of law, that there had been a waiver by the grantor, or the plaintiffs, her heirs at law, of the breach of the condition subsequent, upon which the conveyance had been made to the ancestor of the defendants, under whom they claim.

APPEAL by defendants from *Bond, J.*, at October Term, 1914, (272) of BEAUFORT.

This is an action in the nature of ejectment to recover the land described in the complaint, upon the theory that the ancestor of defendants, John G. Taylor, had forfeited his right and title thereto by reason of his breach of the following stipulation in the deed made to him for the land by the ancestor of the plaintiffs, Margaret Taylor: "The said deed is made on this special trust: That the said John G. Taylor is to feed, clothe, and kindly care for the said Margaret Taylor all of her natural life, and should the said John G. Taylor fail to feed, clothe, and kindly care for the said Margaret Taylor, then this deed is to be null and void." The defendant demurred to the complaint, upon the ground that the stipulation is a covenant and not a condition, for the breach of which the estate was forfeited and reverted to the grantor; that the complaint fails to state that Margaret Taylor ever insisted upon the breach as a forfeiture, by act or conduct, during her lifetime, or attempted to avail herself of it, and that she had, therefore waived the same, and no right now exists in her heirs to take advantage of the breach, and that for these reasons plaintiffs cannot maintain this action. The demurrer was

overruled, and defendants appealed. This fairly states the several contentions of the defendants.

Ward & Grimes for plaintiff.
Julius Brown and Albion Dunn for defendant.

WALKER, J., after stating the facts: The stipulation in the deed for support and maintenance is not like those found in the cases to which the learned counsel for defendant has referred in his brief and argument, such as *Helms v. Helms,* 135 N. C., 164; *McCardle v. Kennedy,* 92 Ga., 198 (44 Am. St., 85), and *Pownal v. Taylor,* 10 Leigh, 172 (34 Am. Dec., 725), where the stipulation merely for support and maintenance of the grantor, or some one else, with no words of strict condition or forfeiture was held to be nothing more than a covenant, for the breach of which damages could be recovered, and constituted a charge upon the land. But this provision is not of that kind, for it is expressly stated in the deed that if the grantee failed to comply with the requirement of support and maintenance, the deed should be "null and void." This is a condition subsequent by its very terms, and also according to (273) the authorities. In the case relied on by appellant, *Helms v. Helms, supra,* the provision, held to be merely a covenant, was for support and maintenance, without any words of forfeiture in case it was not complied with, and the defendant sought to reform the deed by inserting those words, but the proof failed to show that they were intended to be inserted therein and were omitted by fraud or mistake, and an issue upon that phase of the case was denied; but this Court added: "If the deed had contained the words suggested, they would have constituted a condition subsequent." It is said that if something is required by the deed to be done, such as services to be performed, rent to be paid, or divers other undertakings by the grantee, and there be added a conclusion of reëntry, or without such clause if it is declared that if the feoffee does or does not do the act forbidden or required of him to be done, "his estate shall cease or be void," it creates a good condition subsequent. Washburn on Real Property (5 Ed.), pp. 4 and 5; Sheppard's Touchstone, 125; *Moore v. Pitts,* 53 N. Y., 85; *Schulenberg v. Harriman,* 21 Wall. (U. S.), 44. It was so expressly held in *Jackson v. Crysler,* 1 Johns. Cases (N. Y.), 125. The case of *Harwood v. Shoe,* 141 N. C., 161, virtually recognizes that the words used here will create a good condition subsequent. An estate or condition expressed in the grant or devise itself is, where the estate granted has a qualification annexed, whereby it shall commence, be enlarged, or defeated upon performance or breach of such qualification or condition, and estates on

condition subsequent are defeasible, if the condition be not performed. 2 Blackstone Comm., 154; Co. Litt., 201. The words which constitute a condition may be various for in particular words there is no weight, as their operation and effect depend on the sense which they carry. 1 Ves., 147; *Wheeler v. Walker,* 2 Conn., 196. In the construction of contracts and deeds that method should be followed, if practicable, which will give effect to every part. This rule, like others, has been adopted and applied by the courts for the purpose of ascertaining the intention of the parties, and results from the presumption that words are not employed in making contracts without meaning something. *Moore v. Pitts, supra.* The language of the deed under consideration leaves no doubt as to what the parties intended. It is plain, intelligible, and explicit. The grantor conveyed the estate upon the condition that she should be supported, and provided, in order to coerce its performance, that if the grantor failed to do so the deed should be void and of no effect, which means no more nor less than that the estate should cease in the grantee and revest in her; for if the deed becomes void, the grantee can no longer take under it, and as the estate cannot be in abeyance, it must vest in the grantor. It has been said to be not always easy to determine whether the condition created by the words of a devise or conveyance is precedent or subsequent. The construction must depend upon the intention of the parties as gathered from the (274) instrument and the existing facts, since no technical words are necessary to determine the question. In *Underhill v. S. and W. R. Co.,* 20 Barbour (N. Y.), 455, the Court states as a rule that "if the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest and the grantee perform the act after taking possession, then the condition is subsequent." There is this familiar distinction between a condition precedent and a condition subsequent: If the condition is precedent, inasmuch as the estate does not vest at all until such condition happens, the effect of its being unlawful or impossible is that the estate dependent on it fails, and the grant or devise becomes wholly void; and where a condition precedent consists of several parts united by copulative conjunction, each part must be performed before the estate can vest. A condition subsequent, if it has any effect, defeats an estate already vested; but if such condition is impossible or unlawful at the time of creating the estate, or becomes impossible by the act of the feoffor or the act of God, it leaves the estate an absolute and unconditional one, since it is the

condition itself that is or becomes void. 2 Wash. on Real Property, pp. 8 and 11. But there is no question made here as to the validity of the condition in this deed, and it being admitted by the demurrer that the grantee failed to perform his obligation to support the grantor, the estate was forfeited, at the election of the grantor.

Formerly, and at common law, it was held that actual entry upon the land was necessary, upon the idea that as the estate was created by a solemn act, viz., a grant and livery of seizin, it must be defeated and restored to the grantor by an act equally solemn, under the maxim of the common law, *eo ligamine quo ligatur.* If a feudal tenant failed to perform the services, his estate was not defeated until the lord had judgment in a writ of *cessavit.* If a subject incurs a forfeiture by committing treason, his estate is not defeated until "office found." If a feoffment is made on condition and the condition be broken, the estate continues until it is defeated by the entry of the feoffor or his heirs. Coke on Lit., chapter on "Conditions." But the grantor cannot enter or make claim when already in possession. *Rollins v. Riley,* 44 N. H., 1.

A party, for whose benefit a condition subsequent is attached to a devise of land, being in possession at the time of the breach, is presumed to hold for the purpose of enforcing the forfeiture, though he may waive it. "The law will presume that a person who cannot make a formal entry upon the estate of another for condition broken, because he (275) is already in possession, intends to hold possession to enforce all his legal rights, unless there be some indication that such was not his intention, by which the presumption of law may be rebutted. When the facts disclosed are inconsistent with a claim to hold for condition broken, the presumption will be rebutted, or the person entitled to make an entry will be considered as having waived a performance of the condition. Forfeitures are not favored by the law; and any acts of the party entitled to cause a forfeiture, clearly inconsistent with a claim to be the owner of the estate by forfeiture, must be regarded as proof that performance of the condition was not intended to be enforced for the purpose of creating a forfeiture." *Andrews v. Senter,* 32 Me., 394. When the grantor conveyed his estate, he parted with the seizin, which, under the ancient law, he could only regain by an entry made. But this view has long since ceased to obtain, and any act equivalent to an entry is now considered as sufficient in place of an entry, and numerous cases hold that a possessory action may be maintained upon the breach of a condition subsequent without a prior reëntry or demand of possession, such an action being equivalent thereto. *Bronck v. Cryster,* 1 Johns. Cases, 125, and the many cases collected in the note to *Marsh v. Bloom,* 14 L. R. A. (N. S.), p. 1188. In *Phelps v. Chesson,* 34 N. C., 194,

where land was claimed to have been forfeited and to have reverted to the State for nonpayment of taxes, an action was held sufficient without any entry. But if entry were required, a learned text-writer says in regard to it: "If the grantor is himself in possession of the premises when the breach happens, the estate reverts in him at once without any formal act on his part, and he will be presumed, after the breach, to hold, for the purpose of enforcing a forfeiture, unless he waive the breach, as it is competent for him to do so, and as he may do by his acts. But to have possession, in such a state of things, work a forfeiture, it must be at the election of the grantor. He is at liberty to waive the breach and thereby save the forfeiture. Where the grantor covenanted to stand seized to his own use for life, and after his death to the use of his son in fee, but upon condition, and the son failed to perform the condition, it was held that the grantor, being in possession, need not make a formal entry, or make a formal claim to the land, to defeat the estate of the son. Still, the entry, to be effectual to work a forfeiture of an estate, must be made with an intention to produce that effect. And where an heir entered after a breach of condition, but declared the title under which he entered not to be that in favor of which the condition was made, it was held not to avoid the estate of the grantee, though it is not necessary when making such entry to give notice to the feoffee why it is done." 2 Wash. on Real Property (5 Ed.), pp. 18 and 19. This does not conflict with the principle that a forfeiture may be saved, though a condition may have been broken, if the party who has the right to avail himself of the same waives this right, which he (276) may do by acts as well as by express agreement; but mere silence of, or an indulgence by, the grantor, it has been said, will not have this effect, if it has not prejudiced the grantee or induced him to do something which will work to his detriment if the forfeiture is enforced. 2 Washburn, p. 21, and cases in note 4; *White v. Bailey,* 23 L. R. A. (N. S.), 232. The acts and conduct of the grantor who asserts a forfeiture may be of such a character as to become evidence of his agreement that he will not take advantage of the breach or forfeiture, and as affirming that the estate which he once granted still continues. 2 Washburn, p. 21. The question of waiver is generally one of intention, which is said to lie at the foundation of the doctrine. It may sometimes be declared as matter of law, but is usually an inference of fact for the jury. 40 Cyc., 261 *et seq.* It is there said, at p. 263: "The intention need not necessarily be proved by express declarations, but may be shown by the acts and conduct of the parties, from which an intention to waive may be reasonably inferred, or even by nonaction on their part. Mere silence at a time when there is no occasion to speak is not a waiver, nor

evidence from which waiver may be inferred, especially where such silence is unaccompanied by any act calculated to mislead." See *White v. Bailey, supra.* But a condition the breach of which will forfeit an estate, if once dispensed with, is gone forever, and the estate vests absolutely in the grantee. 2 Washburn, p. 21.

It is unquestionably true that not only the grantor, during his life, but his heirs, or privies in blood, after his death, may take advantage of the breach of a condition subsequent and bring suit for the land or to declare the estate forfeited. Sheppard's Touchstone, 125; Tiedeman on Real Property, sec. 207; *Den ex Dem. Southard v. Central R. Co.,* 26 N. J. L., 21; *Hooper v. Cummings,* 45 Me., 359; *Avelyn v. Ward,* 1 Vesey, Sr., 422; 4 Kent Comm., 127; 2 Cruise Digest, ch. 2, sec. 49. *Ruch v. Rock Island,* 97 U. S., at p. 696, held that "If the conditions subsequent were broken, it did not *ipso facto* produce a reversion of the title. The estate continued in full force until the proper step was taken to consummate the forfeiture. This could be done only by the grantor during his lifetime and after his death by those in privity of blood with him." So it is said: "If the tenant neglected to pay or perform his service, the lord might resume his fief. It is upon this ground that conditions are held to be reserved to the grantor and his heirs only, and he and they alone can avail of the right of resuming the estate for a breach." Coke Lit., 201a, and Butler's Note, 84; 2 Washb. (5 Ed.), p. 7. And again, Washburn says, at p. 15, citing Co. Lit., 214; Sheppard Touch. (fol. ed.), 441, and Crabb on Real Prop., 835: "If there be a breach of the conditions *in law,* the lessor of his heirs, or, if he have aliened his estate, his assignee, may avail himself of the right to enter. But of conditions *in* (277) *deed* no one but he who creates the estate or his heirs, as, for instance, the heirs of a devisor, or, in case of a devise of the contingent right, such devisee or his heirs, can take advantage by entering and defeating the estate. It is a right which cannot be aliened or assigned, or pass by a grant of the reversion at common law." It is not necessary to decide whether any one other than the grantor and his heirs can take advantage of a forfeiture arising from the breach of a condition subsequent, as the plaintiffs in this case are the heirs of the grantor, Margaret Taylor.

There are no allegations in the complaint sufficient to show a waiver of the breach in failing to support the grantor. It would seem to be implied that Margaret Taylor had been in possession of the land during her life, as it is alleged that defendants have had the possession since her death. There is certainly not enough in the complaint for us to declare, as matter of law, that she had waived or abandoned her right to take advantage of the forfeiture caused by the breach. There is really noth-

ing alleged that shows that she did, and upon the meager statement in the complaint we would be unwilling to hold that, in law, there had been a waiver. When the answer comes in and the facts and developed, under proper issues submitted for the purpose, we may see more clearly what are the legal rights of the parties and declare them accordingly.

There was no error in overruling the demurrer and allowing defendants to answer.

No error.

Cited: Huntley v. McBrayer, 169 N. C., 77; *Huntley v. McBrayer,* 172 N. C., 644; *Hinton v. Vinson,* 180 N. C., 397; *Hall v. Quinn,* 190 N. C., 329; *Sharpe v. R. R.,* 190 N. C., 353; *Cook v. Sink,* 190 N. C., 629; *Crawford v. Willoughby,* 192 N. C., 273; *Tucker v. Smith,* 199 N. C., 504; *University v. High Point,* 203 N. C., 560.

P. A. LEWIS v. L. E. FOUNTAIN.

(Filed 17 February, 1915.)

1. Appeal and Error—Trials—Rejection of Evidence—Collateral Matters.

In an action for damages for injuries received in a personal assault, the evidence was conflicting as to whether the injury was inflicted in consequence of the plaintiff's endeavor to protect his sister, the defendant's wife, from the defendant's assault on her with a pistol, or whether the plaintiff and defendant engaged in an assault and the plaintiff was shot in self-defense. The rejection of defendant's evidence that the defendant's wife made a different statement on the trial as to her husband's conduct towards her from that she theretofore made is not erroneous, the evidence proposed being on a collateral matter.

2. Jurors—Misconduct Inferential—Court's Discretion—Appeal and Error.

Where it appears that a juror placed himself in surroundings that gave him an opportunity or chance for misconduct in connection with the case, without any evidence that he had in fact been guilty of it, the determination of the trial judge is conclusive on appeal as a matter within his discretion.

3. Same—Estoppel.

Where the appellant knows before verdict rendered that a juror had placed himself in circumstances warranting an inference of misconduct, and, having opportunity, does not then object, he is estopped to impeach the verdict afterwards rendered, on that ground.

4. Trials—Instructions—Special Request.

Where the trial judge correctly instructs the jury upon every phase of the controversy, his refusal to give special prayers for instruction, cov-

ered in other language in the charge, is not error, though the prayers were correct and applicable propositions of law.

5. Assault—Personal Injuries—Mutual Fight—Provocation—Diminution of Damages—Evidence.

A recovery will not be denied in an action to recover damages for personal injuries received in a fight because the fight was mutually or willingly entered into, or was caused by the provocation of the plaintiff, the matter of provocation being only considered upon the question of diminution of the damages recoverable.

6. Assault—Personal Injuries—Self-defense—Trials—Evidence—Instructions.

Where in an action to recover damages for a personal injury received by the plaintiff in a fight the defendant resisted recovery on the ground that he was acting in self-defense, that he fired upon the plaintiff and inflicted the injury to protect himself or his children from death or bodily harm, it is necessary for the defendant to show that he acted upon a reasonable apprehension; and the charge of the court in this case is held to have been favorable to the defendant, of which he cannot complain.

7. Appeal and Error—Record—Immaterial Matter—Costs.

No part of the record in this case is taxable against the plaintiff, the successful party on appeal. It does not contain matter unnecessary to the decision.

(278) APPEAL by defendant from *Ferguson, J.*, at September Term, 1914, of EDGECOMBE.

T. T. Thorne and W. O. Howard for plaintiff.
G. M. T. Fountain & Son and F. S. Spruill for defendant.

CLARK, C. J. This is an action for damages for injuries received in a personal assault. The plaintiff's evidence is that the defendant was drunk, and at request of his sister, the defendant's wife, to protect her against the defendant, who was threatening her with a pistol, the plaintiff went over to defendant's house to endeavor to quiet him, and that the defendant shot him twice with a pistol without any provocation, one of the wounds cutting an artery, and that by reason of his wounds he was unable to work for twelve months, suffered great bodily pain, and was sent to Johns Hopkins in Baltimore for treatment, at considerable expense.

(279) The defendant's testimony is that the plaintiff came over and they got into an altercation; that the plaintiff fired first, and he admits that he then wounded the plaintiff, as alleged, but avers that it was done in self-defense.

The first exception, that the judge refused to admit evidence that the defendant's wife had made a different statement as to her husband's con-

duct towards her from that which she had made on the trial, cannot be sustained. It was merely a collateral matter. *S. v. Leak,* 156 N. C., 643; *S. v. Williams, ante,* 191.

The second exception is misconduct on the part of a juror. The judge finds the facts to be that the juror, after the evidence was in, took dinner at the house of the owner of the house where the shooting had taken place, but that none of the parties to this action were there; that while at the house there was no reference made to the facts of the case on trial and that the juror did not make any inspection of or look at the marks made by the pistol balls in the house. The court found as a conclusion of fact that there was no improper conduct on the part of the juror and no improper influence.

The circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge. *Moore v. Edmiston,* 70 N. C., 471; *S. v. Brittain,* 89 N. C., 481; *Baker v. Brown,* 151 N. C., 12; *S. v. Tilghman,* 33 N. C., 513. Besides, in this case, the knowledge of the juror having gone to the house was acquired by the defendant before verdict. Having taken the chances of a favorable verdict, the defendant is now estopped to impeach it on that ground. *Pharr v. R. R.,* 132 N. C., 418.

As to exceptions 2 and 3, the prayers for instruction were substantially given. It was not necessary that the identical language should be used. *Southerland v. R. R.,* 158 N. C., 327; *Board of Education v. Lumber Co., ibid.,* 314. The charge given presented every phase of the controversy, with correct instructions as to the law applicable, and a new trial will not be awarded for failure to give instructions asked, though they were correct propositions of law. *Muse v. R. R.,* 149 N. C., 443.

Even though the plaintiff invited the assault by insulting language or provoked it by his conduct, this would not bar the recovery in a civil action. As in criminal actions no words, however violent or insulting, justify a blow, but if a blow follows both are guilty, so in a civil action the provocation is a matter in mitigation and not a defense. *Palmer v. R. R.,* 131 N. C., 250; *Williams v. Gill,* 122 N. C., 967.

When two men fight together, thereby creating an affray, each is guilty of assault and battery upon the other and each can maintain an action therefor. *Bell v. Hansley,* 48 N. C., 131. In (280) *White v. Barnes,* 112 N. C., 323, the Court sustained the following charge: "If the jury believe that Barnes struck White with a stick, described in evidence, and broke his nose, the plaintiff is entitled to recover, even though they believe that White entered the fight willingly."

Here the court charged: "The defendant having admitted that he fired his pistol at the plaintiff and shot him, it devolves upon him to satisfy you from the evidence, not beyond a reasonable doubt, but to satisfy you by the greater weight of the evidence, that he did the shooting in his necessary self-defense; and if he has done so, the plaintiff would not be entitled to recover. If he fails to do so, the plaintiff will be entitled to recover such damages as he received by reason of the wound." The court further charged: "If you shall find from the evidence that the defendant did not bring about the trouble; that he was at his home and was remonstrating with the plaintiff and directing him to go away, and while in this conversation between them one word brought on another, the defendant being in his porch and the plaintiff on the sidewalk, and the plaintiff told the defendant to shoot, and took out his pistol and fired while the defendant was sitting with his children, so as to cause the defendant to reasonably believe that he or his children's lives were in immediate danger when he fired to protect himself, or them, or both, from death or bodily harm, it would be a matter of self-defense."

The above instructions were correct and as favorable to the defendant as he could ask. The court charged the jury substantially as requested in all the defendant's prayers except the third, which was: "If you find from the evidence that plaintiff and defendant were willingly engaged in a mutual assault upon each other with pistols, brought on by the plaintiff going to defendant's house and engaging in an altercation, and the plaintiff was injured while they were willingly assaulting each other, then plaintiff is not entitled to recover damages resulting from his own wrong, and you will answer the first issue 'No' and the third issue 'Nothing.'" This was properly refused. *Bell v. Hansley, supra,* and other cases above cited. To have given this instruction would legalize dueling or other fighting by consent or affrays. If the facts were as set forth in this prayer, certainly the defendant did not fight in self-defense.

The defendant cannot complain of the charge. It presented fully his right of self-defense and was more favorable to him than he was entitled to have, for the court practically told the jury that if the plaintiff shot first it was necessary for the defendant to shoot to protect himself and the children, omitting the question of reasonable apprehension or reasonable belief.

The defendant also files a motion to tax the costs of a part of the record, and of printing the same, against the appellee because it
(281) was unnecessarily sent up. The defendant made his exception at the proper time when the case was being settled, as required by Rule 31, 164 N. C., 550, and we do not favor sending up any unnecessary matter which will impose an unnecessary expense upon the

defeated party in the appeal. But, examining the transcript, we cannot say that this matter was unreasonably sent up. The motion, therefore, to tax the appellee with the costs thereof is denied.

No error.

Cited: S. v. Trull, 169 N. C., 368; *Settee v. R. R.,* 170 N. C., 367; *Michaux v. Rubber Co.,* 190 N. C., 619.

PHILIP N. FEREBEE v. W. S. BERRY.

(Filed 17 February, 1915.)

1. Appeal and Error—Evidence—Measure of Damages—Harmless Error.

Error committed on the trial which has worked no wrong or prejudice to the appellant will not constitute reversible error on appeal; and where it appears, by the verdict, in an action for damages for breach of contract for the delivery of goods sold, that the jury has accepted the figures testified to by the defendant upon the measure of damages, the plaintiff's evidence thereof, though incompetent, cannot be a sufficient ground for awarding a new trial on the defendant's appeal.

2. Vendor and Purchaser—Contract—Delivery—Measure of Damages—Evidence—Market—Quotations.

In an action against the seller of several hundred barrels of potatoes, for a breach of contract in failing to deliver them, it is competent, upon the measure of damages, for the plaintiff, as a witness, to give his opinion of the price of the potatoes, based on information delivered from competent sources, such as market reports published in newspapers relied on by the financial world, etc., and his testimony that the potatoes were worth at least $3 or more a barrel is competent as to the value definitely stated.

3. Appeal and Error—Questions and Answers—Responsive Answers—Objections and Exceptions.

The Supreme Court will not consider on appeal the responsiveness of answers to questions asked a witness, when not objected to by the appellant on the trial of the case.

APPEAL by defendant from *Carter, J.,* at September Term, 1914, of CURRITUCK.

This action was brought by the plaintiff to recover damages for a breach of a contract to sell and deliver to him three hundred barrels in which to pack and ship his crop of potatoes. He alleges that by reason of the breach he sustained a loss of $500 by a decline in the price of potatoes. The jury assessed his damages at $100, and from a judgment upon the verdict the defendant appealed.

Ward & Thompson for plaintiff.
Aydlett & Simpson for defendant.

(282) WALKER, J., after stating the case: The only exceptions relate to the admission of evidence as to the market value of the potatoes and the fall in the price, but upon an examination of the case we find that the jury have really awarded less damages than were warranted by the defendant's own testimony in regard to this matter, and, therefore, if error was committed, which we do not concede, it was harmless. He cannot reasonably complain that the jury has accepted and acted upon his own figures and has even given less than they would justify for the delay in delivering two hundred of the barrels and the refusal to deliver the other hundred. We have recently said that if the error has worked no wrong or prejudice to the appellant, it would be vain to reverse the judgment. To quote the language in *S. v. Smith,* 164 N. C., 476, which is very pertinent to this question: "The foundation of the application for a new trial is the allegation of injustice, and the motion is for relief. Unless, therefore, some wrong has been suffered, there is nothing to be relieved against. The injury must be positive and tangible, not theoretical merely. For instance, the simple fact of defeat is, in one sense, injurious, for it wounds the feelings. But this alone is not sufficient ground for a new trial. It does not necessarily involve *loss* of any kind, and without loss or the probability of loss there can be no new trial. The complaining party asks for redress, for the restoration of rights which have first been infringed and then taken away. There must be, then, a probability of repairing the injury; otherwise the interference of the Court would be but nugatory. There must be a reasonable prospect of placing the party who asks for a new trial in a better position than the one which he occupies by the verdict. If he obtains a new trial, he must incur additional expense, and if there is no corresponding benefit, he is still the sufferer. Besides, courts are instituted to enforce right and restrain and punish wrong. Their time is too valuable for them to interpose their remedial power idly and to no purpose. They will not interfere, therefore, where there is no prospect of ultimate benefit." See, also, *Webb v. Tel. Co.,* 167 N. C., 483. It was proper for the plaintiff, testifying in his own behalf, to state his opinion of the price, which was based on information derived from competent sources. 16 Cyc., 1142, 1143; *Smith v. R. R.,* 68 N. C., 107; *Fairley v. Smith,* 87 N. C., 367; *Suttle v. Falls,* 98 N. C., 393. And market reports, properly compiled and published in such newspapers as the commercial world relies on in the conduct of business and important affairs, are admissible as evidence of market values. *Moseley v. Johnson,* 144 N. C., 257. It

was not required that plaintiff should be exact in stating the market price. He testified that potatoes were selling for more than $3 per barrel. This fixed the price, at least, at $3, and was properly submitted to the jury. The answer of W. O. Ferebee was not responsive to the question put to him, and if the answer was incompetent, there was no exception to it, as there should have been. *Peyton v. Shoe* (283) *Co.*, 167 N. C., 280. But the answer, of itself, appears to be unobjectionable, as we must infer from the form and substance of the answer that the witness was speaking of his own knowledge. But, as we have said, if there was error in any of the rulings upon the evidence, no harm has befallen the defendant, as the verdict is correct in any view of the evidence, and it seems to fall below the amount which the undisputed facts justified.

No error.

Cited: In re Craven, 169 N. C., 564; *Schas v. Assurance Society,* 170 N. C., 424; *Smith v. Hancock,* 172 N. C., 153; *Commander v. Smith,* 192 N. C., 160; *Rudd v. Casualty Co.,* 202 N. C., 782.

B. F. BARTLETT v. ROANOKE RAILROAD AND LUMBER COMPANY.

(Filed 17 February, 1915.)

Deeds and Conveyances—Description of Lands—Reservations from Deed —Void Descriptions—Parol Evidence.

A conveyance of lands by definite and sufficiently given metes and bounds is not rendered void for uncertainty by excepting from the operation of the conveyance certain lands with description insufficient to admit of parol evidence of identification; for the lands sufficiently described will pass by the deed inclusive of the lands excepted under the insufficient description.

APPEAL by plaintiff from *Carter, J.*, at July Term, 1914, of CAMDEN.

Action of ejectment. The plaintiff claims under a deed from Justin B. Jacobs to Thomas Standley made in 1832, the description in which is as follows:

"A certaine peice or parcel of undividede swamp land lying and being in the county of Camdene and State of North Carolina and bounded as follows:

"Beginning at a maple, then S. 45 degrees W. 60 chains; N. 45 degrees W. 10 chains; S. 18 degrees W. 19 chains; S. 44 degrees E. 10½ chains; E. 80 chains, from thence to the first station, to have and to

hold 198 acres of the above bounded swamp land, the whole of which contains 398 acres, 100 acres of which Thomas Roberts owns next to Bear Head, and 100 acres, not divided, Wilson B. Webster owns. To have and to hold the said premises free and clear of all encumbrances to him the said Thomas Standley, his heirs and assigns, forever; and the said Justin B. Jacobs doth agree to warrant and defend the said premises free and clear from the claim or claims of every person."

These lands are swamp lands. The court, being of opinion that the land was not sufficiently described, directed a nonsuit, and the plaintiff appealed.

(284) *Worth & Pugh and Ward & Thompson for plaintiff.*
Aydlett & Simpson for defendant.

CLARK, C. J. The plaintiff contends that the deed is good to convey the land therein described. The defendant relies on *Cathey v. Lumber Co.*, 151 N. C., 592, and cases therein cited, and *Higdon v. Allen,* 167 N. C., 455. But this case is very different from those cited.

In *Cathey v. Lumber Co., supra,* the recital was "324 acres" out of a larger tract of land. There was no reference to any description more definite, and the Court said: "The question whether the grantors in this deed intended to convey the whole boundary, containing 724 acres, is set at rest by reference not alone to the descriptive words, but to the language of the habendum, 'to have and to hold the aforesaid 324 acres, being a part of the aforesaid tract of land.'" To same purport, *Higdon v. Allen, supra.*

Giving this deed a reasonable construction, according to the intent of the parties as we gather from the four corners, it means that Jacobs sold and conveyed "to Thomas Standley and his heirs the whole tract of land in question (the description of the entire boundary being given), except 100 acres which Thomas Roberts owns next to Bear Head and 100 acres, not divided, which Wilson B. Webster owns." The description of the entire tract is given and the entire tract is conveyed, with the exceptions set out. If those exceptions are not sufficiently definite, the entire tract went to Standley and his heirs. The "100 acres which Thomas Roberts owns next to Bear Head" evidently refers to that quantity of land which had theretofore been conveyed to said Roberts, and which could be made definite by reference to his deed.

The "100 acres not divided which Wilson B. Webster owns" also evidently refers to an undivided interest or right theretofore conveyed to Wilson B. Webster, to be set apart and allotted in the 298 acres which remained after the conveyance of the 100 acres to Roberts. If the con-

veyance of the "undivided 100 acres" to Wilson B. Webster is too indefinite to be valid, then that interest falls in. If it is conveyed validly, then Webster is tenant in common with the plaintiff. The plaintiff in that case has $^{198}/_{298}$ of the land and Webster has an undivided $^{100}/_{298}$ thereof.

In *Waugh v. Richardson,* 30 N. C., 470, it is said: "When the grant clearly identifies the thing granted it must pass all of it that is not properly and sufficiently excepted. The granting part of the deed is not avoided by a defect in the exception, but the exception itself becomes ineffectual thereby, and the grant remains in force."

In *McCormick v. Monroe,* 46 N. C., 14, it is said: "Where there is an exception in a grant the *onus* of the proof lies upon the party who would take advantage of that exception."

In this case the description of the tract conveyed is neither vague (285) nor indefinite. If there is any vagueness and want of clearness, it is in the exceptions. The conveying clause governs, and the attempt in the *habendum* to except the Roberts and Wilson interests cannot defeat the conveyance. The failure to locate the tracts excepted in the *habendum* will invalidate only the exceptions and not the conveyance to Standley under which the plaintiff claims.

Reversed.

JOHN W. CASEY ET AL. v. DARE COUNTY ET AL.

(Filed 17 February, 1915.)

1. Counties — School Districts — Bond Issues — Board of Education — Parties.

In an action to restrain the issuance of bonds for local public school purposes and the levy of a special tax therefor, under an act authorizing the county commissioners to submit the proposition to the voters of the locality at the request of the county board of education, the latter board to issue the bonds and the former one to levy the special tax, the board of education is a necessary and indispensable party.

2. Counties—School Districts—Bond Issues—Registration—Elections—Interpretation of Statutes.

Where a statute authorizing the proposition to issue bonds to be submitted to the voters provides that the voters in the district "shall be required to register in accordance with the registration laws governing the election of the members of the General Assembly before being permitted to vote in said election," a new registration is not required; for the statute authorizes the use of the registration books used in the last general election of the members of the General Assembly.

3. Bond Issues—Equity—Injunction—Elections—Registrar—Appeal and Error.

In this action to restrain the issuance of bonds for local public school purposes the exception of the plaintiff that no registrar acted therein as required by law is not sustained by the evidence, and though the trial judge overruled the exception, but made no finding on the matters raised thereby, the exception is not sustained on appeal.

4. Bond Issues—Registrar—Irregularities, Effect of—Equity—Injunction—Legal Majority.

Where the plaintiffs seek to restrain to the hearing the issuance of bonds for local public school purposes, for irregularities of the registrar in permitting names to be stricken from the registration books by unauthorized persons, and in being temporarily absent, it is necessary for them to show, in order to obtain the injunctive relief, that these irregularities changed the result of the election, the question thus presented being whether the proposition had been carried by the requisite legal majority.

APPEAL by plaintiff from *Carter, J.*, at chambers, 10 December, 1914. From DARE.

(286) Civil action, brought by the plaintiffs to restrain the issuing of certain bonds of the county of Dare by the defendants, the board of education and the board of commissioners of said county, and to restrain the levy and collection of a special tax to pay the interest on same.

A restraining order was issued by Carter, judge, presiding in the Superior Court of Dare County, and upon the hearing thereof on 10 December, 1914, he continued the restraining order enjoining the collection of the special tax until final hearing, and dissolved the injunction prohibiting the issuing of the bonds. To so much of the order as dissolves the injunction as to the bonds the plaintiffs except and appeal.

W. B. Bailey, Aydlett & Simpson for plaintiffs.
Ward & Thompson, B. G. Crisp, Ehringhaus & Small for defendants.

BROWN, J. The first exception is to the order permitting the board of education of Dare County to come in and make itself a party defendant. The said board was not only a proper but a necessary party to this action, and it would have been error in the judge to have prevented their entry into the case. The act of 1913, Public-Local and Private Laws, chapter 120, provided: "That the county board of education of Dare County shall be authorized to issue bonds for the purpose of erecting a school building in District No. 17 of Dare County, and that the board of commissioners of said county shall levy a tax not to exceed 50 cents on each $100 worth of property and $1.50 on each taxable poll in said district, for the purpose of paying the said bonds at maturity."

The act further provides that "An election shall be held upon the request of the board of education, to be ordered by the commissioners of the said county, for the purpose of determining the amount of said bonds to be issued, the date of maturity of the same, and the rate of tax to be levied."

The act further provides that "At such election five freeholders living in the said district shall be named as trustees, and under the supervision of said trustees the school building herein provided for shall be erected, etc."

It is thus seen from the very language of the act that the board of education alone is authorized to issue the bonds, while the commissioners of the county are compellable to levy the tax. That being so, the board of education is an absolutely necessary party to this proceeding, the purpose of which is to enjoin the issuance of the bonds as well as the levy and collection of the tax.

There are several grounds set up in the complaint for the purpose of attacking the validity of the bonds. It is contended that under the act a new registration was necessary in order to give validity to the election. Section 3 of the act provides: "That all voters in said district shall be required to register in accordance with the registration (287) laws governing the election of members of the General Assembly before being permitted to vote in said election." This section does not require a new registration, but authorizes the election to be conducted in all respects as the election for members of the General Assembly. That being so, it was proper to use the registration books which had been used in the last general election instead of ordering a new registration.

The plaintiff alleges that this election was held on 28 July, 1914, and that there was no registrar, as provided in the said act; that those who voted in the said election, or a large majority thereof, were not duly registered; that many of the names on the registration books were placed there by others than the voters; that names were placed on the books when voters were not present; that the registrar did not register any qualified voters, as provided by the act; that the one who acted as registrar had no right to do so, and was not authorized according to law; that those who acted as judges of the election were not appointed by any one who had the right to do so; that at the pretended election the registrar and the judges of the election did not make the canvass of the votes and sign and make the returns as provided by law; that no board or persons in authority have canvassed the returns and declared the result of the election; that one of the judges of the election was a candidate for the office of trustee under the said act.

There are no findings of fact made by the judge, but several affidavits are set up in the record tending to support some of these charges, which are denied by the defendants, both in their answer and in the affidavits filed. The charge that no registrar was appointed, in accordance with the general election laws of the State, does not seem to be sustained. The evidence shows that the registrar in this case was not only *de facto,* but really *de jure. Norfleet v. Staton,* 73 N. C., 546; *Van Amringe v. Taylor,* 108 N. C., 196.

It is true that the registrar was absent from his duties some days when he should not have been absent, and that some names were put upon the registration books by an unauthorized person, and it is further in evidence that the registrar erroneously struck off a few names from the registration books because he had been informed that they would not be present on election day and vote. This, of course, was erroneous; but it does not necessarily invalidate the election, and before the plaintiff could enjoin permanently the issuance of the bonds, he would have to prove that these irregularities changed the result of the election. An irregularity in the conduct of an election which does not deprive a voter of his rights, or even admits a disqualified person to vote, but which casts no uncertainty on the result, will be overlooked when the only question is as to whether the proposition was carried by the requisite legal majority. *DeBerry v. Nicholson,* 102 N. C., 465.

(288) We find in the allegations of the complaint, and in the affidavits filed in support of it, nothing to substantiate the claim that any legal voter was deprived of an opportunity to register and vote, or that a number of illegal votes sufficient to change the result was cast, and, failing such allegations, the result will not be disturbed. *DeLoatch v. Rogers,* 86 N. C., 358.

The most serious charge, and the only one we think that demands consideration, is that there was no canvass of the votes and no result declared, as required by law. If that is true, which is denied, then the right to use the bonds must necessarily fail. It is the duty of the county commissioners, who are charged with the supervision and control of the election in this case, to canvass the returns and to ascertain whether a majority of the qualified voters of the county voted in favor of the issue of the bonds.

In the election it was the privilege of the voters to determine under the peculiar words of this special statute the amount of said bonds to be issued, the date of maturity of the same, and the rate of tax to be levied, and as to whether or not the bonds shall be issued at all or not, and it must appear, and it should be so recorded upon the records of the commissioners, that a majority of the qualified voters of the county voted in favor of this proposition.

The validity of this election will not be determined upon mere suggestions in affidavits in injunction proceedings unless it clearly appears and is practically not denied that such irregularities entered into it as to render it void.

We will not preclude the plaintiffs from showing, if they can, on the final hearing of this case, that the votes were not canvassed, that the result was not announced, and that no findings have been made by the commissioners that the bonds are authorized by a majority of the qualified voters. Those matters may be determined upon the final hearing of the case, and it would seem, in the absence of an injunction, that as long as that matter remains in doubt it would appear the part of wisdom for the board of education not to attempt to issue the bonds.

It is alleged in the answer that a large majority of the qualified voters of said district voted for the bonds, but whether the questions relating to the amount of bonds to be issued, the date of maturity, and the rate of tax to be levied were submitted at such election to the judgment of the voters does not appear in the answer or affidavits in this case.

The statute is a very peculiar one, and as we read it the question of issuing the bonds alone is not the only matter to be voted on, but the language of the statute says that the election shall be held for the purpose of determining the *"amount of said bonds, date of maturity, and rate of tax to be levied."*

Reversed.

Cited: Comrs. of Johnston v. State Treasurer, 174 N. C., 162; *Williams v. Comrs. of Polk,* 176 N. C., 558; *Comrs. of McDowell v. Bond Co.,* 194 N. C., 139.

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(289)

JAMES E. MORAN v. BOARD OF COMMISSIONERS OF CHOWAN COUNTY.

(Filed 3 March, 1915.)

1. Schools—Bond Issues—Taxation—Constitutional Law—Injunction—Construction and Equipment—Vote of People—Maintenance.

The validity of bonds carried at an election within a designated district for the construction and equipment of a "farm-life school" therein, and in accordance with the statute authorizing it, is not affected by the failure of the statute to provide for its maintenance; and while school purposes are not necessaries within the meaning of our Constitution, Art. VII, sec. 7, and require that taxation for such purpose must be submitted to the voters, a provision of the statute providing that for the maintenance of the school the county commissioners shall make an ap-

propriation in a certain sum under certain conditions, which provision is unconstitutional, affords no ground for an injunction against the issuance of the bonds, not made contingent on the appropriation.

2. Schools—Taxation—Bond Issues—Appropriations—Vote of People—Constitutional Law.

Where a statute provides that the issuance of bonds for the construction of a farm-life school be submitted to the voters of a certain district, and for an appropriation from the State's funds for the maintenance of the school, upon condition that the county also appropriate a like amount for that purpose, the question of the constitutionality of the appropriations made without the approval of the voters does not affect the validity of the bonds. *Semble*, the appropriation of the State's funds, under such circumstances, would be valid, if the contingency were complied with.

3. Schools, Public—Charges for Tuition—Constitutional Law.

The mere fact that a school, erected and maintained for the public in its district, is authorized by the statute to charge tuition for children from other parts of the State does not affect the validity of statute, as such schools are recognized as public, and not private schools. *Whitford v. Comrs.*, 159 N. C., 160, cited and applied.

APPEAL by plaintiff from *Justice, J.*, at Spring Term, 1915, of CHOWAN.

H. R. Leary for plaintiff.

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

CLARK, C. J. This is a controversy submitted without action. Chapter 479 Public-Local Laws 1913, entitled "An act to establish a farm-life school in Chowan County," provides for the creation in "Edenton Graded School" District, in Chowan County, of a school to be known as "Chowan County Farm-life School." After providing for the course of study and the purposes of the school, and for its control and management, the act authorizes an election in said Edenton Graded
(290) School District for the submission to the qualified voters thereof of the issue of bonds, in an amount not to exceed $25,000, and for the levy and collection of taxes to pay the principal and interest of said bonds, the proceeds of which to be used for the "construction and equipment" of said school.

The election was held in conformity with law, and was regular in all respects, and the result was duly canvassed, and, being in favor of the issue of the bonds by a vote of 197 out of a total registered vote of 246, the county commissioners propose, pursuant to said act, to issue said bonds to an amount not to exceed $25,000, as authorized by the act and by the election held thereunder.

The plaintiff, who was not a resident in said school district, attacks the validity of the bonds upon the ground, (1) That by section 7 of said act the county commissioners of Chowan County shall provide annually, by taxation or otherwise, not less than $2,500 for the maintenance of said school. It is true, Art. VII, sec. 7, of the Constitution prohibits any county to levy any tax "except for the necessary expenses thereof unless by a vote of a majority of the qualified voters therein," and it has been held that the maintenance of schools is not a "necessary expense" of the county. *Rigsbee v. Durham,* 98 N. C., 81; *Graded School v. Broadhurst,* 109 N. C., 232; *Rodman v. Washington,* 122 N. C., 39; *Bear v. Comrs.,* 124 N. C., 204; *Hollowell v. Borden,* 148 N. C., 255; *Ellis v. Trustees,* 156 N. C., 10. But there is nothing in this act which makes the validity of this election, and of the bonds issued thereunder, dependent upon the validity of this appropriation by the county commissioners for its maintenance. This case is not like *Winston v. Bank,* 158 N. C., 512, as is explained in *Briggs v. Raleigh,* 166 N. C., 149. Nor is it like *McCracken v. R. R., ante,* 62, where the issue of bonds was submitted to the voters with conditions named in the act.

This graded school election having been duly and regularly had and the bonds voted in accordance with law, the appropriation by the county commissioners for the maintenance of the school after the buildings shall have been erected and equipped may still be provided for by an act of the General Assembly authorizing an election by the county or by the school district, or possibly by private subscriptions or by a donation from some wealthy and patriotic citizen, or "otherwise." But it is sufficient now to say that the validity of the bonds for the erection and equipment of the school buildings is in no wise dependent upon the source from which the maintenance shall come. Doubtless the object of this litigation is to obtain legislation to authorize a vote of the people on the question of maintenance, if it cannot be procured from other sources.

The act is also attacked upon the ground that section 14 authorizes an appropriation out of the State Treasury of $2,500 per year for the fuller maintenance of the school when it shall appear that it (291) has been established and equipped, and that $2,500 has been appropriated for that purpose by the county. It is contended that the Const., Art. V, sec. 4, prohibits such appropriation out of the State Treasury except by a vote of the people of the State. It does not now occur to us that there is any distinction between the validity of such appropriation and many similar appropriations, such as to the Jackson Training School, the Cullowhee High School, and others. But if this

provision were invalid, it in no wise affects the validity of the bond issue authorized by the vote of the people of the Edenton Graded School District.

The validity of the school is also attacked upon the ground that some details of the act are unconstitutional, in that it admits children from other parts of the State to the school upon the payment of tuition, and that children between 6 and 21 are required to pay tuition, and that it is not a public school in the sense of the Constitution. The validity of this legislation, however, has been recognized in *Whitford v. Comrs.*, 159 N. C., 160, and discussion is unnecessary.

Affirmed.

Cited: Keith v. Lockhart, 171 N. C., 459; *Snider v. Jackson County,* 175 N. C., 592; *R. R. v. Reid,* 187 N. C., 325.

T. B. SPENCER v. WALTER JONES AND T. B. JONES.

(Filed 17 February, 1915.)

1. Deeds and Conveyances—Covenants of Warranty—Intent.

The courts will construe a deed as a whole when necessary to interpret a covenant of warranty of title therein, in order to arrive at the intent of the covenantor.

2. Same—Two Grantors—Special Warranty—Exclusive Words.

Where J. and S. convey land, covenanting that they are seized in fee simple and have the right to convey in fee, that it is free from encumbrances, "that they will warrant and defend the title to the same against the claims of all persons whomsoever claiming by, through, or under them, the said special warranty applying only to S. and his heirs," the special warranty is construed, by its very terms, to exclude J. from any liability thereunder, and damages for its breach cannot be enforced against him.

APPEAL by defendant from *Carter, J.*, at Fall Term, 1914, of HYDE.

Action against the executors of W. H. Jones, deceased, upon the following covenants in a deed for land, dated 4 September, 1903, from William H. Jones and wife and B. B. Saunderson and wife to Thomas B. Spencer: "The said parties of the first part covenant with Thomas B.

Spencer and his heirs and assigns that they are seized of said (292) premises in fee and have right to convey in fee simple; that the same are free and clear from all encumbrances, and that they will warrant and defend the said title to the same against the claims of

all persons whomsoever claiming by, through, or under us, the said special warranty applying only to B. B. Saunderson and wife, Eugenia C., and their heirs."

Thomas C. Spencer was ousted from the premises under an execution issued in a suit by T. C. Mann against him for the same within three years prior to the bringing of this action, which was commenced on 14 October, 1913, Mann having the paramount title. It was admitted that the action was barred as to the covenants of seisin and against encumbrances. Judgment was entered in favor of the plaintiff for $1,500, the amount of the purchase money, with the interest thereon and the costs, and the defendant appealed.

Ward & Grimes for plaintiff.
S. S. Mann and Ward & Thompson for defendant.

WALKER, J., after stating the case: The only question raised and argued before us is whether the presiding judge was right in holding that the warranty as to the covenantor, W. H. Jones, was a general one, and not special, as contended by the defendants, there being no breach if it was special. We concur with his Honor that it is a general warranty. If this is not the true meaning of it, but it was intended to extend the special or restrictive clause to both of the parties, William H. Jones and B. B. Saunderson, it was idle to use the last words of the covenant confining its operation to Saunderson, as without them the clause would have that meaning, and, besides, the use of the words contravene any such intention. Nor can it be successfully argued that the only warranty intended was a special one by B. B. Saunderson, and that W. H. Jones was not embraced by the warranty at all. The language forbids any such construction, because the words are in the plural number, viz., "*they* will warrant and defend the said title to the same against the claims of all persons whomsoever," which is a general warranty, and then comes the restrictive clause reducing it to a special warranty as to Saunderson. It is somewhat awkwardly expressed, but with sufficient certainty to gather the meaning of the parties from a consideration of the entire deed, which we are enjoined to do. *Gudger v. White,* 141 N. C., 507; *Triplett v. Williams,* 149 N. C., 394; *Beacon v. Amos,* 161 N. C., 357. This doctrine applies to a covenant as to other contracts, and the intention of the parties, if discernible, will control in determining its meaning, which should be gathered from the entire instrument. 11 Cyc., 1051; *A. K. and N. Railroad Co. v. McKinney,* 124 Ga., 929; *s. c.,* 6 L. R. A. (N. S.), 436; *Empire Bridge Co. v. Larkin Soap Co.,* 109 N. Y. Suppl., 1062; *Godfrey v. Hampton,* 127 S. W., 626.

(293) What was clearly meant in this case is that the words restrictive of the general warranty should apply only to the Saundersons, for otherwise the first and last parts of the covenant of warranty cannot be reconciled.

No error.

Cited: McMahon v. R. R., 170 N. C., 459; *Lewis v. May*, 173 N. C., 103.

E. H. HOBBS v. CITY OF WASHINGTON AND GEORGE N. HOWARD.

(Filed 3 March, 1915.)

1. Municipal Corporations—Cities and Towns—Insanitary Lockup—Damages—State Offense—Liability.

The act of a city's chief of police in causing the incarceration of one violating the laws of the State, and not of the city, in the insanitary lockup of the city, when unauthorized on the part of the city, does not make the latter responsible in damages for a consequent injury to the health of the prisoner; the right of action existing only against the chief of police.

2. Municipal Corporations—Cities and Towns—Theft of Boat—State Offense.

The theft of a boat upon a river from the wharf of a city is an offense against the State, and the thief, after arrest, should be incarcerated in the county jail, and not in the city lockup.

3. Municipal Corporations—Police Officers—Unlawful Arrest—Warrants for Arrest.

The arrest of a person by an officer without a warrant is allowed upon emergency (Revisal, secs. 3176-8), but a warrant must be procured as soon thereafter as possible (Revisal, sec. 3182); and, under the circumstances of this case, it appearing that this was not done, the officer responsible for the arrest is personally answerable in damages.

HOKE and ALLEN, JJ., dissenting.

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

Small, MacLean, Bragaw & Rodman for plaintiff.
H. C. Carter, Jr., for defendants.

CLARK, C. J. On the night of 27 June, 1912, the plaintiff, who was at that time a minor, but is now of age, was arrested, together with

several other boys, upon the complaint of the owner of a boat to the defendant Howard, the chief of police of Washington, that some one had stolen it. Two of the police officers were sent by the defendant Howard, chief of police, to the wharves to ascertain and apprehend the guilty parties.

The boat was seen in the river, and when it came ashore the plaintiff and the other boys were arrested and afterwards confined in the city lockup. The plaintiff was kept in the city lockup overnight (294) on the charge of removing the boat from the wharf, but next morning was acquitted of the charge by the recorder.

The complaint alleges that the lockup was in a filthy and insanitary condition. The defendant, the city of Washington, had in its employment a janitor whose business it was to keep the lockup in a clean and sanitary condition, but the jury find that the lockup was in fact in an insanitary condition, which is to the discredit of the city. We need not, however, consider the debated proposition whether the city under such circumstances would be liable for damages, because the plaintiff was arrested for a violation of the State law, and his being placed in the city lockup was without its authority, express or implied, but was the unauthorized act of the defendant Howard. Such action by Howard imposes no liability upon the city, any more than if he had imprisoned the plaintiff in a pig-pen on the premises of an individual, which would not have imposed any liability upon the owner of the lot, without his concurrence in the act.

As to the defendant Howard, the jury find that he arrested the plaintiff without any warrant and detained him in confinement until next morning without procuring one. Upon emergency, which does not appear to have been the case here, one may be arrested without a warrant (Rev., 3176-8), but as soon thereafter as possible the warrant must be procured (Rev., 3182). This was not done in this case.

The action of Howard, being unauthorized, created no liability as to the city. *McIlhenney v. Wilmington,* 127 N. C., 146.

Howard was liable, not only because he arrested the plaintiff without a warrant and without procuring one until next morning, but because he imprisoned the plaintiff in a lockup that was filthy, and without any authority of law, since the arrest being for an offense against the State, the plaintiff should have been placed in the county jail.

As to the city of Washington, the nonsuit should have been granted. As to Howard,

No error.

HOKE and ALLEN, JJ., dissenting.

(295)

J. A. NEWSOME v. EULA HARRELL ET AL.

(Filed 24 February, 1915.)

1. Partition—Owelty—Charge Upon Land—Life Tenant—Limitation of Actions.

In a division of land by a voluntary deed of partition among tenants in common, subject to the life estate of another, charging one of the parts owelty in a certain sum, the ten-year statute bars the right of recovery for the charge of owelty upon the land and begins to run during the life estate to which the land is subjected.

2. Partition—Owelty—Charge Upon Lands—Personal Judgment—Personal Representatives—Parties.

Where tenants in common have made a voluntary partition of lands by a division deed, charging one of the shares with owelty, and the owner thereof has since died, devising his lot to his wife, in an action brought to recover judgment for the amount of the owelty and declare the judgment a lien on the land, no personal judgment can be rendered against the defendant or the personal representative of the deceased, and the latter is not a necessary party.

APPEAL by defendants from *Bond, J.*, at Fall Term, 1914, of HERTFORD.

No counsel for plaintiff.
Winborne & Winborne for defendants.

CLARK, C. J. This is an action to recover owelty of partition, $350, and that the judgment be declared a lien on the land owned by the defendant.

On 17 December, 1902, the tenants in common divided the land by a voluntary partition into five shares, subject to the life estate of their father, and executed a division deed. The plaintiff drew lot No. 2 and his brother, Walter E. Newsome, drew lot No. 1, which was to pay lot No. 2 $350 owelty. Walter Newsome died and devised the lot No. 1 to his wife, the *feme* defendant. The life tenant died 1 December, 1907. The defendant pleads the statute of limitations, and the only question before the Court is, "Is the $350 charge barred by the statute of limitations?"

The procedure for enforcing the payment of owelty in a judicial proceeding is by execution. *Ex parte Smith,* 134 N. C., 495; 3 Pell's Revisal, sec. 2495; Laws 1911, ch. 9.

The procedure for enforcing the payment of owelty in partition by agreement is by action in the Superior Court. *Sumner v. Early,* 134 N. C., 233; *Keener v. Den,* 73 N. C., 132.

Proceedings to enforce payment of owelty in judicial partition is barred by ten years statute of limitations. *Ex parte Smith, supra.* The existence of a life estate does not prevent the run- (296) ning of interest or the statute of limitations except as to minors. Rev., 2497. *Turpin v. Kelly,* 85 N. C., 399.

Does the ten-year statute bar the collection of the charge when the partition is by agreement? Since it must be collected by action, the ten-year statute bars. Rev., 399. When the sum is a lien or a charge on land, the ten-year statute applies. *Aston v. Galloway,* 38 N. C., 126; *Rice v. Rice,* 115 N. C., 43; *Allen v. Allen,* 121 N. C., 328. The plaintiff was not prevented from bringing this action during the life estate.

If the sum sued for was simply a personal debt, the three years statute of limitations would apply. *Rice v. Rice, supra.* But this action is to enforce the charge upon the land, and no personal judgment can be rendered against the defendants or the personal representative of Newsome. *Halso v. Cole,* 82 N. C., 161; *Waring v. Wadsworth,* 80 N. C., 345. The personal representative is not necessary in this action to enforce the charge on the land. *Lee v. Eure,* 82 N. C., 428; *s. c.,* 93 N. C., 5.

The headnote *In re Ausborn,* 122 N. C., 42, that the statute of limitations does not run against a charge upon land for owelty in partition, is corrected after full discussion in *Ex parte Smith, supra.*

The plea of the statute of limitations should have been sustained.

Reversed.

Cited: Morganton v. Avery, 179 N. C., 552; *Cochran v. Colson,* 192 N. C., 664; *Hughes v. Thomas,* 199 N. C., 209; *Hyman v. Jones,* 205 N. C., 267.

W. S. HASSELL & CO. v. DANIELS' ROANOKE RIVER LINE STEAMBOAT COMPANY.

(Filed 24 February, 1915.)

1. Appeal and Error—Process—Parties.

Where an action is commenced in the court of a justice of the peace and summons is erroneously served on one as agent for a certain corporation, and on appeal to the Superior Court an order is entered to make the corporation a party, but summons is not accordingly served, a judgment rendered against the corporation will be set aside on appeal unless the corporation defendant has entered an appearance, denied liability, or in some manner has waived the lack of proper service.

2. Same—Courts—Presumptions.

Every intendment and presumption on appeal is in favor of the validity of the judgment of the Superior Court appealed from; and where it appears that summons had not been served on the defendant, and it entered a general as well as a special appearance for the purpose of dismissing the action, without showing which was done first, and judgment has been rendered against it, it will be presumed that by a general appearance first entered the right to dismiss upon the special appearance had been lost.

(297) APPEAL by defendant from *Ferguson, J.*, at September Term, 1914, of MARTIN.

Action to recover value of a bale of cotton, which was commenced before a justice of the peace and heard on appeal in the Superior Court.

The summons was issued against and served on J. L. Davenport, agent for the Daniels' Roanoke River Line Steamboat Company.

Judgment was rendered in favor of the plaintiff before the justice of the peace, and the defendant appealed.

In the Superior Court an order was made that the Daniels' Roanoke Steamboat Company be made a party defendant, and said company was entered upon the record as a defendant, but no summons was issued.

The case on appeal to this Court is entitled *Hassell v. Daniels' Roanoke River Line Steamboat Company,* and it states that the case was tried "on an appeal by defendant from the justice of the peace's court to recover the sum of sixty dollars ($60) for the loss of one bale of cotton. The defendant denied owing the plaintiff anything. The pleadings will show the contentions fully of the parties.

"Before the trial began, the defendant company, through its attorneys, Martin & Martin and B. A. Critcher, made a motion to dismiss the proceedings, and they made a special appearance to make this motion, and same was entered of record, for the reason that no summons has ever been issued against Daniels' Roanoke River Line, and none has ever been served upon the defendant, but summons was only issued and served upon J. L. Davenport, agent.

"Motion overruled and exception taken by defendant."

Both parties introduced evidence, and a verdict was rendered in favor of the plaintiff and judgment entered accordingly, from which the plaintiff appealed.

No counsel for plaintiff.
Martin & Martin and B. A. Critcher for defendant.

ALLEN, J. If there was nothing in the record except that summons issued against and was served upon J. L. Davenport, agent for the

Daniels' Roanoke River Line Steamboat Company, we would not hesitate to set aside the judgment rendered against the company upon the ground of want of jurisdiction of the party—the corporation (*Mauney v. Manufacturing Co.*, 39 N. C., 196; *Young v. Barden*, 90 N. C., 424); but it also appears that the company was entered on the record as a party and that it filed a plea denying liability, and it nowhere appears that this was not done before the attempt to enter a special appearance for the purpose of the motion to dismiss because no process had been served. The filing of the plea denying liability was an appearance by the corporation, and, if made before the motion to dismiss, gave to the court as full jurisdiction of the party as if a summons (298) had been regularly issued and served (*Wheeler v. Cobb*, 75 N. C., 21; *Scott v. Life Asso.*, 137 N. C., 516; *Rackley v. Roberts*, 147 N. C., 201), and as every intendment and presumption is in favor of the validity of the judgment and the jurisdiction of the court, it must be assumed that the plea was entered and after that time the motion to dismiss made. *Mauney v. Gidney*, 88 N. C., 200; *Settle v. Settle*, 141 N. C., 553; *Spillman v. Williams*, 91 N. C., 483.

There is nothing in the record to rebut this presumption in favor of the judgment, and the form of the motion to dismiss strongly corroborates it, because it is made upon the ground that no summons has ever been issued or served, and not upon the ground that there has been no appearance.

We are therefore of opinion that the motion to dismiss was properly overruled, and as there is no other exception relied on, the judgment is affirmed.

No error.

Cited: Wooten v. Cunningham, 171 N. C., 127; *Comrs. of Buncombe v. Scales*, 171 N. C., 526; *Gordon v. Gas Co.*, 178 N. C., 440.

H. WEIL & BROTHERS v. D. G. DAVIS.

(Filed 3 March, 1915.)

1. Mortgage—Assignment—Intent—Trustee—Power of Sale.

It is necessary that the assignment of a note and mortgage on real estate should operate upon the land described in the mortgage in order that the power of sale, which is appendant or appurtenant to the legal title, may pass to the assignee; otherwise the legal title, with the power

of sale, will remain in the mortgagee, and the assignment will only operate to transfer the note, which carries with it the security of the mortgage.

2. Mortgage—Assignment—Inartificially Drawn—Intent.

In construing an assignment of a note and a mortgage security of real estate the courts will regard the entire instrument to ascertain and uphold the intent of the grantor, as in other conveyances; and where the intent to assign the title to the lands with power of sale clearly appears from such construction, it will not be defeated because the assignment has been inartificially drawn.

3. Same—Power of Sale—Purchaser—Legal Title.

An assignment of a note and mortgage on land to a trustee, expressly referring to the lands described in the mortgage as a part of the consideration and as "the premises therein conveyed," using words of inheritance in connection with the thing conveyed, with the assignor's covenant of seizin, viz., that he is seized "of the premises in fee and has the right to convey the same," also expressly setting forth that "the grant shall carry full power and authority to sell the lands and apply the proceeds to the payment of the debt," etc.: *Held:* The intent of the assignor as gathered from the language employed was not only to assign the mortgage as a security, but also to convey to the assignee the legal title to the same extent and as fully as was conveyed to him, the assignor, in the mortgage, and necessarily included the power of sale; and when the sale was made, in accordance with the provisions of the mortgage, and the law, the purchaser acquired a good title.

(299) APPEAL by plaintiffs from *Bond, J.*, at January Term, 1915, of WAYNE.

Civil action. The facts of the case are these: W. H. Davis conveyed certain land to D. G. Davis, who alleged that the deed did not include all of the land contracted to be sold and conveyed to him. He executed a mortgage to W. H. Davis to secure the purchase money, or a part thereof, consisting of three notes, amounting, in all, to $500. These notes and the mortgage were assigned by W. H. Davis and wife to James M. McGee, trustee, who sold the land, after due advertisement, under the power contained in the mortgage, and executed a deed for the same to the plaintiffs, who were the purchasers. The following verdict was returned by the jury:

1. What sum is due by defendant, D. G. Davis, on notes referred to in complaint? Answer: "$500 and interest from 30 October, 1906."

2. Did W. H. Davis agree to convey to defendant, D. G. Davis, land which was not included within the boundaries of deed made in pursuance of said contract? Answer: "Yes."

3. If so, what damage, if any, did the defendant, D. G. Davis, sustain thereby? Answer: "$550."

4. What was the rental value of land described in complaint that defendant kept possession of during year 1914? Answer: "$75."

5. Are plaintiffs the owners and entitled to the possession of lands described in the complaint? Answer: "No."

The court adjudged that the assignment of W. H. Davis and wife and the deed of James M. McGee, trustee, to the plaintiffs were void and of no effect, and that the mortgage by D. G. Davis to W. H. Davis and wife be canceled as having been satisfied, as appeared from the verdict, the judge holding that the assignment did not confer any power on James M. McGee to sell under the mortgage, and that plaintiff acquired no right superior to that of the defendant, D. G. Davis. The agreement of the parties as to the question involved and the assignment of W. H. Davis and wife to James M. McGee are as follows:

"Plaintiffs claim title under an assignment of a mortgage from one W. H. Davis to James McGee, trustee, and a deed from McGee, assignee, to the plaintiffs in foreclosure of the mortgage.

"It is agreed that if the assignment is sufficient to authorize the said McGee, trustee, to make the sale and pass the title of the land to the plaintiffs, they are the owners of the land; if the assignment was not sufficient to authorize McGee, trustee, to make the sale and (300) pass the title, the plaintiffs are not the owners of the land.

"The assignment was duly registered in the office of the register of deeds in said Wayne County on 20 June, 1913, Book 115, page 359, and is in these words and figures:

"NORTH CAROLINA—WAYNE COUNTY.

"This indenture, made this 20th day of June, 1913, by and between W. H. Davis and wife, Louvenie E. Davis, of the county of Wayne, State of North Carolina, parties of the first part, and James M. McGee, trustee, of said county and State of North Carolina, party of the second part:

"Witnesseth, That whereas the said parties of the first part are the holders of two certain notes amounting to $500 and secured by first mortgage on real estate to secure the payment of the same, which mortgage deed is duly recorded in the registry of Wayne County, in Book 91, at page 262: said parties of the first part, for and in consideration of the premises therein conveyed and the sum of $10, have bargained and sold and by these presents doth bargain and sell said notes and securities thereto belonging to the said W. H. Davis and wife, Louvenie E. Davis, their heirs and assigns; and the said parties of the first part covenant to and with the said party of the second part that they are seized of said premises in fee, and have right to convey the same in fee simple, and

that the same is free from any encumbrances whatever, and that they will warrant the title to the same against the lawful claims of all persons whatsoever.

"Granting to the said parties of the second part, their heirs, executors, and assigns, full power and authority to advertise said lands agreeably to the terms of said mortgage and apply the proceeds of the said sale to the discharge of said debt and interest on the same, and any surplus pay to the said D. G. Davis and wife, agreeably to the terms thereof.

"In testimony of which the said parties of the first part have hereunto set their hands and seals the day and year first above written.

W. H. DAVIS, [SEAL]
LOUVENIE DAVIS. [SEAL]"

Probate in regular form.

His Honor being of opinion that the assignment was insufficient to authorize the assignee to make the sale and pass the title of the land, answered the issue as a matter of law as follows: "Are plaintiffs the owners and entitled to the possession of the land described in complaint? Answer: 'No.'"

Plaintiffs excepted and assigned as error that "his Honor erred in holding as a matter of law that the assignment was insufficient to
(301) authorize McGee to make the sale and pass the title to the plaintiff, and in answering the issue as above set out."

Dortch & Barham for plaintiffs.
D. H. Bland and H. B. Parker for defendant.

WALKER, J., after stating the case: The contention of the defendant, and the court held in accordance therewith, is that the assignment of W. H. Davis and wife to James M. McGee operated only upon the mortgage as a security for the debt, and not upon the land itself, which is necessary to be conveyed in order that the power of sale, which is appendant, or appurtenant, to the legal title, may pass to the assignee. This statement of the law is abstractly correct, but it does not apply to this case, as we hold that there is a sufficient reference to the land in this assignment to pass the legal title thereto, and consequently the power of sale, to James M. McGee. Speaking to this question in *Williams v. Teachey,* 85 N. C., 402, *Chief Justice Smith* said: "It is just as necessary to the operation of a conveyance that its subject-matter should be specified as the names of the parties between whom it operates. The assignment of a note secured by mortgage carries with it the mortgage security, the mortgagee being then a trustee for the owner of the note,

the trusts of which may be enforced, and we are not prepared to say that an assignment of the mortgage deed is more than an expression in terms of what is implied in law from the act of assigning the debt secured. *Hyman v. Devereux,* 63 N. C., 624: 1 Jones Mortg., sec. 805. We are aware that in many of the States the strict legal relations of the parties resulting from the making of a mortgage have been changed, 'for the most part by statute,' remarks a recent author, 'so that a mortgage is regarded as a mere pledge, and the rights and remedies under it are wholly equitable, so that a second system has grown out of the first.' 1 Jones Mortg., sec. 17. It is held that the mortgage, though conveying land, passes but a chattel interest incidental to and partaking of the nature of the debt intended to be protected, and hence upon the death of the mortgagee it may be assigned by his personal representative. Such is not the law in this State, and the distinction is maintained between the legal estate in the mortgagee and the equitable estate in the mortgagor, created by the execution of the mortgage deed, while the latter is subject to dower and to sale under execution. *Hemphill v. Ross,* 66 N. C., 477; *Ellis v. Hussey, ibid.,* 501; *Isler v. Koonce,* 81 N. C., 378." The Court then decides that an assignment which does not in terms profess to act upon the land, the subject-matter of the deed of mortgage, nor upon the estate or interest which the assignor may have therein, but only upon the mortgage itself, is not sufficient to pass the land, or the legal title thereto; and the power of sale, which is only an incident, does not, therefore, pass. It will be found that the cases (302) upon which the defendant relies are like *Williams v. Teachey, supra,* in respect to the fact that the words of the assignment in all of them, with perhaps one exception, are identical, or substantially so, with those used in the assignment construed in that case, as they referred only to the mortgage itself, without any sufficient inclusion of the land or the legal title therein; and in the excepted case, when first here, *Justice Connor* said: "The exceptions raise two questions of law: (1) Can the administrator buy up the outstanding mortgages on his intestate's land and then exercise the power of sale therein to foreclose the heirs of his intestate? (2) Can the assignee of a mortgage on land exercise the power of foreclosure without first registering the assignment? If the expression 'buy up the mortgage' be understood as simply taking an 'assignment of the mortgage,' as distinguished from taking a conveyance of the land with the transfer of the power of sale conferred upon the mortgagee, it is settled by numerous and uniform decisions of this Court that he cannot do so. *Williams v. Teachey,* 85 N. C., 402; *Dameron v. Eskridge,* 104 N. C., 621; *Hussey v. Hill,* 120 N. C., 312." *Morton v. Lumber Co.,* 144 N. C., 31. It will be ob-

served that the language of the assignment was treated as "an assignment of the debt and mortgage," which would only transfer to the assignee the debt and the security for it, as in *Williams v. Teachey, supra.* It does not seem that the instrument itself was before the Court, as the case was heard upon the pleadings. When the case came here the second time it appeared that the bank had not affixed its seal, and the assignment was for that reason held to be insufficient as a deed which would pass the legal title. We were not called upon to construe the words of the assignment, having decided the other question as we did, and the writing, in its entirety, was not brought under review. None of the cases hold that when the language, by clear intendment, refers to the land, as embraced by the assignment, the land or legal title will *not* pass, without regard to the form of expression used, as the latter is not material, if by fair and reasonable construction it appears certainly what was meant.

The assignment in this case is informally drawn, but enough appears to show that in making it the parties intended it should pass the land. We must consider the entire instrument in order to determine what thing was intended to be conveyed. We may concede the proposition that a power of sale given to the mortgagee to sell the lands depends strictly upon the estate limited to him in the mortgage, as it is appendant, or appurtenant, and not a power in gross (31 Cyc., 1041), and also that a general covenant will be taken as restricted to the premises and estate purported and intended to be conveyed, and to protect which is its object, and cannot be construed so as to enlarge the estate granted (11 Cyc., 1059); but these rules of interpretation do not prevent us from ascertaining, from the language used, what the parties in-
(303) tended to convey. It was said in *Gudger v. White,* 141 N. C., 507, citing *Kea v. Robeson,* 40 N. C., 373, and *Rowland v. Rowland,* 93 N. C., 214: "We are required by the settled canon of construction so to interpret it as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instrument; but it is proper to seek for a rational purpose in the language and provisions of the deed and to construe it consistently with reason and common sense. If there is any doubt entertained as to the real intention, we should reject that interpretation which plainly leads to injustice, and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results. All this is subject, however, to the inflexible rule that the intention must be gathered from the entire instrument, 'after looking,' as the phrase is 'at the four corners of it.'" This was approved in *Bryan v. Eason,* 147 N. C., 284; *Triplett v. Williams,* 149 N. C., 394; *Beacom v. Amos,* 161

N. C., 357. It is pertinently said in *Triplett v. Williams, supra,* at pp. 397, 398: "All parts of a deed should be given due force and effect. Words deliberately put in a deed and inserted there for a purpose are not to be lightly considered or arbitrarily thrust aside. To discover the intention of the parties is the main object of all construction. When the intention of the parties can be ascertained, nothing remains but to effectuate that intention. The inclination of many courts at the present day is to regard the whole instrument without reference to formal divisions. The deed is so construed, if possible, as to give effect to all its provisions, and thus effectuate the intention of the parties. When an instrument is informal, the interest transferred by it depends not so much upon the words and phrases it contains as upon the intention of the parties as indicated by the whole instrument," citing *Elliott v. Jefferson,* 133 N. C., 207; *Salisbury v. Andrews,* 19 Pick. (Mass.), 250; *Walsh v. Hill,* 38 Cal., 481; *Mining Co. v. Becklenheimer,* 102 Ind., 76; *Doren v. Gillum,* 136 Ind., 134; 1 Jones Real Property, sec. 568. By this wholesome rule it will, therefore, be seen we are permitted to ascertain not only what estate passes by the deed, but also the thing intended to be conveyed, whether the land itself or simply a mortgage of it. The general scope of the assignment indicates that the first parties, W. H. Davis and wife, intended to part with everything and to retain nothing in themselves. They expressly referred to the land as a part of the consideration and as "the premises therein conveyed"—that is, in the mortgage to them, where it was fully described, they use words of inheritance in connection with the thing conveyed, which *Chief Justice Smith* thought important, as a factor in determining the meaning in *Williams v. Teachey, supra,* at p. 405, and the assignor's covenant "that they are seized of said premises in fee *and have the right to convey the same.*" Why say this, if the land itself had not (304) been conveyed? There are also covenants against encumbrances and of warranty in the assignment, and finally it is expressed in so many words that the grant shall carry full power and authority to sell the lands and apply the proceeds to the payment of the debts and the surplus to pay to D. G. Davis, none of which could be done if the land or an estate therein is not conveyed. The intention to convey the land is so manifest that it is impossible not to see it, unless we close our eyes to the terms of the deed. Because the assignment is inartificially drawn is no reason for disappointing the intention of the parties, if otherwise clearly and sufficiently expressed. We should not omit reference to the further fact that words appropriate to convey the land or an estate therein are also used, that is, "Said parties have bargained and sold and by these presents do bargain and sell to James M. McGee," which im-

mediately follows the words "the premises therein conveyed," which refer to the land described in the mortgage. While we will adhere to the principle stated in *Williams v. Teachey, supra,* and cases following it, the difference in a mortgage of land, as considered in this and in other States, is but a technical one, and we are not disposed to carry it beyond what the words of the instrument imperatively require. It is sufficient if the assignment was intended to operate upon the land, and not merely upon the mortgage itself as the security, which would be no more than is implied by an assignment of the debt itself. *Hyman v. Devereux, supra;* 1 Jones on Mortgages, sec. 805; *Williams v. Teachey, supra,* at p. 404.

There was error in the judgment of the court, and it is reversed. The fifth issue will be set aside and, upon the agreement of the parties, judgment will be entered in the court below for the plaintiffs, to the effect that they are the owners of the land and entitled to the possession thereof, with costs to the plaintiff.

Reversed.

Cited: Parrott v. Hardesty, 169 N. C., 669; *Brewington v. Hargrove,* 178 N. C., 146; *In re Sermon's Land,* 182 N. C., 129; *Bank v. Sauls,* 183 N. C., 167; *Stevens v. Turlington,* 186 N. C., 194; *Trust Co. v. White,* 189 N. C., 283; *Dunn v. Jones,* 192 N. C., 252; *Duplin County v. Harrell,* 195 N. C., 449.

SAVINGS BANK AND TRUST COMPANY, GUARDIAN, ET AL. V. S. H. JOHNSON ET AL.

(Filed 24 February, 1915.)

1. Wills, Interpretation—Trusts.

While no particular words are necessary in a will for the creation of a trust, the intention of the testator as gathered from the whole instrument, and not from parts of it, must be clear and manifest for the courts to declare that one has therein been created.

2. Same—Executor and Administrator—"Entire Control."

A devise to the wife of the testator of the home place for life and at her death to his children in fee, share and share alike, with further provision, in a later item, that his wife and children "shall share equally in both real and personal property, the division not to be final until my youngest child, Virginia, is 21, if living, and if either die without children, their property is to be equally divided between their brothers and

sisters," does not create a trust merely by the appointment of executors, stating that they were for the purpose "to execute this my last will and to have entire control thereof so long as may be necessary for the fulfillment of this will," and to act as guardian for minor children of the testator, the powers given the executors being only such as they would otherwise have had as a matter of law, and the appointment of a guardian being unnecessary to a trust estate.

3. Wills, Interpretation—Estates—Beneficiaries' Death — Limitations — Contingent Remainder—Trusts.

A testator who died seized and possessed of a large estate consisting in real and personal property, devised his home place to his wife for life, with limitation over to his children in fee simple, share and share alike, and by a later item provided that his wife and children "shall share equally in both real and personal property, the division not to be final until my youngest child, Virginia, is 21, if living, and if either die without children, their property is to be equally divided between their brothers and sisters." *Held:* The last words of the quotation refers to the death of the children of the testator and is inconsistent with the construction that the whole property should be held by the executors, as trustees, such construction applying equally to the wife, who takes her life estate in the home place absolutely.

4. Wills, Interpretation—Executors and Administrators—Passive Trusts —Possession and Use—Statute of Uses.

Executors named in a will "to all intents and purposes to execute this my last will and testament; to have entire control thereof so long as may be necessary for the fulfillment of this will," etc., if construed to hold as trustees, they are, upon the terms of the will being construed, trustees only of a passive trust, and the devisees and legatees will be entitled to the present possession and use of the property they derived by the will, under the statute of uses.

5. Wills, Interpretation—Contingent Remainders—Final Distribution.

A devise and bequest of the testator's real and personal property to his wife and children, "the division not to be final until my youngest child is 21 years, and if either die without children, their property is to be equally divided between their brothers and sisters." *Held:* The wife presently takes her share of the property devised to her; and the children presently take a determinable fee to their whole interest in the property, to be defeated upon the happening of the contingency of dying without children, the final division to take place when the youngest child is 21 years.

APPEAL by plaintiff from *Carter, J.*, at November Term, 1914, (305) of PASQUOTANK.

Action by the guardian of three of the devisees and legatees of J. B. Flora against his executors to compel the delivery and payment of the devises and legacies, and the matters in controversy depend upon the construction of the will of said Flora, which reads as follows: (306)

I, J. B. Flora, of the above county and State, and being of sound mind and memory, do make, publish, and declare this to be my last will and testament, as follows:

1. My executors hereinafter named shall pay all my just debts out of the first money which may come into their hands belonging to my estate.

2. I give and devise unto my beloved wife, Allie V. Flora, the home place where I now reside, at the time of my death, together with all the household and kitchen furniture therein, so long as she may live and no longer, and at her death to my children in fee simple, share and share alike.

3. I give and devise unto my wife and children, share and share alike, all the balance of my property, both real and personal property, after paying the following amounts herein named.

4. I give to each of my sisters' three daughters as follows: To Serena, $100; to Georgia, $100, and to Bettie, $200, and to my brother John Flora's deceased three girl children, $100 each, and to his son, Jerome Flora, a note I have of $150, hereto attached.

5. I also give to D. G. Brockett $200.

6. I give to Jerome Flora, my son, $4,000, and to Howard and Edward Flora and to Virginia Flora, my children, $5,000 each, to the equal amount I have given my daughter Ida J. Flora, now Mrs. S. H. Johnson, having bought a home and given her. Also to Howard, Edward, and Virginia I give and bequeath $583.90, with interest at 4 per cent from 28 May, 1913, this being their part received from a dividend of the Mutual Life Insurance Company; Ida and Jerome having had this amount paid to them.

6. I wish the farm known as the Baxter farm to be divided as follows: Commencing at the Smith line, running down the lead ditch to the river, the eastern part, the old home, to my son Howard, value $12,000; the front part bound by the main road, Smith and Winslow, to Edward, value $10,000; the road leading to both houses to be kept up equally by both. In case that neither one should not want it at the above valuation, it is to be had by the others and the same valuation, and it is not to be sold by either Howard or Edward to any other party except a brother or sister unless they both agree to sell, and this shall not be till they are both 21 years old. The team and farming utensils shall be equally divided between Howard and Edward, the value of farm to include the team and farming utensils.

7. My wife and children shall share equally in both real and personal property, the division not to be final till my youngest child,
(307) Virginia, is 21 years, if living, and if either die without chil-

dren, their property is to be equally divided between their brothers and sisters.

8. I hereby constitute and appoint my wife, Alice V. Flora, and all my children who may be of lawful age, and S. H. Johnson to represent my daughter Ida, my lawful executors to all intents and purposes to execute this my last will, to have entire control thereof so long as may be necessary for the fulfillment of this will, to act as the guardian of my minor children, should there be any.

9. And shall not be required to give any bonds, and make only such returns to the court that is required by law. In case of minor children, if in the judgment of the executors it is best, they may appoint the Savings Bank and Trust Company guardian.

In testimony whereof I have hereunto set my hand and seal this the 6th day of January, 1914.

Witness: J. B. FLORA. [SEAL]

H. G. KRAMER.

E. W. CARR.

The estate is estimated to be worth $250,000, a considerable portion of which is a prosperous mercantile business.

The testator left a wife and five children surviving him, three of the children being under 21 years of age. All the debts of the testator and the legacies given in items 4 and 5 have been paid.

The executors contend that the language in item 8 appoints them trustees of the estate, and that they have the right to retain the whole of the estate, and to continue the mercantile business. His Honor ruled against this contention, and the defendants excepted. The plaintiffs contend that they are entitled to have a division of the property now, and to enter into possession thereof.

His Honor ruled against this contention, and the plaintiffs excepted.

Judgment was entered accordingly, and both parties appealed.

Aydlett & Simpson for plaintiff.

Ehringhaus & Small for defendant.

ALLEN, J. We agree with his Honor that the words used in the eighth item of the will in connection with the appointment of the executors, that they are "to have entire control thereof (the property) so long as may be necessary for the fulfillment of this will," do not create a trust.

It is true, no particular words are necessary for the creation of a trust, but the intention to do so must be clear and manifest (*Haywood v. Trust Co.*, 149 N. C., 208; *Haywood v. Wright*, 152 N. C., 421), and

in determining the intention of the testator the entire will must be considered, and not separate parts of it. *Taylor v. Brown,* 165 (308) N. C., 157.

When so considered, we not only find no language in item 8 importing a trust, but when we look at the other parts of the will we nowhere find any trust declared.

The control of the property is given to the executors, not to trustees, and for the fulfillment of the *will* and not to execute a trust and no power or authority is conferred that did not exist under the law, as they had the right, as executors, to have control of the property "so long as may be necessary for the fulfillment of the will."

Again in the same item the executors are appointed guardians of the minor children, which would be unnecessary if they were trustees, and upon an examination of the whole will the intention is clear that the testator contemplated a division of his property now, and another and final division upon the death of a child leaving no children, which would be in conflict with the position that the executors are to hold and control the property as trustees.

It also appears from the will that the wife and children are the objects of the testator's bounty, and he declares his intention that they shall share equally in real and personal property. In item 2 he gives the wife his home place for life, and after giving away certain specific amounts and making a devise of a tract of land, he provides in item 7 that his wife and children shall share equally in real and personal property.

This devise to the wife is absolute, because the language in item 7, "if either die without children," does not refer to the wife, but to the children; and if absolute, it is inconsistent with the position that the whole property shall be held by trustees; and the part of item 8 relied on to create a trust applies with equal force to the property given to the wife as to that given to the children.

If, however, it should be held that the language is sufficient to establish a trust, it would now be a passive and not an active trust, because it could only continue "so long as may be necessary for the fulfillment" of the will, and all the duties under the will have been performed except the distribution of the property, and if passive, the devisees and legatees would be entitled to the possession and use of the property. *Perkins v. Brinkley,* 133 N. C., 86; *Lummus v. Davidson,* 160 N. C., 487.

The ruling upon the other question involved in the appeal is, in our opinion, erroneous.

No language can be found in the will which limits the estate and interest given to the wife and children except the words in the seventh

item, "if either die without children," and it is clear these do not refer to the wife, because at the time of making the will she had five living children, and it is improbable that the testator contemplated the death of all the children before the death of the wife, and in the contingency named *"their* property is to be equally divided between *their brothers* and *sisters."*

It follows, therefore, that the interest of the wife is absolute, (309) and that she is now entitled to the property devised and bequeathed to her.

These provisions are in the item of the will which declares, "My wife and children shall share equally in both real and personal property," and this principle of equality which pervades the whole will would be destroyed if the wife can take now and the right of the children is postponed.

The use of the language in this item, "the division not to be final till my youngest child, Virginia, is 21 years," also indicates a purpose to have a division before that time, and is without meaning unless interpreted to give the right to a division of the property among the children now, but if a child dies without leaving children, that there shall be another and final division.

It follows, therefore, that the children take the whole interest in the property, which may be defeated upon dying without children, or, as it is usually termed, a determinable fee, which passes a present interest, subject to be defeated, however, upon the happening of the contingency (*Rees v. Williams,* 165 N. C., 202); and following the principle which favors the early vesting of estates (*Dunn v. Hines,* 164 N. C., 113), and in accordance with the declared purpose that *final* division shall be had when Virginia becomes 21, the time for the happening of the contingency would be that fixed for final division, and the estates and interests will then be absolute.

The court may by decree protect the several interests until the estates become absolute, taking into consideration the protection afforded by the guardian bonds of the infants.

Reversed on plaintiffs' appeal.

Affirmed on defendants' appeal.

Cited: Springs v. Hopkins, 171 N. C., 493; *Ryder v. Oates,* 173 N. C., 575; *Kirkman v. Smith,* 175 N. C., 582; *Dupree v. Daughtridge,* 188 N. C., 196; *Westfeldt v. Reynolds,* 191 N. C., 808.

LILLIE CULLIFER v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 3 March, 1915.)

1. Courts—Clerks of Court—Trials—Instructions—Appeal and Error.

Where, in accordance with an agreement previously entered into, the clerk receives the verdict of the jury in the absence of the court, it is his duty to do so without comment thereon and to keep it until the reconvening of the court; and where the clerk hands the answered issues back to them and tells them they should retire to their room and reconsider the issues to see if the answers were not in conflict with the charge, but refusing to say in what respects, he has exceeded his authority in assuming to instruct the jury, and a verdict differently rendered will be set aside and a new trial ordered.

2. Negligence—Contributory Negligence—Last Clear Chance.

Where in an action to recover damages for a personal injury received by being run upon by the train of defendant railroad company, contributory negligence of the plaintiff is shown, under evidence justifying it, an issue as to the last clear chance should be submitted to the determination of the jury, and it is error for the trial judge to so modify an issue tendered by the plaintiff that it limits the inquiry to the time after the perilous condition of the plaintiff was discovered.

3. Issues—Trials—Instruction, Correct in Part—Appeal and Error.

Where the trial judge has submitted an erroneous issue upon the last clear chance, to the plaintiff's prejudice, the error is not cured by the charge of the court which lays down the correct principle applicable to the evidence, in one part, and in another part erroneously states it.

(310) APPEAL by plaintiff from *Ferguson, J.*, at November Term, 1914, of EDGECOMBE.

Civil action, tried upon these issues:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: "No."

2. Was the plaintiff guilty of contributory negligence, which brought about her own injury? Answer: .....

3. Notwithstanding any negligence on the part of said plaintiff, could the defendant by the exercise of due care and prudence have prevented the injury after the perilous condition of the plaintiff was discovered? Answer: "No."

4. What damages, if any, is plaintiff entitled to recover? Answer: .....

From the judgment rendered the plaintiff appealed.

Fountain & Fountain, Claude Kitchin, G. M. Fountain & Son for plaintiff.

F. S. Spruill for defendant.

BROWN, J. Exception No. 3 of the plaintiff is based upon the following facts: After the case was given to the jury by the judge, it was agreed by counsel, with the approval of the court, that the clerk should take the verdict. The clerk went to the courtroom to receive the verdict and, without asking them whether or not they had agreed upon their verdict, he asked them to hand him the issues, and the issues were handed to him, answered as follows by the jury: The first issue, "Yes"; second issue, "Yes"; third issue, "No"; fourth issue, "$2,500." That the clerk thereupon handed the issues back to said jury and said to them that they had better retire to their rooms and reconsider the issues and see if answers were not in conflict with the judge's charge. That one of the jurors asked, "In what respect?" The clerk said to him that he could not instruct him as to that; that they could retire and see for themselves; and the jury immediately retired to their room.

The next morning, which was Sunday, about twenty minutes (311) after 10 o'clock, the jury returned the verdict of record. To this the plaintiff excepted for that the verdict of record is not the proper verdict, and before judgment moved for a new trial and that both verdicts be set aside. The court, being of opinion that the defendant was entitled to judgment on the verdict as returned to the clerk, overruled the plaintiff's motion, and the plaintiff excepted.

It was error upon the part of the clerk to have given any instructions whatever to the jury. It was not for him to say whether they had followed the charge of the court or not. When the jurors tendered to him the issues, on Saturday night, it was his duty to have accepted them under the instructions of the court and the agreement of counsel, and not have undertaken to advise the jury as to their attitude. In so doing he overstepped his authority.

The plaintiff tendered an issue as follows: "Notwithstanding any negligence on the part of said plaintiff, could the defendant, by the exercise of due care and prudence, have prevented the injury?" The court refused to submit this issue as tendered, but submitted it, modified so as to read: "Notwithstanding any negligence on the part of said plaintiff, could the defendant, by the exercise of due care and prudence, have prevented the injury *after the perilous condition of the plaintiff was discovered?*" The plaintiff excepted, and this is her second exception.

His Honor erred in refusing to submit the issue as tendered by the plaintiff. It is well settled in this State that where the plaintiff is guilty of contributory negligence the defendant must exercise ordinary care and diligence to avoid the consequences of the plaintiff's negligence,

and if by exercising due care and diligence the defendant can discover the situation of the plaintiff in time to avoid injury, the defendant is liable if it fails to do so. *Denmark v. R. R.*, 107 N. C., 185; *Willis v. R. R.*, 122 N. C., 905; *Pierce v. R. R.*, 124 N. C., 83; *Powell v. R. R.*, 125 N. C., 370; *Bogan v. R. R.*, 129 N. C., 155; and many other subsequent decisions of this Court.

The defendant seeks to avoid the consequences of this error upon the part of the court by attempting to show that his Honor charged the law correctly, and that the jury must have understood that the answer to the third issue was not to depend solely upon whether the engineer did actually discover the plaintiff's condition, but whether the engineer by exercise of ordinary care could have discovered it.

We have examined the charge with great care, and we find that his Honor did instruct the jury once to that effect, but he instructed them otherwise and erroneously in other parts of his charge. In view of the language of the issue, together with the conflicting charge, we think the jury were most probably misled.

New trial.

Cited: Treadwell v. R. R., 169 N. C., 701; *Horne v. R. R.*, 170 N. C., 649, 662; *Haynes v. R. R.*, 182 N. C., 681; *Fry v. Utilities Co.*, 183 N. C., 292; *Redmon v. R. R.*, 195 N. C., 767; *Morris v. Transportation Co.*, 208 N. C., 811.

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(312)

W. A. BROWN v. WRIGHT MITCHELL.

(Filed 3 March, 1915.)

1. Contracts, Written—Vendor and Purchaser—Conditional Sales—Title—Parol Evidence.

Where a conditional sale of a chattel has been entered into in writing between the seller and purchaser, it may be shown that contemporaneously and as a part of the contract; not reduced to writing, the seller should retain the title to the chattel until paid for or the conditions are performed by the purchaser.

2. Same—Subsequent Agreements—Consideration.

Where a written contract for the sale of a sick mule has been entered into between the seller and purchaser, that the latter take the mule and should it get well or able to work in a year he would pay $20 for it, parol

evidence is admissible to show that subsequent to the writing and according to its terms it was agreed between the parties by parol that the seller should retain the title, the consideration expressed in the writing being sufficient to support the subsequent agreement resting in parol.

3. Mortgages, Chattel—Conditional Sales—Parol Agreements.

A parol mortgage or conditional sale of a chattel is valid and enforcible.

APPEAL by plaintiff from *Bond, J.*, at October Term, 1914, of HERTFORD.

Action begun before a justice of the peace and heard on appeal, its purpose being to recover a mule from the defendant.

The plaintiff testified that on 22 February, 1913, he sold and delivered to the defendant a mule for $20, and took from defendant a paper-writing in words and figures as follows:

I, Wright Mitchell, promise to pay W. A. Brown the sum of $20 for one bay mule, if said mule should get well and able to work any time in the limited time of twelve months. If said mule does not get well and able to work in this limited time above mentioned, I am not to pay said W. A. Brown anything.

This 22d day of February, 1913. WRIGHT MITCHELL.

Plaintiff delivered the mule to the defendant and took from defendant above paper. It was agreed that plaintiff should deliver said paper to E. J. Gerock, a merchant at Ahoskie, to keep for said parties.

Plaintiff offered to show that after the mule had been delivered to the defendant, and within half an hour after said paper had been delivered by defendant to plaintiff, and before plaintiff had handed it to said Gerock, the defendant agreed that title to said mule should remain in plaintiff until payment was made, if same became enforcible. Defendant objected.

As there was no offer to show that any part of the agreement (313) between the parties had been omitted by mistake, and as said alleged parol agreement, in the opinion of the court, assailed the written part thereof; and, further, that if it was a subsequent promise there was no consideration therefor, the evidence was excluded and plaintiff excepted.

Plaintiff offered evidence tending to show that the mule recovered and was able to work within the time fixed by the written contract.

Verdict and judgment for defendant, and plaintiff excepted and appealed.

W. W. Rogers and Winborne & Winborne for plaintiff.
George Cowper and W. D. Boone for defendant.

ALLEN, J. The evidence offered by the plaintiff to prove that it was agreed that the title to the mule should remain in the plaintiff until payment was made does not come within the rule excluding parol evidence when there is a written contract.

In the first place, if the agreement had been made contemporaneously with the writing, it would fall within the principle that where a part of the contract is in writing and a part not, that the part in parol may be proven, because there is no inconsistency between a promise to pay and an agreement to secure payment (*Evans v. Freeman,* 142 N. C., 61; *Wilson v. Scarboro,* 163 N. C., 380), and if made subsequent to the writing, which appears to be the case here, the rule excluding parol evidence would have no application. *Freeman v. Bell,* 150 N. C., 146; *McKinney v. Matthews,* 166 N. C., 580.

In the *Evans case, supra,* the Court quotes a section from Clark on Contracts, that "Where a contract does not fall within the statute, the parties may at their option put their agreement in writing, or may contract orally, or put some of the terms in writing and arrange some orally. In the latter case, although that which is written cannot be aided by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitutes one entire contract," and comments on the section as follows: "In such a case there is no violation of the familiar and elementary rule we have before mentioned (against varying or contradicting a written agreement), because in the sense of that rule the written contract is neither contradicted, added to, nor varied; but, leaving it in full force and operation as it has been expressed by the parties in the writing, the other part of the contract is permitted to be shown in order to round it out and present it in its completeness, the same as if all of it had been committed to writing"; and this is approved in the *Wilson case, supra.*

In *Freeman v. Bell, supra,* the Court says: "It is well settled that the rule that parol evidence will not be admitted to contradict or
(314) modify a written contract does not apply where the modification takes place after the execution of the contract"; and this was approved in the *McKinney case, supra.*

We are also of opinion that the preëxisting debt is a sufficient consideration to support the agreement. 1 Jones on Ch. Mort., sec. 81; 6 Cyc., 1013; 5 Ruling Case Law, 420; *McMurtie v. Riddell,* 9 Col., 503; *Louthain v. Miller,* 85 Ind., 163; *Close v. Hodges,* 44 Minn., 205;

Paine v. Benton, 32 Wis., 491; *Collerd v. Tully,* 78 N. J. Eq., 557; *S. v. Surles,* 117 N. C., 721.

In the case from Indiana the Court says: "We have no doubt that an antecedent debt is a valuable consideration and that it will support a mortgage or other contract," and in the New Jersey case, after quoting a passage from the opinion of the Vice Chancellor: "This passage from the opinion assumes that in order to make a chattel mortgage good there must be then a present consideration when it is given. It has, however, been held by this Court that a precedent debt is a good consideration for a chattel mortgage"; and further, after citing the case of *Knowles Loom Works v. Vacher,* 57 N. J. L., 490: "We not only held that a chattel mortgage given for a preëxisting debt was valid, but also that it was entitled to priority over an antecedent conditional sale not recorded."

The New Jersey case is also reported in 24 A. and E. Anno. Cases, 78, and the editor in an extended note cites a great number of cases in support of the position that "The authorities unanimously support the holding of the reported cases to the effect that a precedent debt is a good consideration for a chattel mortgage."

In the citation from Ruling Case Law the author says: "There has probably never been any doubt that as between the parties a mortgage given to secure a preëxisting debt is as valid and effective as one given for a debt contemporaneously incurred. Such a mortgage is not without consideration, because the debt affords a sufficient consideration for it."

In the *Surles case, supra,* the defendant was indicted for disposing of mortgaged property, and one of the defenses was that the mortgage was not valid because executed to secure a preëxisting debt, and the Court says of this contention: "In his charge his Honor told the jury that the mortgage rested on a good consideration, whether it was given, as testified by defendant, for a balance due on a former debt, or whether, as testified by the witness Green, for supplies furnished after the date of the mortgage. The defendant excepts, but on what ground it is not clear. His Honor was correct in the ruling."

It was also held in *Potts v. Blackwell,* 67 N. C., 59, a case which has been frequently cited and approved, that a mortgagee for a preëxisting debt is a purchaser for value.

These authorities fully sustain the position that if a written (315) chattel mortgage has been executed that the preëxisting debt would have been a sufficient consideration to support it, and as a chattel mortgage or conditional sale by parol is recognized as valid in this State (*McCoy v. Lassiter,* 95 N. C., 88; *Odom v. Clark,* 146 N. C., 544), the same effect must be given to it as if it had been in writing.

Being, therefore, of opinion that the evidence offered by the plaintiff was competent, and that there is a sufficient consideration to support the agreement, a new trial is ordered.

New trial.

Cited: Bank v. Cox, 171 N. C., 81; *Mfg. Co. v. McCormick,* 175 N. C., 279; *Starr v. Wharton,* 177 N. C., 325; *Thomas v. Carteret County,* 182 N. C., 393.

W. A. J. PINNELL ET AL. v. W. C. BURROUGHS ET AL.

(Filed 24 February, 1915.)

1. Executors and Administrators — Deeds and Conveyances — Recitals— Lost Records—Evidence—Judgment—Estoppel.

The question of the ownership of the lands belonging to the estate of a decedent in proceedings to sell them to make assets to pay his debts by his personal representative is directly involved in the proceedings, and the judgment therein is conclusive upon the parties thereto and will estop them in a collateral or direct proceeding from claiming the lands from this or other sources while the judgment continues in force.

2. Executors and Administrators — Deeds and Conveyances — Recitals— Lost Records—Evidence—Parties—Statutes—Appeal and Error.

When the court records are shown to have been lost or destroyed, the recitals in the deed of an administrator, executor, etc., are made "*prima facie* evidence of the existence, validity, and binding force of the decree, order, or judgment, or other record, referred to or recited in the deed," by Revisal, sec. 341; and the statute also makes the deed, record, and decree valid and binding as to all persons mentioned or described therein; and where the title to a party is made to depend upon a deed of this character, and the trial judge rules that the deed could not be considered in evidence, though the loss of the records therein recited could be shown, it erroneously deprives the party of his rights to develop his case, and an appeal to the Supreme Court will directly lie.

3. Same—Parties—Presumptions.

In this action to recover lands the defendant relied for title upon a deed made by an executor in proceedings to sell lands of the decedent to make assets to pay his debts, reciting that the present plaintiff "and others were defendants" in the proceedings; and under the admissions in the pleadings *it is held* that not only the plaintiff, but the others mentioned in the deed, were the heirs of the deceased, they being the brothers and sisters of the plaintiff, and raised a presumption, *prima facie* at least, that they were necessary parties in the former action and bound by the judgment therein.

(316) APPEAL by defendants from *Ferguson, J.,* at January Term, 1915, of WARREN.

PINNELL *v.* BURROUGHS.

Action to recover the possession of land, brought by W. A. J. Pinnell, Robert L. Pinnell, and Lena Andrews, as children and heirs at law of Jackson Pinnell, against the defendants, who are the children of Lucy W. Pinnell, the widow of Jackson Pinnell, by her subsequent marriage with John H. Burroughs, who was her second husband. The land in dispute is that which was allotted to the widow of Jackson Pinnell, and plaintiffs alleged that at her death the defendants wrongfully took possession thereof. Plaintiffs further allege that Jackson Pinnell, at the time of his death, was seized of the said land, and that it descended to them as his heirs at law. Defendants admit that Jackson Pinnell was at one time seized of the said land, but deny that it descended to plaintiffs as his heirs. On the contrary, they aver that the "reversionary interest" therein, or the fee subject to the widow's dower, was sold under a judgment of the Superior Court of Warren County, where the land is situated, in a suit or proceeding entitled Henry B. Hunter, executor of Willis Lloyd, deceased, against Willis A. J. Pinnell (one of the plaintiffs in this action) and others, who were the other plaintiffs.

The court held that, in the state of the pleadings, the burden was upon the defendants, and they offered as evidence "the deed of Henry B. Hunter, executor of Willis Lloyd, deceased, to John H. Burroughs, as evidence of title in the defendants, they being the children of said John H. Burroughs, now deceased; to which the plaintiffs objected. The defendants proposed and offered to prove the loss of the records recited in the said deed, and further insisted that the deed could not be attacked collaterally." The court permitted the deed to be read as evidence. It had been proved 25 November, 1870, and registered 4 March, 1871, and was in the following words and figures:

This indenture, made and entered into this the 20th day of September, 1870, between Henry B. Hunter, executor of Willis Lloyd, party of the first part, and John H. Burroughs, party of the second part, all of Warren County, State of North Carolina:

Witnesseth, That the said party of the first part was by a decree of the Superior Court of the said county of Warren, made in a certain cause wherein the said party of the first part was plaintiff and Willis A. J. Pinnell, an infant under 21 years old, and others were defendants, ordered to sell, for the purpose of paying the debts of the said Willis Lloyd, which his personal property was insufficient to discharge, certain real estate of the said Willis Lloyd, to wit, the reversion after the life estate of Mrs. Lucy W. Burroughs in a tract of land of 238 acres, situated in the said county of Warren, on the waters of Rich Neck, adjoining the lands of Jacob Parker, Henry Williams, and (317)

others, same being the tract which was assigned to the said Lucy W. Burroughs, then Lucy W. Pinnell; and whereas the said party of the first part, in pursuance of the said decree, did on the 14th day of May, 1870, sell the said real estate at auction at the courthouse door in the town of Warrenton, when said party of the second part became the purchaser in the sum of $1,000 and paid the whole of the purchase money in cash; and whereas, upon report of the said sale to the said court, the same was in all respects confirmed, and said party of the first part was by final decree in said cause ordered to execute a deed for said real estate to the said party of the second part: Now, therefore, in consideration of the premises and of the said sum of $1,000, the receipt of which is hereby again acknowledged, the party of the first part has given, granted, bargained, sold, and conveyed, and doth by these presents, give, grant, bargain, sell, and convey unto the said party of the second part and his heirs, forever, the real estate heretofore described. To have and to hold the same, with all appurtenances thereto belonging, to him the said party of the second part and his heirs, forever. In testimony whereof the said party of the first part has hereunto set his hand and affixed his seal on the date first above written.

H. B. HUNTER, [SEAL]
Executor of Willis Lloyd.

It was admitted that the plaintiff, Willis A. J. Pinnell, was heir at law of Willis Lloyd, deceased. The court was of the opinion, and so ruled, that even if the defendants should show the loss of the records recited in the deed, the deed could not be considered as evidence of title against the plaintiffs, who are the heirs at law of Jackson Pinnell, the sale being had, as recited in said deed, by the executor of Willis Lloyd and the property sold as the property of Lloyd to pay Lloyd's debts and not the debts of Pinnell, and Pinnell's heirs are not bound by the recitals of said deed. The defendants duly excepted to this ruling and, in deference thereto, offered no other evidence. The court thereupon directed the jury to find for the plaintiffs, which was done, and defendant appealed, after reserving exceptions and assigning errors.

Thomas M. Pittman for plaintiffs.
John H. Kerr and A. C. & J. P. Zollicoffer for defendants.

WALKER, J., after stating the facts: We are of the opinion that there was error in the ruling of the court. It may be conceded that there is no connection between Jackson Pinnell and Willis Lloyd, and in the view taken by us of the case it was not necessary that it should have been shown. The object of the defendants was not to prove that the

heirs of Jackson Pinnell had lost the title, which it is alleged had descended to them, by a sale of the land under the decree of the (318) court in the suit by the executor of Willis Lloyd, but to show that the plaintiffs in this action were parties, as defendants and as heirs of Willis Lloyd, in the proceeding brought by the executor of Willis Lloyd to have the land sold for the payment of his debts. If they were parties to the latter suit, they are bound and concluded by the judgment rendered therein, and it can make no difference whether they acquired title to the land as the heirs of Jackson Pinnell or as heirs of Willis Lloyd, as they are estopped by the judgment without regard to the source from which they may have derived title. If they had any other right or title to the land at the time they were called upon to answer the complaint, they should have disclosed it, and pleaded it, and having failed to do so, they are concluded by the judgment as to the title, which was alleged to have been in Willis Lloyd, and will not be heard to aver against it in this action. *Armfield v. Moore,* 44 N. C., 157; *Carter v. White,* 134 N. C., 466; *Gregory v. Pinnix,* 158 N. C., 147. The Court, in *Owen v. Needham,* 160 N. C., 381, quoting from and approving *Coltrane v. Laughlin,* 157 N. C., 282, held it to be a well recognized doctrine 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," citing *Gillam v. Edmonson,* 154 N. C., 127; *Tyler v. Capehart,* 125 N. C., 64; *Tuttle v. Harrill,* 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. It was stated again, and applied to a proceeding for the sale of land for assets, in *Smith v. Huffman,* 132 N. C., 600. One question involved directly in a proceeding to sell lands for assets is the intestate's ownership of the land, and if he is not the owner and any other party to the record is the owner or has an interest therein which would be prejudiced by a decree which does not recognize and protect it, he is estopped so long as the decree stands unreversed, and the doctrine is said to be founded on the principles of justice and fair dealing, as we find declared in the foregoing cases. The party is estopped for the reason, in part, that he has been delinquent, as he had his day in court and a fair opportunity to assert his right, which he deliberately failed to do, and he will not afterwards be heard to call the matter in question, for the law does not permit the same question to be again litigated under such circumstances.

If it did, there never would be an end to controversy. The parties to the proceeding entitled Hunter, executor of Willis Lloyd, v. Willis A. J. Pinnell and others are estopped as to the right and title being in (319) the intestate, Willis Lloyd. But who were the parties? It is not necessary to inquire beyond the fact that Willis A. J. Pinnell, who is a party, as plaintiff, in this action, was one of them, for the court directed a verdict against the defendants, and if they are entitled to recover an interest in the land, in any view of the case, his direction was erroneous. This brings us to the consideration of the next question.

We must take it that the records of the court had been lost or destroyed, because the court refused to consider the deed or its recitals as evidence of title, even if they had been lost. The statute, Revisal, sec. 341, makes the recital of an executor, administrator, or commissioner for the sale of land "*prima facie* evidence of the existence, validity, and binding force of the decree, order, judgment, or other record, referred to or recited in said deed," where the record or files containing the original entries and papers have been lost or destroyed. *Isler v. Isler,* 88 N. C., 576; *Hare v. Hollomon,* 94 N. C., 14; *Everett v. Newton,* 118 N. C., 919. The statute also makes the said deed, record, and decree valid and binding as to all persons mentioned or described therein, and who were parties or purported to be parties thereto. *Chief Justice Smith* said, in *Hare v. Hollomon, supra,* that "The rule is indispensable when, as in the present case, the original papers in the cause have been lost or destroyed." If the decree or judgment is to be taken as *prima facie* valid, as the statute provides, this necessarily implies that the proper parties were made defendants by service of process, voluntary appearance, or otherwise, because it could not be valid unless the court had jurisdiction of the cause and the parties, which is prerequisite to its validity. *Kello v. Maget,* 18 N. C., 414. The recitals are sufficient to justify the inference, by the aid of the statute, that all proper steps were regularly taken for the sale of the land, and we have often held that such a record cannot be attacked collaterally. Apparently the heirs of Willis Lloyd were made parties, as the case could not proceed without them, and Willis A. J. Pinnell is one of them, which, with the facts stated and admitted in the first sections of the complaint and answer, gives rise to the presumption, *prima facie,* at least, that "the others mentioned in the deed were his heirs, as they are the brothers and sisters of Willis A. J. Pinnell, all being children of Jackson Pinnell."

The rule as to attacking records is well stated by *Justice Reade* in *Doyle v. Brown,* 72 N. C., 393: "Where a defendant has never been served with process, nor appeared in person or by attorney, a judgment against him is not simply voidable, but void; and it may be so treated

whenever and wherever offered, without any direct proceedings to vacate it. And the reason is that the want of service of process and the want of appearance is shown by the record itself, whenever it is offered. It would be otherwise if the record showed service of process or appearance, when in fact there had been none. In such case the (320) judgment would be apparently regular, and would be conclusive until by a direct proceeding for the purpose it would be vacated. A plaintiff needs not to be *brought* into court; he *comes* in. A judgment is of no force against a person as plaintiff unless the record shows him to be plaintiff. If the record shows him to be plaintiff when in fact he was not, then it stands, as where the record shows one to be defendant when he was not. In both cases the record is conclusive until corrected by a direct proceeding for that purpose." And this rule has been followed ever since in all the cases upon the subject. *Barefoot v. Musselwhite,* 153 N. C., 208; *Cooke v. Cooke,* 164 N. C., 272. Discussing the validity of judgments, with special reference to proceedings for the sale of land, *Chief Justice Smith* said, in *Sumner v. Sessoms,* 94 N. C., 371: "It is true, the record produced does not show that notice was served on the infant or upon her guardian *ad litem,* nor does the contrary appear in the record, which, so far as we have it, is silent on the point. The jurisdiction is presumed to have been acquired by the exercise of it, and if not, the judgment must stand and cannot be treated as a nullity until so declared in some impeaching proceeding instituted and directed to that end. The irregularity, if such there be, may be such as to warrant, in this mode, a judgment declaring it null; but it remains in force until this is done." This doctrine was approved in *Rackley v. Roberts,* 147 N. C., 201; *Hargrove v. Wilson,* 148 N. C., 439; *Burgess v. Kirby,* 94 N. C., 575; and has been recognized in other cases too numerous to be mentioned. Some of the more important ones will be found in the last two cases above cited.

By his remark, that the proof which defendant proposed to offer, as to the loss of the record, would not avail them by making the recitals in the deed evidence of their title to the land, the presiding judge prevented the defendants from developing their case and made their defeat a certainty. They were not required to do the vain thing of going on with their proof, if indeed they had any more or needed it. The ruling was fatal to their case, and they did well to desist. The ruling was error, as also was the peremptory instruction to find for the plaintiff.

The plaintiffs may by a direct proceeding in the original cause correct the record if it fails to speak the truth, but cannot assail it collaterally in this action. They may be barred of any remedy by the long delay, or for other reason; but we do not decide as to this, the facts not being now

before us. If a judgment is irregular, a court will not always set it aside, and have declined to do so when the rights of *bona fide* purchasers for value and without notice of the irregularities would be prejudiced. *Matthews v. Joyce,* 85 N. C., 258; *Sutton v. Schonwald,* 86 N. C., 198; *England v. Garner,* 90 N. C., 197; *Harrison v. Hargrove,* 120 N. C., 96; *Rackley v. Roberts, supra; Yarborough v. Moore,* 151 N. C.,
(321) 116. We cannot too often repeat what was said by the Court in *Sutton v. Schonwald, supra,* as to the necessity of safeguarding the integrity of judicial sales, after they had stated that this wholesome doctrine is founded upon public policy, as well as the principles of equity: "Purchasers should be able to rely upon the judgments and decrees of the courts of the country, and though aware of their liability to be reversed, yet they have a right, so long as they stand, to presume that they have been rightly and regularly rendered, and they are not expected to take notice of the errors of the court or the laches of parties. A contrary doctrine would be fatal to judicial sales and the values of title derived under them, as no one would buy at prices at all approximating the true value of property if he supposed that his title might at some distant day be declared void because of some irregularity in the proceeding altogether unsuspected by him and of which he had no opportunity to inform himself. Under the operation of this rule occasional instances of hardship may occur, but a different one would much more certainly result in mischievous consequences and the general sacrifice of property sold by order of the court."

The recitals in the deed of Henry B. Hunter, executor, to John H. Burroughs are as explicit as those in the deed which was the subject of consideration in *Hare v. Hollomon, supra,* and, as held in that case, are *prima facie* adequate to sustain the action of the court. *Irvin v. Clark,* 98 N. C., 437. They are fuller and more definite than some recitals which have been held sufficient to show the validity of titles acquired at judicial sales.

There must be a new trial because of the error committed by the court in its ruling upon the legal force and effect of the deed as evidence. It may be that the defendants, who are the heirs of J. H. Burroughs, purchaser at the sale, will be able to prove more clearly, at the next trial, that the other defendants in the former suit, besides Willis A. J. Pinnell, were the heirs of Willis Lloyd.

New trial.

Cited: Randolph v. Heath, 171 N. C., 388; *Pinnell v. Burroughs,* 172 N. C., 186; *Starnes v. Thompson,* 173 N. C., 468; *Baggett v. Lanier,* 178 N. C., 132; *Clark v. Holmes,* 189 N. C., 708.

H. E. NORRIS, SOLICITOR, v. CARY K. DURFEY, EXECUTOR.

(Filed 24 February, 1915.)

1. Statutes—Interpretation—Legislative Intent—Inheritance Tax.

Revenue laws, imposing an inheritance tax, should be liberally construed and that interpretation given them which would effectuate the intention of the Legislature.

2. Same—Real Estate.

The Revenue Act of 1909, imposing an inheritance tax, enacts that "all real and personal property of whatsoever kind and nature which shall pass by will or by the intestate laws of this State . . . shall be and hereby is made subject to a tax for the benefit of the State as follows, that is to say: Where the whole amount of said legacy or distributive share of personal property shall exceed $2,000 the tax shall be," etc. *Held:* The State imposed the tax upon real as well as upon personal property in the manner stated.

3. Same—Exceptions.

The language used in the Revenue Act of 1909, after imposing an inheritance tax upon real and personal property, "where the whole amount of the said legacy or distributive share of personal property shall exceed in value $2,000," etc., has only the effect of exempting that much of the estate from the tax imposed, whether personal or real property, in favor of each legatee or devisee, to be assessed and determined by a commissioner appointed in accordance with the statute.

4. Statutes—Inheritance Tax—Constitutional Law.

The inheritance tax imposed in the Machinery Act of 1909 is constitutional and valid.

5. Statutes—Interpretation—State Departments—Courts.

The construction given the inheritance tax statute by the Attorney-General and State Treasurer are only *prima facie* correct, and not binding upon the courts, though given consideration as persuasive authority.

WALKER and HOKE, JJ., dissent.

APPEAL by plaintiffs from *Whedbee, J.*, at September Term, (322) 1914, of WAKE.

Civil action to recover the inheritance tax imposed by law upon the estate of Florence P. Tucker, who died, leaving a last will and testament, in the city of Raleigh on 11 December, 1909.

Her estate consisted of both real and personal property. The most of her estate was bequeathed to her executors in trust for her children, the legatees under the will. It is admitted that the real estate exceeds in value the sum of $250,000, and that the personal estate exceeds in value the sum of $450,000.

The case was heard upon the facts agreed by his Honor, *Judge Whedbee,* September Term, 1913, Wake Superior Court, who adjudged that under the law the real estate of which Mrs. Tucker was seized and possessed at the time of her death was not subject to the inheritance tax.

The plaintiff excepted and appealed.

H. E. Norris, Manning & Kitchin for plaintiff.
Pace & Boushall for defendant.

BROWN, J. The only question presented is whether or not the inheritance tax section of the revenue law of 1909 imposes a tax upon real estate. Public Laws 1909, pp. 656, 657. The first inheritance tax law of 1903 imposes no tax upon real estate, but upon personal property only. The constitutionality of that act, as well as many points growing out of it, were passed on by this Court *In re Morris Estate,* 138 N. C., 260.

(323) The succeeding acts of 1905, 1907, and 1909 are exactly alike, and read as follows: "From and after the passage of this act *all real and personal* property of whatever kind and nature which shall pass by will or by the intestate laws of this State . . . shall be and hereby is made subject to a tax for the benefit of the State as follows, that is to say: Where the whole amount of said legacy or distributive share of personal property shall exceed in value $2,000 the tax shall be," etc.

It is contended that the Legislature, in using the words comprising the last two lines above quoted, whilst manifesting an intention to subject landed property to the inheritance tax, failed to do so and levied the tax only upon legacies or distributive shares of personal property exceeding in value $2,000.

It is elementary law in the construction of all statutes, applicable alike to revenue laws and all other species of legislation, that the statute should be given liberal and reasonable interpretation with a view to effectuate the intention of the Legislature. *In re Matter of Stewart,* 131 N. Y., 274; Ross on Inheritance Taxation, sec. 35.

Mr. Ross says that "It is gratifying to note that whatever the courts may have said on this question, they have in fact generally given inheritance tax statutes liberal construction in favor of the Government by subjecting to taxation every transfer of property that could be reasonably brought within the purview of the law." 27 A. and E., p. 340.

The Court of Appeals of New York has said: "It was undoubtedly the intent of the Legislature that the statutes under consideration should be liberally construed to the end of taxing the transfer of all property which fairly and reasonably could be regarded as subject to the same,

and this Court has unequivocally placed itself upon record in favor of construing the statute in the light of such intent." *Estate of Gordon,* 186 N. Y., 471; 10 L. R. A. (N. S.), 1089.

It does not require any argument to prove that it was the manifest purpose of the General Assembly to tax real estate as well as personal property. Every word in the statute is pregnant with meaning and indicates with unerring certainty that such was the intention of the lawmakers.

The contention that there are no operative words in the statute which in effect levies tax upon real estate cannot be sustained. The very language of the act is, as hereinbefore quoted, that "from and after its passage all real and personal property of whatever kind, etc., shall be and hereby is made subject to a tax for the benefit of the State." Then the act goes on to levy the tax, prescribe the degrees of consanguinity, when and how it shall be levied and collected.

The language relied upon by the defendant, namely, "where the whole amount of said legacy or distributive share of personal property shall exceed in value $2,000," is nothing more nor less than ex- (324) emption of that much of the estate from taxation, and those words do not in any way destroy the force and effect of the statute in its declared purpose to levy the same tax upon land. This section was in the personal property act of 1903, and its validity was passed on and the act construed in *In re Morris Estate, supra.*

The language of the act is not a mere declaration of intention or a recital of a purpose to tax real estate, but it is the enactment itself, by actual imposition of the tax, namely, "shall be and hereby is made subject to a tax." This plain declaration of the Legislature should not be defeated by subsequent words, unless they are clear, plain, and emphatic.

In reference to the contention that, although the intent to tax real estate is manifest, the Legislature failed to provide the machinery for its taxation, 27 A. and E., 340, very pertinently says: "But where a particular subject is within the scope of the statute, and exemption from taxation is claimed on the ground that the Legislature has not provided proper machinery for accomplishing the legislative purpose in the particular instance, *a liberal rather than a strict construction shall be applied,* and if by fair and reasonable construction of its provisions the purpose of the statute can be carried out, *that interpretation ought to be given to effectuate the legislative intent.*"

The exemption clause that we have quoted from, contained in the act of 1909, is in the same words as the exemption clause in the act of 1903, yet the latter act undertook to tax personal property only. Practically the same law was reënacted in 1905, 1907, and 1909 in almost the same

language, with the words *"all real and personal property"* inserted. No change whatever was made in the exemption clause. The wording of the exemption clause in the act of 1903 is the same as the acts of 1905, 1907, and 1909.

The effect of this would be, if any, not to displace the tax on real property, but to exempt only personal property, as the exemption clause is not effective in levying the tax, but only in exempting estates not exceeding $2,000 in value from its provisions.

Inasmuch as the operative words of the statute imposing the inheritance tax upon real property precedes this exempting clause, we fail to see how it is possible for the language of the latter to be construed as a repeal of the former.

It is not necessary that the exemption clause should contain any words making the tax effective. That is done by the preceding words of the statute. It is not necessary for us to hold, and we do not place so narrow a construction on the exemption clause as to declare that only personal property comes within its terms.

(325) It is true that the words "legacy" and "distributive shares" technically are understood to apply to personal property, but it is evident that the word "legacy" is not used in its technical and narrow sense in this statute. It is plainly the intent of the Legislature to create an exemption of $2,000 in favor of the heirs, devisees, legatees, or distributees.

There is an analogy between the intent of the Legislature and the intent of a testator. Sometimes in wills the words "distributive share" and the word "legacy" have been construed to embrace land, when such was the manifest purpose of the testator.

The words "residuary legatee" will, when necessary to effect the testator's intention, be construed to mean "residuary devisee." In *Jones v. Myatt,* 153 N. C., 225, this Court held that the words "distributive share" could be enlarged to embrace a share in real estate, and that the word "legacy" would be enlarged, when necessary to carry out the purposes of the will, to include land. Gardner on Wills, p. 403.

So in *Hope v. Taylor,* 1 Burrows, 268, *Lord Mansfield* held that the word "legacy" used in a will extended to and embraced land. *Foil v. Newsome,* 138 N. C., 115.

It is contended that the administrative officers of the State, the State Treasurer and Attorney-General, have interpreted this statute so as to exempt real estate. The construction placed by a department of the Government is only *prima facie* correct, and is not binding on the courts. The opinions of such officers are treated with respect, but are only persuasive. They are given authority to construe the statutes because they

have to be construed frequently without delay and before the courts can pass on them.

We are of opinion, upon the facts agreed, that the real and personal estate of the testatrix is liable for the inheritance tax, subject to a total exemption of $2,000 in favor of each devisee or legatee, and that the same should be assessed and determined by a commissioner appointed in accordance with the statute. *S. v. Bridgers,* 161 N. C., 247.

Error.

WALKER and HOKE, JJ., dissent.

Cited: S. v. Scales, 172 N. C., 917; *Corp. Com. v. Dunn,* 174 N. C., 686; *Allen v. Cameron,* 181 N. C., 122; *Trust Co. v. Doughton,* 187 N. C., 267; *In re Davis,* 190 N. C., 361; *Waddell v. Doughton,* 194 N. C., 539; *Reynolds v. Reynolds,* 208 N. C., 630.

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(326)

D. B. ZOLLICOFFER, GUARDIAN, v. E. T. ZOLLICOFFER, EXECUTOR, ET AL.

(Filed 24 February, 1915.)

1. Gifts—Delivery—Trials—Evidence—Questions for Jury.

Where there is evidence tending to show that the grandmother indorsed certain certificates of corporate stock to her granddaughter and requested the latter's father to hold them for his daughter until after her death, which he refused to do, deeming it better for the donor to so hold the stock; that she put the certificates in her Bible and afterwards stated that she had given them to her granddaughter, the evidence raises more than a conjecture of the delivery necessary to the validity of the gift; and the certificates not having been found after her death in the place the alleged donor had put them, the question of a valid gift is one for the determination of the jury in an action against the administrator and the corporation to compel the issuance of a certificate to the alleged donee to supply the place of the lost one.

2. Statutes—Deceased Persons—Transactions and Communications.

Transactions and communications between a deceased person and a third party not interested in the event of the action are not objectionable, as evidence, under our statute, Revisal, sec. 1631.

3. Appeal and Error—Evidence Immaterial.

The admission of evidence which, under the charge of the court, could not have been prejudicial to the appellant is not reversible error on appeal.

4. Trials—Issues Sufficient—Appeal and Error.

Where the issues submitted at the trial are sufficient to present all the matters involved in the controversy, the rejection of those tendered by the appellant will not be held as error.

5. Trials—Instructions—Objections and Exceptions—Specific Requests.

Where the charge states correctly, though in general terms, the law applicable to the issues involved in the controversy, exceptions that they were not more specific will not be considered on appeal, in the absence of the refusal of special requests for instructions, that they be made so.

APPEAL by defendant from *Bond, J.*, at August Term, 1914, of HALIFAX.

The plaintiff, D. B. Zollicoffer, brought this action as guardian, to recover for his ward, Catherine A. Zollicoffer, who is his daughter, a certain certificate for ten shares of stock in the Roanoke Bridge Company of the par value of $1,000. The bridge company has no interest in the action, being only a nominal defendant, and agreeing to transfer the stock on its books and issue a certificate therefor to whomsoever the court may direct. The stock stands upon the books of said company in the name of Mrs. S. A. Thomas, the defendants' testatrix. The plaintiff claims the stock as the property of his ward, for the reason that the defendants' testatrix, some seven months prior to her death and about four months prior to the making of her last will, gave the cer-
(327) tificate of stock to his ward. The defendants admit that their testatrix intended at the time to give the stock to the ward of the plaintiff, her granddaughter and their younger sister, but contend that she failed to complete the gift and afterwards revoked her intention; made a will giving the ward of the plaintiff $1,000 in cash, which has been paid, in lieu thereof, and bequeathed the stock to defendants as residuary legatees and devisees under her will.

The plaintiff married the only child and daughter of the defendants' testatrix. They had eight children living at the time of the defendants' testatrix' death. Mrs. Thomas left a will giving legacies to her daughter and each of her other grandchildren and bequeathing the rest and residue of her estate, after paying the debts and legacies, to the defendants, who are her executor and executrix, and the two eldest of her grandchildren. There was some evidence that Mrs. Thomas placed the certificate of stock, after she had indorsed it to Catherine A. Zollicoffer, in her Bible, and it is admitted that it disappeared therefrom, in some way unknown, prior to her death. Before placing it in the Bible, she had requested the plaintiff, who was not then guardian, to take it and keep it for his daughter, Catherine Zollicoffer, but he declined to do so, stating that she was the one to hold it for her.

At the trial, upon an issue submitted to the jury, they found that plaintiff is the owner of the certificate of stock, and from the judgment on the verdict the defendants appealed.

F. S. Spruill, William L. Knight, and W. E. Daniel for plaintiff.
Mason, Worrell & Long and George C. Green for defendants.

WALKER, J., after stating the facts: It seems to us, after making a careful analysis of this case, that the question presented by it is largely one of fact. Defendants contended that there was no evidence of a delivery of the certificate of stock to Catherine A. Zollicoffer or to any one for her. If there was such evidence, then it was the province of the jury to pass upon it and decide the issue. The certificate had been issued to Mrs. Thomas, and it does not appear to have been denied, and it would be vain to deny that she wished to give it to her granddaughter, the ward of the plaintiff. She failed to do so in the best way conceivable, that is, by indorsement to her and delivery of the certificate, either to her personally or to some one for her. Her effort to do so miscarried because the plaintiff would not receive the certificate, at Mrs. Thomas' request, and hold it for his daughter, thinking that for some reason it was best for Mrs. Thomas to hold it for her. At any rate, Mrs. Thomas retained the certificate and placed it in her Bible for safe-keeping, but some one either abstracted it therefrom or it was lost or destroyed accidentally. It can make no material difference, in our view of the case, how it disappeared, if there was a delivery or valid transfer (328) of the certificate ever made. The whole case turns upon what Mrs. Thomas said or did in regard to it. There was testimony to the effect that she stated, after the stock was placed in the Bible, that she had given it to her granddaughter, Catherine Zollicoffer, and whether she had done so or not was manifestly a question for the jury. The judge submitted it to the jury, with proper instructions to find the fact, placing the burden of proving the issue upon the plaintiff. The evidence of the fact may have been very slight, but it was more than a scintilla, and when this is so it carries the case to the jury. *Wittkowsky v. Wasson,* 71 N. C., 451. We cannot say that the evidence did not reasonably warrant the verdict or that there was only room for a mere guess or conjecture. *Byrd v. Express Co.,* 139 N. C., 273. We decided in *Gross v. Smith,* 132 N. C., 604, that where a party stated that he had given personal property to another, in the absence of explanation, or restriction, it included the idea that he had delivered it, as delivery is essential to a valid gift. "All courts," we there said, "hold that delivery is necessary to the validity of the gift, but the fact of

delivery may be found by the jury from the acts, conduct, and declarations of the alleged donor, just as any other material fact may be found in the same way from the acts, conduct, and declarations of a party to be affected thereby. What is a gift is a question of law, but whether or not there was a gift in any particular case is a question for the consideration of the jury upon the testimony." In *Rooney v. Minor,* 56 Vt., 527, it was held that the admissions of an intestate that she had made the gift did not prove the fact in the sense that it was conclusive, but that it was some evidence to be weighed by the jury upon the question of delivery. It tended to show the fact, though it was not sufficient in law to constitute a gift *inter vivos,* unless the jury should find therefrom that there had been a delivery. This is the very point in our case. In *Spencer v. Littlejohn,* 22 S. C., 358, the same question was involved, and the Court held that, while a gift of personal property is not complete without delivery, declarations of the alleged donor to the effect that he had given the property was competent evidence from which the jury might determine whether the gift had been made. The Court says: "It is true that delivery must be proved, but this is a question of fact for the jury; and inasmuch as there can be no complete and legal gift without delivery, the very use of the term 'give' or 'I have given' may sometimes be intended to include the delivery, and when such declarations have been used by the donor and they are admitted by the court as competent, we think it ought to be left to the jury to say whether the gift has been proved, including the delivery; and it ought not to be laid down as a rule of law to govern the jury that such declarations in themselves are insufficient to prove the gift." The question is fully discussed in that case, and no further argument in support
(329) of the proposition is required. *Gross v. Smith, supra,* was approved in *Davis v. R. R.,* 134 N. C., 300. See, also, 20 Cyc., 1247, 1248. Defendants' counsel rely on *Davis v. Boyd,* 51 N. C., 249, but the case is clearly distinguishable, for there it clearly appeared that there had been no delivery, as the slaves were in this State and the alleged donee in Virginia. Delivery was, therefore, physically impossible. Besides, the evidence referred to the gift as having been made only by a writing, which was invalid to pass the property. It was not pretended that there had been any actual delivery or transmutation of possession. If it had appeared conclusively, or it had been found that Mrs. Thomas had not parted with the possession, and all she meant was that she had merely indorsed the certificate to her granddaughter and had not actually delivered it to her or to some one for her, the case would be different. The contrary rather appears, for the court told the jury that delivery was necessary to constitute a gift, and that plaintiff

could not recover unless they found there had been such a delivery, or, to use the language of the court, that the certificate "was given and delivered to the young lady." The court also very aptly illustrated what it meant by a delivery, so that the jury could not have misunderstood the question they were to decide, and they were sufficiently instructed that the mere indorsement and retention of the certificate by Mrs. Thomas would not constitute a gift of it.

As to the question of evidence, we think the court confined the testimony of plaintiff, D. B. Zollicoffer, to what occurred between Mrs. Thomas and the defendant E. T. Zollicoffer, and in this view there could be no valid objection to it, as the witness was not speaking of any communication or transaction between him and Mrs. Thomas, but of one between her and a third party. *Johnson v. Cameron,* 136 N. C., 243; *Bunn v. Todd,* 107 N. C., 266; *S. v. Osborne,* 67 N. C., 259; *McCall v. Wilson,* 101 N. C., 598; *Loftin v. Loftin,* 96 N. C., 94; *Ballard v. Ballard,* 75 N. C., 190. We may add that it seems to have been admitted that Mrs. Thomas requested D. B. Zollicoffer to take and hold the certificate for his daughter and that he refused to do so, and if so, any error as to that communication or transaction would be harmless. But the court carefully excluded it.

The introduction of the will of E. I. Thomas did not prejudice the defendants, as the court charged the jury that no trust was created thereby in the certificate, but only as to his own estate, for he had no interest in the stock. Exceptions were taken to the statement by the court of the contentions of the respective parties, but we can see no valid ground for objection. It was fair to both parties, and tended to present the case more carefully and clearly to the jury and to aid them in weighing the arguments.

(330) The issues were sufficient to present all the matters involved, and, therefore, there was no error in rejecting those tendered by the defendants. *Hatcher v. Dabbs,* 133 N. C., 239; *Albert v. Ins. Co.,* 122 N. C., 92; *Ratliff v. Ratliff,* 131 N. C., 425. If defendants desired more specific instructions as to whether, in stating that she had given the stock to her granddaughter, Mrs. Thomas merely referred to her indorsement of it, and not to any actual delivery of it, and if so, the jury should answer the issue "No," they should have asked for it. *Simmons v. Davenport,* 140 N. C., 407, and cases cited.

The other exceptions require no special comment, as they are covered by those already discussed.

No error.

Cited: McNeeley v. Shoe Co., 170 N. C., 281; *Hardware Co. v. Buggy Co.,* 170 N. C., 301; *Power Co. v. Power Co.,* 171 N. C., 258;

Hux v. Reflector Co., 173 N. C., 100; *Harris v. R. R.*, 173 N. C., 112; *Potato Co. v. Jeanette*, 174 N. C., 240; *Brown v. Adams*, 174 N. C., 496, 503; *Parker v. Mott*, 181 N. C., 439; *Abernethy v. Skidmore*, 190 N. C., 70; *Michaux v. Rubber Co.*, 190 N. C., 619; *Barton v. Barton*, 192 N. C., 455.

JOHN L. PRITCHARD v. J. W. DAILEY.

(Filed 3 March, 1915.)

1. Vendor and Purchaser—Corporations—Reorganization—Certificates of Stock—Corporate Name.

Where a corporation has practically reorganized under a different name, the fact that persons in negotiating for the sale of shares of stock in the reorganized corporation used the former name is immaterial, it appearing that the purchaser received the certificates he had contracted to purchase, and held them without objection, and must have known of the fact.

2. Equity—Contracts—Misrepresentations, Reliance Upon—Fraud.

In the negotiation for the purchase of shares of corporate stock the purchaser, after receiving and paying for the shares, entered into a written agreement with the seller that the latter would repurchase the certificate at the same price, provided the purchaser would deliver them to him in ten days from that date. *Held:* The purchaser's entering into the subsequent agreement was inconsistent with the theory that he relied upon the representations theretofore made by the seller, alleged to have been false, which is necessary to be shown in order to set aside the first transaction on the ground of fraud.

3. Equity—Contracts—"Promissory Representations"—Fraud.

Representations made in the sale of certificates of corporate stock looking to the future value of the shares are only "promissory representations," or statements of the seller's opinion, and are, in themselves, insufficient as evidence of fraud, necessary to set aside the sale.

4. Equity—Contracts—Fraud—Intent.

In order to invalidate a transaction for fraudulent representations made by the seller, it must be shown, not only that they were false, or untrue, but that he knew them to be false at the time, and made them with intent to deceive.

(331) APPEAL by plaintiff from *Bond, J.*, at September Term, 1914, of BERTIE.

Civil action, tried upon these issues:

1. Did J. L. Pritchard within time fixed by the paper-writing signed by J. W. Dailey, copied in complaint, tender the certificate of stock and demand return of his $1,000 paid for the same? Answer: "No."

2. Did defendant J. W. Dailey, by fraudulent or by false statements which he knew or should have known were false, cause and prevent J. L. Pritchard from surrendering said stock and demanding repayment of the $1,000 he had paid for same? Answer: "No."

3. If so, what damage is the plaintiff J. L. Pritchard entitled to recover of defendant J. W. Dailey? Answer: .....

From the judgment rendered, the plaintiff appeals.

Winston & Matthews for plaintiff.
Ward & Grimes for defendant.

BROWN, J. This action is brought to recover damages of defendant for fraud and deceit in selling to plaintiff ten shares of stock in the Southern Lime and Fertilizer Works of Washington, N. C. There was a corporation in said city called the Southern Lime Company, which was practically reorganized under the name of the Southern Lime and Fertilizer Company, and all of its property conveyed to the latter. The stockholders, officers, property, and business conducted were the same. This transpired before the transaction between the plaintiff and defendant.

In December, 1910, the defendant sold the plaintiff ten shares of stock in said corporation, for which the plaintiff paid $1,000. The defendant was secretary and treasurer of the corporation, and the stock was sold on behalf of the corporation and payment for it made by check payable to him as such treasurer.

The certificate of stock sent to the plaintiff, accepted and retained by him, was the certificate of the Southern Lime and Fertilizer Works. The fact that in the conversations and correspondence between the plaintiff and defendant the corporation is called the Southern Lime Company is immaterial. The plaintiff knew when he received his certificate, and retained it, what the correct corporate name was.

Shortly after the agreement to purchase the stock, the plaintiff wrote the defendant, inclosing the following contract, and told him to sign it or return his check which had been given the defendant:

$1,000. December 26, 1910.

On 1 January, 1912, I agree to pay to John L. Pritchard the sum of $1,000 for ten shares of capital stock in the Southern Lime Company of Washington, North Carolina, provided said ten shares (332) of capital stock be delivered to me on that day or not later than ten days thereafter.

J. W. DAILEY,
GEORGE T. HARDY.

The defendant executed it, and returned it as demanded.

The plaintiff bases his right to recover upon two alleged causes of action: First, fraud and deceit of defendant in the original purchase of the stock; second, to recover on the contract of 26 December upon the ground that he was beguiled by the fraud and falsehoods of the defendant from tendering the stock and demanding a compliance within the stipulated period.

1. The plaintiff tendered the proper issues based on his first cause of action. His Honor declined to submit them. In this we think his Honor committed no error, as there is no sufficient evidence of fraud in order to avoid the original transaction upon that ground.

The material elements of fraud, a commission of which will justify the court in setting aside a contract or other transaction, are well settled. First, there must be a misrepresentation or concealment; second, an intention to deceive, or negligence in uttering falsehoods with the intent to influence the action of others; third, the misrepresentations must be calculated to deceive and must actually deceive; and, fourth, the party complaining must have actually relied upon the representations.

The evidence in this case as to what took place between the plaintiff and the defendant when the plaintiff agreed to purchase the stock does not come up fully to the requirements of the law.

The representations of the defendant seem to be what are called "promissory representations," looking to the future as to what can be done to the property, how profitable it was, and how much could be made by the investment. Representations which merely amount to a statement of opinion go for nothing. One who relies on such affirmations made by a person whose interest might prompt him to invest the property with exaggerated value does so at his peril and must take the consequences of his own imprudence. *Cash Register Co. v. Townsend,* 137 N. C., 652; Kerr on Fraud and Mistakes, p. 83.

Again, the evidence fails to show that the plaintiff relied upon the representations of the defendant. On the contrary, the plaintiff's own evidence shows that he wrote the paper-writing dated 26 December, 1910, mailed it to the defendant and demanded the execution of it or the return of his check. This demand was complied with by the defendant in his letter of 2 January, 1911, who says: "I am not only signing it, but I have got a good man to sign it with me, who owns $8,000 stock in this company and has as much faith in the undertaking as I have.
(333) Inclosed you will find certificate of stock for ten shares, which I hope you will draw dividends on for a number of years."

This certificate of stock was issued by the Southern Lime and Fertilizer Works and the plaintiff accepted and retained it. This is incon-

sistent with the theory that the plaintiff relied upon any representations made by the defendant in the original negotiations for the sale of the stock. *Hamrick v. Hogg,* 12 N. C., 350; *Stafford v. Newsom,* 31 N. C., 507; *McEntire v. McEntire,* 43 N. C., 297; *Gerkins v. Williams,* 48 N. C., 12.

Then, again, there is no evidence in this case which tends sufficiently to prove that the defendant not only made the false representations, but knew them to be false and made them with the intention to deceive. In *Tarault v. Seip,* 158 N. C., 363, it is said: "Nor can fraud exist where intent to deceive does not exist, for it is emphatically an action of the mind that gives it existence. It is not sufficient that the representations be false in fact; the defendant must be guilty of a moral falsehood."

2. The second cause of action is based upon the allegations that the defendant by false and fraudulent representations prevented the plaintiff from presenting his stock, and demanded payment therefor under the contract of 26 December.

This issue was properly submitted to the jury, and has been found by them in favor of the defendant. The evidence in this respect was conflicting, and we find no exception to it that needs discussion.

The charge of his Honor was full and clear in respect to this issue, and free from error.

No error.

Cited: Bank v. Yelverton, 185 N. C., 318; *Indemnity Co. v. Tanning Co.,* 187 N. C., 197; *Pittman v. Tobacco Growers Asso.,* 187 N. C., 342; *McNair v. Finance Co.,* 191 N. C., 716; *Colt v. Conner,* 194 N. C., 346; *Peyton v. Griffin,* 195 N. C., 688; *Shoffner v. Thompson,* 197 N. C., 667; *Folger v. Clark,* 198 N. C., 45; *Hinsdale v. Phillips,* 199 N. C., 572; *Hotel Corp. v. Overman,* 201 N. C., 341; *Bolich v. Ins. Co.,* 206 N. C., 155; *Brooks v. Trust Co.,* 206 N. C., 439; *Mitchell v. Mitchell,* 206 N. C., 548.

T. J. THOMPSON ET AL v. NANCY A. BATTS ET AL.

(Filed 24 February, 1915.)

1. Estates—Remainders—Heirs—Children.

While as a general common-law rule, subject to some exceptions, a conveyance of an estate for life in lands to another, with remainder to the heirs of the grantor, could not divest the grantor of the fee, under the rule that *nemo est hæres viventis,* this does not prevail under the provisions of the Revisal, sec. 1583, that "any limitation by deed, will, or other writing to the heirs of a living person shall be construed to be the chil-

dren of such person, unless a contrary intention appear, by the deed or will."

2. Same—Deeds and Conveyances—Interpretation of Statutes.

A conveyance of land in contemplation of marriage, and in lieu of dower, to M., "to descend to the heirs of the body of the said M. in fee simple, the issue of such marriage, and on failure of issue to revert to the heirs of" the grantor, providing also for the year's support of the grantee and that she shall receive a child's part of his personal estate. *Held:* The grantor, from the construction of the instrument, did not anticipate that he would survive his wife, or that there was a possibility of reverter to him; and that the "reverter" to his heirs, under Revisal, 1583, meant to his children after the death of his wife and the non-happening of the stated contingency.

(334) APPEAL by plaintiffs from *Ferguson, J.,* at November Term, 1914, of WILSON.

Proceeding for partition of a tract of land which originally belonged to Alfred Thompson, who was twice married.

He had children by the first marriage, and no children by the second marriage.

On 6 February, 1879, in contemplation of his second marriage, he executed a deed to his intended wife, Martha Jane, conveying the land in controversy for life, and with the following limitations: "The aforesaid tract of land to descend to the heirs of the body of said Martha Jane in fee simple, the issue of such marriage, and on failure of issue to revert to the heirs of said Thompson."

Alfred Thompson died before his wife, leaving those represented by the plaintiffs as his heirs, and also leaving a will in which he devised the land to those represented by the defendants.

His Honor held that upon the death of Martha Jane without issue the title reverted to Alfred Thompson and passed to the defendants by his will, and entered judgment accordingly, and the plaintiffs excepted and appealed.

F. A. & S. A. Woodard, Jacob Battle, Winston & Biggs, and R. C. Strong for plaintiffs.

W. A. Finch and H. G. Connor, Jr., for defendants.

ALLEN, J. The plaintiffs contend that the words in the deed "the heirs of said Thompson" mean children, and that they take by way of contingent remainder, while the contention of the defendants is that the word "heirs" being used in connection with the name of the grantor, there can be no remainder, upon the familiar maxim *nemo est hæres viventis,* and that upon the happening of the contingency the estate reverted to the grantor and passed to them under his will.

This position of the defendants seems to have prevailed at common law, the principle being that as no one could be heir to the living the attempted limitation to the heirs of a living person was void, and being void, upon the happening of the contingency and the determination of the intermediate estate there was a reverter to the grantor.

Ferne says, page 51: "A limitation to the right heirs of the grantor will continue in himself as the reversion in fee. As where a fine was levied to the use of the wife of the co-user for life, remainder (335) to the use of B. in tail, remainder to the use of the right heirs of the co-user, it was adjudged that the limitation of the use to the right heirs of the co-user was void, for that the old use of the fee continued in him as a reversion."

In *Read and Morpeth v. Evington,* Moor K. B., 284, it was ruled that "If a man seized in fee make a feoffment to the use of A. in tail or for life, remainder to the use of his own right heirs, the land upon the death of A. without issue returns to the feoffor as his ancient reversion, and does not rest in his right heir as a remainder by purchase."

Sir Edward Coke says: "If a man make a gift in tail, or a lease for life, the remainder to his own right heirs, this remainder is void and he hath the reversion in him, for the ancestor during his life beareth in his body (in the judgment of law) all his heirs." Co. Litt., 22.

In Hargrave and Butler's notes (1 Am. Ed., from 19 London Ed. of 1853), one of the notes to this section states the following case, being note 3: "Feoffment to the use of a feoffee for forty years, remainder to B. in tail, remainder to the right heirs of the feoffor. It is the old reversion, and the feoffor may devise it; for the use returned to the feoffor for want of consideration to retain it in the feoffee till the death of the feoffor." See, also, 2 Wash. Real Property, 692, and *Robinson v. Blankinship,* 92 S. W., 854, 24 A. and E. Enc. L., 398.

The same principle is recognized in *King v. Scoggin,* 92 N. C., 99, where the Court says: "It is true, remainders are created by deed or writing, but the estate is sometimes created so that what is called a remainder is, in effect, only a reversion; as, for instance, when an estate is given to one for life, remainder to the right heirs of the grantor (2 Washburn on Real Property, 692; Burton on Real Property, 51), and this must be the kind of remainder classed with reversions which go to the donor or to him who can make himself heir to him."

This rule to the effect of using the word "heirs" in connection with a living person was not invariable at common law, as is pointed out by *Justice Walker* in *Campbell v. Everhart,* 139 N. C., 503. He says: "It appears to have been established by the authorities that, *prima facie,* the word 'heir' should be taken in its strict legal sense, but if there was

a plain demonstration in the will that the testator used it in a different sense, the court would assign that meaning to it, what was sufficient to show that the testator did not intend that it should have its technical construction depending largely upon the language employed in connection with it and the circumstances under which the word was used. Broom's Legal Maxim (8 Ed.), 521, marginal page 523. It was likewise held in the case of a will that the rule had no place, if the testator knew of the existence of the parents and intended his devise to take effect during his life. Broom, 524. . . . But the maxim
(336) was also extended to deeds, and a limitation (the word is here used in the sense of conveyance) 'to the heirs of a person' who is living was held to be void for uncertainty, as no one can in any proper sense be the heir of a living person, and it could not, therefore, be known who were to have the benefit of the conveyance; but it was likewise the rule in regard to a deed that, if anything appeared on its face to indicate that the grantor used the word 'heirs' as *designatio personarum,* or if a preceding estate was created so as to make the limitations to the heirs of the living person a contingent remainder, depending for its vesting upon the event of the death of the ancestor before the life estate terminated, the word 'heirs' was construed to mean children."

Assuming, however, that the principle prevails with us unimpaired, except as changed by statute, it remains to consider the effect of Revisal, 1583, which was adopted in this State in 1827 and reads as follows: "Any limitation by deed, will, or other writing to the heirs of a living person shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will."

The learned counsel for appellee, adverting to the position of the plaintiffs that the word "heirs" in the deed means children under the statute, says: This would possibly have been so had there been no intervening estate conveyed, but an estate having been conveyed to Martha Jane Edmundson with the contingent limitation over, which possibly might vest and thereby defeat any estate in the heirs of Alfred Thompson, would take this out of the terms of the statute; and in support of his view he relies on *Jones v. Ragsdale,* 141 N. C., 200; *Marsh v. Griffin,* 136 N. C., 334.

We do not agree with counsel that the rule of construction declared by the statute does not operate when an intervening estate is conveyed, nor do we think the authorities cited support this contention, but that the effect of the decisions is that where there is a *conveyance* to a living person, with a limitation to his heirs, the statute is not applicable, which is not our case, because here the limitation is to the heirs of the *grantor* and not to the heirs of the grantee.

The words in the *habendum* in the *Marsh case, supra,* were: "To her, the party of the second part, her heirs and assigns, during her natural life, and at her death then to belong to her bodily heirs, to have and to hold in fee simple forever," and the Court said: "The contention that this deed gave her only a tenancy in common with her children is unfounded. The Code, sec. 1329, providing that a limitation 'to the heirs of a living person shall be construed to be the children of such person,' applies only when there is no precedent estate conveyed to said living person, else it would not only repeal the rule in *Shelley's case,* but would convert every conveyance to 'A. and his heirs' into something entirely different from what those words have always been understood to mean."

This language of the Court was quoted with approval in the (337) *Jones case, supra,* and applied to a conveyance to "Zilphia S. Jones and her heirs by her present husband, Levy Jones, the land in controversy, . . . to have and to hold the said land and appurtenances thereunto belonging, to the said Zilphia Jones and her heirs by her present husband, and assigns, to her only use and behoof."

We are therefore without decision upon the statute upon the facts presented here, and as the case of the defendant rests upon the position that the limitation in the deed is to the heirs of a living person, we must give effect to the statute and hold that "heirs" "shall be construed to be the children of such person," as no contrary intent appears in the deed.

An examination of the entire deed indicates very clearly that the grantor did not anticipate that he would survive his wife, or that there was a possibility of reverter to him.

He conveys the land in lieu of dower, and immediately following the clause we have been considering provides: "That the said Martha Jane shall have one year's provision for self and family out of the personal estate of said Thompson at his death, to be set apart to her in the usual way; and also two feather beds, now her own; in addition thereto, it is agreed that the said Martha Jane shall receive a child's part of the personal estate of said Thompson at his death. And should said Thompson hereafter acquire any real estate, the said Martha Jane may dower on the same."

Upon careful consideration of the case, being of opinion that heirs is to be construed children, and as such they take by way of contingent remainder, the judgment is

Reversed.

Cited: Grantham v. Jinnette, 177 N. C., 240; *Baugham v. Trust Co.,* 181 N. C., 409.

ROYSTER GUANO COMPANY OF VIRGINIA, INC., v. THE LUMBER COMPANY ET AL.

(Filed 24 February, 1915.)

1. Equity—Injunction, Permanent—Restraining Order—Serious Issues.

Where a permanent injunction is the sole subject of an action, and the evidence raises serious questions as to the facts affecting the plaintiff's rights, the temporary injunction should be continued to the final hearing.

2. Municipal Corporations—Cities and Towns — Streets — Public Uses—Private Rights.

The public streets of a city are dedicated to the public and for public use, and though subject to the control and management of the city authorities, they have not the power, generally speaking, to grant an easement or right other than of a public nature.

3. Same—Nuisance—Injunction.

Where a private enterprise has been given by a city the right to erect and use an electric trolley or hoist, for transporting its wares across a public street, 12 feet above the ground, and a permanent injunction is sought by the plaintiff, with evidence tending to show it was a serious detriment to his business in the use of the street, having the effect of frightening horses and dangerous to others using the street, *it is held* that such use of the street is a nuisance, that the evidence raises a serious question, and that a restraining order should be continued to the final hearing.

(338) APPEAL by plaintiff from *Ferguson, J.,* at Chambers in Wilson, 9 October, 1914. From EDGECOMBE.

Civil action pending in the Superior Court of Edgecombe County, heard by Ferguson, judge, on a motion for an injunction to the final hearing. The motion was denied, and the plaintiff appealed.

Gilliam & Gilliam for plaintiff.
Allsbrook & Phillips for defendant.

BROWN, J. The object of this action is to enjoin the defendants from erecting across a public street of the town of Tarboro an electric trolley or hoist. The facts are, as set forth in the complaint and supported by affidavits, that the defendants have built an electric trolley or hoist, supported by posts, across the alleged public street of the town of Tarboro leading from the East Carolina Railway to the river, over which it is proposed to transport the logs and other articles of transportation from Tar River to the defendant's factory, and also much of its finished product.

This hoist is about 12 feet above the level of the ground. Under it every team must pass in going to and fro from the plaintiff's factory

and the public boat landing on Tar River. The street in question has been opened and in public use for a great many years, and is the only passageway to the plaintiff's factory or to the boat landing.

Many affidavits tend to prove that the operation of this hoist is calculated to frighten teams and is attended with danger; that many customers of the plaintiff would be unwilling to patronize the plaintiff and risk their teams passing under it; that by reason of the obstruction of this street by this electric hoist the plaintiff would lose many customers, would have to abandon its plant, and would suffer irreparable damage. The defendants are private corporations.

In August, 1914, H. C. Bridgers, who is likewise controlling owner of The Lumber Company, appeared before the board of commissioners of the town of Tarboro and asked permission to install an electric hoist *across the street leading to the boat landing* for the purpose of loading and unloading freight of that company. He stated to the board that the public would not be inconvenienced.

At a regular meeting of the board on 10 August the following (339) proceedings were had, as appears from the minutes of said board: "Commissioners J. D. Jenkins and M. P. Williams, as representing the committee appointed to investigate the request of Mr. H. C. Bridgers, asking the board's permission to *cross the street* leading to the boat landing with electric hoist, reported they saw no objection to letting this hoist be installed, provided the bottom of said hoist be 12 feet above the street, and if this became a nuisance, that the board had a right to rescind order at a later date. On motion of Commissioner R. H. Hyman, it was ordered by the board that permission be granted Mr. Bridgers to *cross the street* with his hoist, provided the town had legal authority to do so, and if not, Mr. Bridgers was to remove the hoist."

The above order of the commissioners is the authority under which the electric hoist was erected. That order seems to recognize the fact that the passway over which the hoist was located is a public street of the town. It is well settled that where a permanent injunction is the sole object of the action, and the evidence raises serious question as to the facts affecting the plaintiff's right, the temporary injunction should be continued to the final hearing. *Stancill v. Joyner,* 159 N. C., 617; *Tice v. Whitaker-Harvey Co.,* 144 N. C., 508.

It is generally held that the public streets of a city are dedicated to the public and for public use. While they are subject to the control and management of the city authorities, they have not power to alien or otherwise encumber the streets, but must hold them for public uses only, and they have no right, generally speaking, to grant an easement or

right other than of a public nature. A permanent encroachment or a permanent obstruction of it is in law a nuisance.

We have held in *Butler v. Tobacco Co.,* 152 N. C., 416: "The town authorities hold the streets in trust for the purpose of public traffic, and cannot, in the absence of statutory power, grant to any one the right to obstruct the street, to the inconvenience of the public, even for public purposes, *and for private purposes not at all,*" . . . "for the entire street from side to side and from end to end belongs to the public."

In *S. v. Evans,* 85 N. C., 522, it is said: "Any permanent obstruction to a permanent highway, such as would be caused by the erection of a fence or building thereon, is of itself a nuisance, though it should not operate as an actual obstruction to travel, or work a positive inconvenience to any one. It is an encroachment upon a public right, and as such is not permitted by law to be done with impunity."

This case is cited in the note of *Hagerstown v. Whitner,* 39 L. R. A., p. 662, where there is a lengthy discussion of obstruction of public streets by buildings, fences, and the like. This case and notes fully and abundantly sustain the proposition that any unreasonable inter-
(340) ruption of the public use of a street is an unlawful obstruction, and a permanent obstruction in law a nuisance. See, also, *Hibbard v. City of Chicago,* 40 L. R. A., 621; *Callahan v. Gilman,* (New York) 1 Am. St. R., 831. In the latter case it is said: "The primary purpose of streets is use by the public for travel and transportation, and the general rule is that any obstruction of a street or encroachment thereon which interferes with such use is a public nuisance. But there are exceptions to the general rule, born of necessity and justified by public convenience. An abutting owner engaged in building may temporarily encroach upon a street by the deposit of building material. A tradesman may convey goods in the street to and from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers. But all such interruptions and obstructions of streets must be justified by necessity and must, also, be reasonable with reference to the rights of the public, which may not be sacrificed or disregarded." *Abendroth v. R. R.,* 19 Am. St. R., 461; *White v. R. R.,* 113 N. C., 610; 28 Cyc., p. 873, where it is said: "Except where authorized by the Legislature, a municipality has no power to grant the right to use a street in a manner not consistent with the right of the public."

We think his Honor erred in dissolving the injunction.

Reversed.

Cited: Little v. Efird, 170 N. C., 189; *Bennett v. R. R.,* 170 N. C., 393; *Swinson v. Realty Co.,* 200 N. C., 279.

ISHAM ROSSER v. T. M. BYNUM ET AL.

(Filed 3 March, 1915.)

1. Accord and Satisfaction—Disputed Accounts—Checks "in Full"—Acceptance—Rebuttal Evidence.

A check given and received by the creditor which purports to be in full of account to date does not conclude the creditor, accepting it, from showing that in fact it was not in full, unless, under the principles of accord and satisfaction, there had been an acceptance of the check in settlement of a disputed account.

2. Evidence, Weight of—Positive Evidence—Trials—Instructions.

While in proper instances it will not be considered erroneous for the trial judge to charge the jury that more weight should be given to positive than to negative evidence, the rule is very restricted, and does not apply where there is a direct contradiction in the evidence of witnesses on a material fact to which their attention has been directed; and the application of the rule is reversible error where the testimony of this character is conflicting as to whether a check purporting to have been given in full had the appropriate words written on its face at the time it was given and accepted; as in this case "lbr. to date," meaning in connection with the facts presented, in full for lumber purchased to date.

3. Evidence—Checks "in Full"—Custom—Similar Transactions.

Where in payment for lumber it is controverted that a check given and accepted therefor stated thereon, at the time of its acceptance, that it was in full, it is competent for the maker of the check to show by significant and similar entries made by him on other checks in transactions of like nature that it was his custom to do so, as bearing upon the disputed fact at issue.

APPEAL by plaintiff from *Peebles, J.*, at March Term, 1914, (341) of LEE.

Civil action, heard on appeal from justice's court.

Plaintiff offered evidence tending to show that during 1911, beginning in May, he sold and delivered to defendants an amount of lumber at a stipulated price, and the balance due thereon was $107.01.

Defendant pleaded payment, and in support of the plea there was evidence tending to show that the lumber was all delivered prior to 31 August, 1911, and defendant put in evidence a check of defendant's on Bank and Trust Company in plaintiff's favor, of date 31 August, for $392.73; on face of said check were the words "For lbr. to date"; offered testimony tending to show that said check had been paid plaintiff and that the word "lbr." meant lumber.

In reference to this check and the entry thereon, the court held that if the jury should find that "lbr." meant lumber, and was on the check

when plaintiff took it, that closed every particular of indebtedness for lumber up to that date and plaintiff could not recover unless he showed that, after that time, more lumber was delivered. Plaintiff excepted.

There was evidence of plaintiff to the effect that there was indebtedness for lumber and a balance still due thereon over and above the amount covered by defendant's checks. Plaintiff testified further that the word "lbr." was not on the check of 31 August when the same was drawn or taken by him. Defendant F. R. Snipes testified that said words were on the check when same was taken by plaintiff, and defendant was allowed, over plaintiff's objection, to introduce a number of other checks, drawn by defendant, showing lumber entries thereon and tending to show a custom of defendant to make entries of that kind on checks given in the course of its business and of this transaction. Plaintiff excepted.

In reference to the word "lbr." appearing on the check, and the testimony in reference thereto, the court, concerning other things, charged the jury as follows: "Now, the defendant pleaded payment, and he says he paid this check. The burden upon that issue is upon the defendant; he must satisfy you by the greater weight of evidence that this check was given for that lumber, and that those words 'lbr. to date' mean for lumber, and that those words were written on there at the time when the check was accepted by the plaintiff. The plaintiff swears that those words were not on there. The law says that when one
(342) man swears to a negative fact and another swears to a positive fact, if they are both men or equal credibility, the jury ought to give more weight to a man who swears to a positive fact than a man who swears to a negative fact; for instance, if a witness were to go on the stand and say that he was in the courthouse yesterday and Sheriff Petty was in the courthouse, and another should go on the stand and swear that he was in the courthouse yesterday and Sheriff Petty was not in there, the law says both sides being of equal credibility, you ought to give more faith to the one who swore that Sheriff Petty was in the courthouse than the one who swore that he was not, because he might have been there and the man not have seen him or not had his attention called to it, and he might have been honestly mistaken; whereas a man who swears that he was in here could not be mistaken; Petty was either here or else that man told a willful falsehood. Now, here Rosser swore that those words were not on there when he accepted the check. Snipes swears that they were on there. Here is one man swearing to a negative and one to a positive fact, and it is for you to say which one is right and which one is wrong."

Plaintiff excepted.

There was verdict for defendant; judgment, and plaintiff appealed, formally assigning for error the exceptions above noted.

A. A. F. Seawell, W. D. Siler for plaintiff.
Williams & Williams for defendant.

HOKE, J. We do not concur in the view of the trial judge that if the words "lbr. to date" were on the check of 31 August when plaintiff took it they would necessarily conclude as to every particular of indebtedness for lumber up to that date.

It is well recognized that when, in case of a disputed account between parties, a check is given and received clearly purporting to be in full or when such a check is given and from the facts and attendant circumstances it clearly appears that it is to be received in full of all indebtedness of a given character or all indebtedness to date, the courts will allow to such a payment the effect contended for. The position is very well stated in *Aydlett v. Brown,* 153 N. C., 334, as follows: "That when a creditor receives and collects a check sent by his debtor on condition that it shall be in full for a disputed account, he may not thereafter repudiate the conditions annexed to the acceptance"; and is upheld and approved in numerous decisions of the Court, *Armstrong v. Lonon,* 149 N. C., 434; *Kerr v. Sanders,* 122 N. C., 635; *Pruden v. R. R.,* 121 N. C., 509; *Petit v. Woodlief,* 115 N. C., 120; *Koonce v. Russell,* 103 N. C., 179. A proper consideration of these and other cases on the subject will disclose that such a settlement is referred to the principles of accord and satisfaction, and unless the language and the (343) effect of it is clear and explicit it is usually a question of intent, to be determined by the jury.

On perusal of the record, we do not find that any dispute had arisen between the parties when this check was given, and, applying the doctrine as stated, we do not think the words, if they were on the check when received, are sufficiently definite or conclusive to be allowed the effect given them by his Honor, and that the question should be referred to the jury as to the intent of such an entry, and we must hold that there was error in the charge in reference to the testimony bearing on this matter.

As to the second proposition writers on evidence lay it down as the general rule that positive evidence is entitled to more weight than negative evidence (Moore on Facts, pp. 1337-38), and our decisions hold that while a judge is not required to lay this down as a rule of law, it will not be considered as reversible error when he does this in proper instances. *S. v. Murray,* 139 N. C., 540; *Glenn v. Bank,* 70 N. C., 191; *Smith v. McIlwaine,* 70 N. C., 287. But, on the facts presented here,

this is not a case of positive and negative evidence, within the meaning of the rule. *Smith v. McIlwaine, supra; Reeves v. Poindexter,* 53 N. C., 308.

In *Smith's case, supra,* it was held: "A plaintiff being examined in his own behalf, and swearing that the defendant promised to pay a certain debt, the defendant swearing that he made no such promise, both witnesses being of equal credibility, is not entitled to have the jury charged by the court that as a rule of evidence the positive testimony was entitled to more weight than the negative testimony. Such rule is subject to so many exceptions as not to be of much practical use; and if carelessly administered may work much mischief," and in *Reeves' case, supra,* that, "Where A. swears that B., C., and D. had an important conversation together, and D. swears that no such conversation took place, it was held that the rule giving preference to affirmative, over negative testimony does not apply, for there being a direct contradiction, the jury must be guided by other tests in ascertaining the truth"; and *Judge Manly,* delivering the opinion, in illustration of the principle, said: "With respect to the rule, it is clear that its applicability to any state of facts must depend upon whether the negative testimony can be attributed to inattention, error, or defect of memory. 1 Stark., 517. If two persons admit they were in a room together, and one swears that while there he heard a clock in the room strike, and the other swears that he did not hear it, it is a case for the application of the rule, according to all elementary writers. But in the case supposed, if two

(344) persons were placed in a room where a clock was, for the express purpose of ascertaining by their senses whether it would strike or not, a variance between their testimony could not be well attributed to mistake or inattention, and the real question would be as to the credit of the witnesses. In the case before us the defendant proves by a witness that the parties held a certain conversation, in which a witness, previously introduced by the plaintiff, participated, and plaintiff's witness, being recalled, denies that any such conversation was held; this is not a question between affirmative and negative testimony, wherein the latter may be ascribed to inattention, but it is a question between witnesses who contradict each other, and the question is, To which side under all the circumstances, is credit due?"

In the case before us there is a direct contradiction between the witnesses on a material fact to which their attention was directed, and the issue should have been submitted to the jury without comment as to the existence and application of the rule referred to. On the disputed question as to the existence of the entry, "1br. to date," on the face of the check, we think his Honor correctly ruled that significant and similar

entries by defendant on other checks and tending to show a custom to make such entries by the parties in this and transactions of like nature, was competent and that the same were properly received in evidence. *Parrott v. R. R.*, 140 N. C., 546; citing 1 Wigmore, sec. 92; *Matthias v. O'Neal*, 94 Mo., 527.

For the reasons stated, we are of opinion that reversible error has been shown and plaintiff is entitled to a new trial of the issues.

Error.

Cited: Bogert v. Mfg. Co., 172 N. C., 250; *McMillan v. R. R.*, 172 N. C., 855; *Mercer v. Lumber Co.*, 173 N. C., 54; *Long v. Guaranty Co.*, 178 N. C., 507; *Supply Co. v. Watt*, 181 N. C., 433; *Blanchard v. Peanut Co.*, 182 N. C., 21; *Refining Corp. v. Sanders*, 190 N. C., 208; *Dredging Co. v. State*, 191 N. C., 253; *Hardware Co. v. Farmers' Federation*, 195 N. C., 704.

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

(Filed 3 March, 1915.)

1. Trespass—Limitation of Actions—Separate Tracts of Land—Adverse Possession—Constructive Possession.

In an action of trespass, where the party in possession claims title under color by adverse possession to two separate and distinct tracts of land under two deeds separately describing them, his possession of the one is not constructive possession of the other, and possession of each will have to be sufficiently shown in order to ripen the title to them both.

2. Limitations of Actions — Adverse Possession — Color — Outstanding Titles—Purchase—Evidence.

A party in possession of lands under a deed may buy in an outstanding claim of title to them without acknowledging paramount title in his subsequent grantor or interrupting the continuity of possession under his first deed; and where adverse possession is sufficiently shown under his first deed, for the period of time limited, it will ripen his title under color thereof, unless he has in some way been estopped or precluded from doing so.

3. Same—Acts and Declarations—Questions for Jury.

Where one claiming title to lands has bought in outstanding titles thereto and claims by adverse possession under his first deed, it is competent to show his acts and declarations as evidence of the character of his possession, and it is for the jury to determine upon all the evidence

whether his possession continued to be adverse under the first deed and sufficient to ripen his title into a good and sufficient one during the period fixed by the statute.

4. Trials—Instructions—Appeal and Error—Harmless Error.

An erroneous statement of a contention of a party, corrected in the charge of the judge, is harmless error.

(345) APPEAL by defendant from *Whedbee, J.*, at July Term, 1914, of CAMDEN.

Action to recover damages for a trespass on the plaintiff's land, known as the lots numbered 2 and 3 in the New Lebanon Division, which was made in the year 1819. The trespass consisted in cutting roads on the land for the purpose of carting over it, the defendant justifying under a clause contained in the partition decree, reciting that it would be convenient in carting to the Cross Canal for one proprietor to have the free privilege of using the share of other proprietors for that purpose. Plaintiff asked for a restraining order to stop the trespass, which was at first granted, but afterwards vacated, and plaintiff appealed to this Court, when the order was reversed and the injunction directed to be continued to the hearing. 158 N. C., 161. Defendant at first admitted the title of plaintiff to Lots 2 and 3, and set up the right to cross them; afterwards, by amendment, admitted plaintiff's title to Lot No. 2 and formally denied the title to Lot No. 3, and finally, by amendment, denied plaintiff's title to both lots, which defendant alleges was due to the unexpected decision of this Court in *Weston v. Lumber Company,* 162 N. C., 165, involving the titles to Lots 1 and 4 in said division, as to the estoppel of a judicial partition between tenants in common. The other litigation between them concerned the title to Lot 12 of said division, which was finally decided by this Court in favor of the plaintiff, so that plaintiff has recovered Lots 1 and 4, which bound the land in controversy on the east and west; Lot 12, which bounds it on the north, the Cross Canal being its southern boundary. The jury, in this case, returned the following verdict:

1. Is the plaintiff, John L. Roper Lumber Company, the owner and entitled to the possession of the land described in the complaint, as alleged? Answer: "Yes; the whole thereof."

(346) 2. If so, have defendants entered and trespassed thereon, as alleged? Answer: "Yes."

3. If so, what damage has plaintiff sustained thereby? Answer: "$75."

The decision of this matter turns chiefly on the plaintiff's adverse possession of Lots 2 and 3. Judgment was entered upon the verdict, and defendant appealed.

Small, MacLean, Bragaw & Rodman, and J. Kenyon Wilson for plaintiff.

Ward & Thompson and Winston & Biggs for defendant.

WALKER, J., after stating the case: The defendant contends, as to both tracts, that plaintiff has had no such adverse possession as ripened his title under color, as the two tracts, designated as Lots 2 and 3 in the New Lebanon Division, were held by plaintiff and claimed by two separate deeds, and were, in fact and in law, to be taken and considered as two separate and distinct tracts of land, which would, therefore, require an adverse possession of each tract during the full period of limitation. It may be admitted, generally, that where the bar of the statute is pleaded, or the benefit thereof is relied on in any way, as to two separate pieces of land against the same claimant, an adverse holding of each must be made out for the requisite time by circumstances relating to the possession of each piece respectively, and mere possession of the one will not be extended so as constructively to include the other. A discussion of the question is not called for, as we are satisfied that there was an actual adverse possession of each tract under color for a sufficient length of time to ripen the title into a perfect one. The defendant's objection was not to the character of the possession, as not being adverse, but to the application of the doctrine of constructive possession to a case where there are two or more separate tracts of land, when it should be restricted to cases where there is only one tract involved. 1 Cyc., 1128. There was no error, therefore, as to Lot No. 2.

The other question presented, as to Lot No. 3, is whether the plaintiff waived or abandoned all right to claim any benefit from its adverse possession of six and a half years under the deed of Harrison E. Weston to it, dated 1 June, 1878, as color of title, by afterwards, 19 December, 1884, taking a deed from H. E. Weston, John R. White, and others. Defendants contend that at the time the last deed was made they were tenants in common with H. E. Weston and the other persons named therein, but it may well be doubted if they have offered evidence sufficient in law to establish the fact under the rule laid down in *Byrd v. Express Co.*, 139 N. C., 273, or whether they have connected themselves with the title of Samuel Weston, the first. As tested by the clear weight of authority and the rule of reason, the general doctrine (347) is that a person in adverse possession of land under color may purchase an outstanding title to the same land without thereby preventing his possession from being longer adverse or breaking its continuity; and this is so, although the period fixed by the statute for perfecting his title, under color, had not then expired. The subject is so fully and

lucidly treated by *Circuit Judge William H. Taft* in *Elder v. McCaskey,* 70 Fed. Rep. (Circuit Court of Appeals), 529, especially at p. 547, that we could not do better than to reproduce what has there been said, and especially as the facts of that case are so clearly analogous to those now under consideration, the outstanding title being that of a tenant in common: "There remains to consider the contentions of claimants, sustained by the court below, that, whether the possession of defendants was at any time adverse to the claimants, the disseizin was subsequently purged by recognition and acquiescence of defendants in claimants' title, so that an avowed cotenancy ensued before the statute had run. This contention is chiefly rested on the purchase and acceptance by the defendants of deeds conveying to them outstanding interests of certain of the heirs of the brothers and sisters of William Barr, Sr., whose title was of the same character as that of claimants. It is well settled by binding authority that a vendee is not estopped to deny the title of his vendor. *Robertson v. Pickrell,* 109 U. S., 608, 614, 615, 3 Sup. Ct., 407; *Watkins v. Holman,* 16 Pet., 25, 54; *Willison v. Watkins,* 3 Pet., 43; *Blight's Lessee v. Rochester,* 7 Wheat., 535. And the necessary conclusion from this is drawn, in the last named case, that the person in possession of property under a claim of complete ownership has the right to fortify his title by the purchase of any real or pretended titles, without thereby holding possession in subordination to them. This is further supported by the decisions of many other courts to the same effect. *Warren v. Bowdran,* 156 Mass., 280; *Gardner v. Greene,* 5 R. I., 104; *Chapin v. Hunt,* 40 Mich., 274, 279; *Mather v. Walsh,* 107 Mo., 121, 131; *Giles v. Pratt,* 2 Hill (S. C.), 439, 442; *Osterhout v. Shoemaker,* 3 Hill, 513, 518; *Tobey v. Secor,* 60 Wis., 310, 312. The following are cases where the possessor and defendant purchased outstanding titles of tenants in common with the plaintiffs in ejectment, and yet was held not to have thereby acknowledged the validity of the plaintiff's title; *Fox v. Widgery,* 4 Me., 214; *Jackson v. Smith,* 13 Johns., 406, 413; *Northrop v. Wright,* 7 Hill, 477, 489, 496; *Bryan v. Atwater,* 5 Day, 181; *Cannon v. Stockmon,* 36 Cal., 539; *Winterburn v. Chambers,* 91 Cal., 183; *Cook v. Clinton,* 64 Mich., 309, 313. And the same rule prevails in Ohio." We need not assent to all that is said in that case as to the relation of vendor and vendee with respect to any estoppel of the latter to deny or dispute the title of the former, and we cite the case only for the purpose of showing that the vendee's adverse
(348) possession is not affected by his purchase, and not as binding us to an approval of all the reasons advanced in support of the conclusion, as that is not necessary to a decision of this matter or to the value of the case as an authority.

Mr. Freeman, in his work on Cotenancy and Partition, sec. 106, says: "A person in possession of land may protect himself from litigation by purchasing any outstanding claim against his property. By so purchasing he does not necessarily admit the superiority of the title bought, nor change his possession, which was before adverse, into a possession subordinate to the newly acquired title. Therefore, one who is in possession of real estate does not become a tenant in common thereof by merely accepting a deed therefor from the owner of an undivided interest therein."

The party who accepts a deed in fee from a grantor having no title or a less estate than he conveys performs no act expressly designed to influence, and which influences, the conduct of the latter to his injury, nor does he make any admission which in good conscience and honest dealing he should be forbidden to gainsay. The grantee is the one exposed to injury, and when necessary for his protection, he may show the truth and dispute the title of his grantor, as a party is only concluded against showing the truth or asserting a legal right when the result would be a wrong, through his means, to some third person. There is no such relation ordinarily existing between the grantee in fee and his grantor as will raise even an implied obligation, on the part of the former, against a denial of the title and estate of the latter. Although a tenant cannot question the right of his landlord, a grantee in fee, as he stands on a different footing in the law, may hold adversely to the grantor, and there can be no good reason why he should not be at liberty to deny that the grantor had any title. There is no estoppel where the occupant is not under an obligation, express or implied, that he will at some time or in some event surrender the possession, but the grantee in fee is under no such duty. He does not receive the possession under any contract, express or implied, that he will ever give it up, but takes the land to hold for himself and to dispose of at his pleasure. He owes no faith or allegiance to his grantor, and he does him no wrong when he treats him as an utter stranger to the title; and, finally, it results from these considerations, and perhaps others of equal cogency, that his possession is really adverse to his grantor, as has often been held by the courts. The above principles are supported by the following cases: *Sparrow v. Kingman,* 1 N. Y. (1 Comstock), 242; *Osterhout v. Shoemaker,* 3 Hill, 518. The disseizin, therefore, was not purged by taking the deed, nothing else appearing. A disseizor in possession has an interest in the land which he may transfer with the possession to a third person or which on his death will pass to his heir, and (349) the mere taking of a deed from another, against whom he is holding adversely, does not, of itself, constitute a relinquishment of this

right. *City of St. Paul v. C. M. and St. P. Railway Co.,* 48 N. W. (Minn.), 17.

In *Coakley v. Perry,* 3 Ohio St., 344, one Nathan Perry had purchased the land, received a conveyance, and was in possession. Subsequently he took a deed, with covenant of warranty, from Job Doan, to whom one-fourth interest in a tax title had descended from his father, and with reference to these facts the Court said: "It would be the grossest absurdity to conclude that Nathan Perry, by taking the conveyance from Job Doan, for a trifling consideration, contemplated, instead of continuing seized of the whole premises, as he claimed to have been before, that he became seized of only an undivided part in common with the other heirs of Job Doan's ancestor. It would seem to be just and reasonable that a person in the *bona fide* possession of land under a claim of title should be allowed to buy in any title, real or pretended, with a view to quiet the enjoyment of his possessions, and that the purchase of an adversary title, if it does not strengthen, should certainly not have the effect to impair, the title of the owner. It is not the policy of the law to deter persons from buying their peace and compel them to submit to the expense and vexation of lawsuits, for fear of having their titles tainted by defects which they would gladly remedy by purchase, where it can be done with safety." *Judge Taft* further says in *Elder v. McCaskey, supra,* at p. 548: "Whether the acceptance of a deed of an outstanding interest by one in possession shall affect his adverse possession depends on all the circumstances surrounding it. Generally, if his possession began under a claim of title in fee, the purchase of another title is not to be regarded as a change in his attitude. His purchase may strengthen his title, but it is usually not permitted to impair it. Cases may perhaps be conceived where the acceptance of a deed for an interest in property by one in possession would be equivalent to an express avowal of subordination to the title of others in privity with the grantors, but it would be exceptional. The cases relied upon by the court below to establish a different doctrine do not seem to us to do so." He then proceeds to distinguish the cases which it was contended held to the contrary, and demonstrates that they were based upon exceptional circumstances which showed that the grantee in the deed intended to abandon his prior possession and to claim under his newly acquired title, which, of course, would take them out of the rule. It is said in 1 Cyc., p. 1016: "With the exception of at least one decision in which it has been broadly ruled that the purchase of an outstanding title or interest by the adverse claimant interrupts the continuity of his possession, it seems to be very generally conceded that an adverse occupant may (350) purchase an outstanding title without thereby interrupting the

continuity of his possession. A party, it is said, may very well deny the validity of an adverse claim of title, and yet choose to buy his peace at a smaller price than be at great expense and annoyance in litigating it." It may be admitted that, under some special circumstances, the purchase of an outstanding interest will have the effect of divesting the possession of its hostile character, but no such circumstances are to be found in this case. A party is not bound to admit, and does not necessarily admit, title in another because he prefers to get rid of that other's claim by purchasing it. He has a right to quiet his possession and protect himself from litigation in any lawful mode that appears to him most advantageous or desirable. To hold otherwise would compel him to litigate adverse claims, or, by buying one, forego any right to claim the benefit of the statute of limitations as to all others. The acts and declarations of the possessor may, doubtless, be given in evidence with a view of showing the character of his claim, but whether the possession is adverse or not is a question for the jury to determine upon all the evidence. *Cannon v. Stockmon,* 36 Cal., 539. If a party is in possession continuously for seven years, all the time claiming ownership exclusive of any other right, and under color, he is entitled to the benefit of the statute of limitations, no matter how many outstanding adverse claims he may purchase to secure his peace and remove any cloud or suspicion from his title, unless he has in some way estopped or precluded himself from relying on that statute, and the question for the jury to determine on such claim is, whether upon all the evidence he appears to have been continuously in possession during the time prescribed, claiming title adversely and exclusive of any other right. *Cannon v. Stockmon, supra.* This is not the case of a grantee of one tenant in common who is in possession under a deed for the whole and not for the particular tenant's interest, which requires a holding for twenty years to bar the cotenant, the making of the deed and the possession by the grantee claiming thereunder not being sufficient, under our ruling, to constitute such a disseizin of the cotenant as to bar his right if the possession is continued for seven years. *Page v. Branch,* 97 N. C., 97; *Breeden v. McLaurin,* 98 N. C., 307; *Ferguson v. Wright,* 113 N. C., 537; *Roscoe v. Lumber Co.,* 124 N. C., 42; *Bullin v. Hancock,* 138 N. C., 198; *Whitaker v. Jenkins, ibid.,* 476; *Dobbins v. Dobbins,* 141 N. C., 210. And these cases show, as also does *Caldwell v. Neely,* 81 N. C., 114, that twenty years of possession is essential to bar cotenants, and the fact of holding and claiming under a deed for the whole from one of them will make no difference. *Boggan v. Somers,* 152 N. C., 390. And the same doctrine was stated very recently in a case between the same parties as those arrayed against each other in this

record (*Lumber Co. v. Cedar Works,* 165 N. C., 83), where we (351) said: "We are aware that this Court has held that a deed by one tenant of the entire estate held in common is not sufficient to sever the unity of possession by which they are bound together, and does not constitute color of title, as the grantee of one tenant takes only his share and 'steps into his shoes.' In such case, twenty years of adverse possession, under a claim of sole ownership, is required to bar the entry of the other tenants, under the presumption of an ouster from the beginning raised thereby. *Cloud v. Webb,* 14 N. C., 317; *Hicks v. Bullock,* 96 N. C., 164; *Breeden v. McLaurin,* 98 N. C., 307; *Bullin v. Hancock,* 138 N. C., 198, and *Dobbins v. Dobbins,* 141 N. C., 210, where the other cases are collected. We are not inadvertent to the fact that this State stands alone in the recognition of this principle, the others holding the contrary, that such a deed is good color of title (1 Cyc., 1078, and notes); but it has too long been the settled doctrine of this Court to be disturbed at this late day, as it might seriously impair vested rights to do so. It should not, though, be carried beyond the necessities of the particular class of cases to which it has been applied, but confined strictly within its proper limits; otherwise, we may destroy titles by a too close attention to technical considerations growing out of this particular relation of tenants in common, and more so, we think, than is required to preserve their rights. This view has, within recent years, been thoroughly sanctioned by the Court." *Judge Gaston* said, in *Cloud v. Webb,* 15 N. C., 290 (second appeal): "A sole possession by the bargainee of a part under a deed in severalty for that part might and probably would amount to a demonstration plain that such possession was a several holding under that deed, was tantamount to an ouster of that part, and therefore adverse to Mrs. Cloud's claim of a right to the possession thereof." It will be seen by these references within what narrow limits the doctrine as to the effect of a possession held under the deed of one of the cotenants is confined, and as to whether such a deed, followed by possession taken by the grantee, will constitute a disseizin of the other tenants. But here the plaintiff held under a deed made by a stranger, and adversely to all others, for six and one-half years, and we find no evidence that he intended to relinquish the advantage he had gained by such holding and substitute for it a one-half undivided interest in the land of doubtful validity, but the contrary appears to have been the motive and purpose, as the subsequent purchase was clearly intended merely to clear up the title, or to get rid of adverse claims to it, however unfounded they may have been, so that it would be exempt from future attack. It was not supposed by any of the parties to the transaction that plaintiff was buying an interest in

common with defendants, but all the circumstances tend to show that it continued to rely upon the adverse possession to ripen its title under the color. The case is, therefore, not like that of one when an outsider receives a deed from one of the tenants for the entire (352) and undivided estate in the land held in common, and has no other source of title. Plaintiff holds the deed of a stranger to a several interest, and not one held in common, and has the right to perfect his title under it, although he may have purchased another claim and taken a conveyance from those asserting it, to safeguard the title, which was maturing by his continued possession under color.

The prayers of the defendants required the court to instruct the jury, as matter of law, that the taking of the second deed prevented plaintiff from claiming any benefit by its adverse possession under the Harrison E. Weston deed of 1878, and there was no error in refusing them. The court properly left the question of adverse possession to the jury, with appropriate instructions. The reference to plaintiff's possession in 1871 and 1872 was harmless, being merely the statement of a contention. The court immediately afterwards correctly instructed the jury as to adverse possession under color, and the jury could not have been misled. The issues were sufficient to present all controverted matters and were properly submitted by the court, instead of those tendered by the defendant. *Albert v. Ins. Co.,* 122 N. C., 92; *Ratliff v. Ratliff,* 131 N. C., 425; *Hatcher v. Dabbs,* 133 N. C., 239; *Zollicoffer v. Zollicoffer, ante,* 326. The other exceptions are without any merit.

After a careful review of the record and a studious consideration of the arguments of counsel, we have not been able to find any error committed by the court at the trial.

No error.

Cited: Alsworth v. Cedar Works, 172 N. C., 23; *Ruark v. Harper,* 178 N. C., 252; *Crews v. Crews,* 192 N. C., 686; *Shelley v. Grainger,* 204 N. C., 492.

IN RE INHERITANCE TAX FROM THE ESTATE OF JOHN H. WHITE.

(Filed 24 February, 1915.)

1. Statutes—Interpretation—Inheritance Tax—"Relation of Child."

The inheritance tax law, imposing a higher rate of taxation and allowing no exemption as to those whose beneficial interest in the property is not derived as the lineal issue or lineal ancestor or husband or wife of the person who died possessed of such property, etc., by making the

express provision that the lower rate and exemptions would also apply "where the person to whom such property shall be devised or bequeathed stood in the relation of child" to such person, extends the lower rate and exemptions to persons who are shown to have been regarded by the testator or ancestor as if they were his children, or lived in his family or associated with him as such, in mutual recognition of the assumed relationship, and without restriction to cases of formal adoption.

2. Same—Jurisdiction—Clerks of Courts—Courts.

The inheritance tax law, by providing that the "clerk of the Superior Court shall determine whether any person to whom property is so devised or bequeathed stands in the relation of child to the decedent," refers and was intended to refer the question of such relationship to the courts; primarily to the sound legal discretion of the clerk, as a mixed question of law and fact.

(353) APPEAL by petitioner from *Peebles, J.*, heard 19 August, 1914. From BERTIE.

Petition to appraise and correct the assessment of inheritance tax on devise by the will of deceased to petitioner, John R. Lawrence, heard on appeal from clerk Superior Court.

The petitioner, claiming to stand in the relation of child of the testator, subject to the smaller tax imposed by the law, and that he is entitled to the exemption allowed in such cases, filed his petition before the clerk and alleged and prayed:

"First. That John H. White, deceased, died on or about 12 July, 1913, leaving a last will and testament which has been admitted to probate and is recorded in Bertie County, and in which he appointed your petitioner as his executor under said will and testament; and your petitioner duly qualified as such executor on 20 July, 1913, and is now the executor of said estate.

"Second. That said John R. Lawrence is the principal legatee and devisee in said will and testament, the same being referred to and made a part hereof for all purposes; and on 13 June, 1914, the said clerk of the Superior Court of Bertie County duly appointed T. C. Bond as the appraiser to appraise the said estate for the purpose of assessing the inheritance tax under the provisions of chapter 201, section 15, of the Public Laws of 1913 of North Carolina, and the said Bond duly qualified, assessed said estate, and has filed his report in this court bearing date of 26 June, 1914; and the same is referred to and made a part hereof for full description of same.

"Third. That the said John R. Lawrence is the only devisee and legatee in said will and testament and in the report of said assessor whose share is liable for the inheritance tax as provided for in chapter 201 of Public Laws of North Carolina, 1913.

"Fourth. That the said John R. Lawrence was the nephew and foster child of the said John H. White, deceased, and was the son of the sister of said White and her husband, Thomas Lawrence. That Thomas Lawrence died when your petitioner was about 6 years of age, leaving surviving him his wife and three small children, John R. Lawrence, Bettie Lawrence, and Ida Lawrence, and without leaving any estate and property. That John H. White, who lived and died a bachelor, took and adopted his sister and her child, John R. Lawrence, into his household as members of his family, and the two small girls, Ida and Bettie Lawrence, went to live with their aunt, Bettie Wilson. That your petitioner's mother, the sister of said White, cared for his house (354) and did the other duties pertaining to the same until the time of her death, which occurred when your petitioner was 9 years, and your petitioner remained there, also cared for by his uncle and mother.

"That before the death of his mother, the said White promised her that he would adopt the said John R. Lawrence, raise him, and leave him all of his property at the time of his death, and after the death of his mother your petitioner remained with the said White until he reached the age of 21 years, and was treated as a son by the said White and in turn treated the said White as he would have his father. That the said John R. Lawrence worked in the field of said White, never receiving any compensation therefor, other than his board and clothes and a little spending money, just as any other man in similar circumstances in said locality would have treated a son, and he nursed and cared for said White when he was sick and was in turn nursed and cared for by the said White. That the said White announced to the world that he had adopted his nephew as his child and heir, and he was so regarded by the neighbors in that community, though there was never any actual 'legal adoption.'

"That the said White repeatedly told him that he was going to leave him his property when he died, and he raised and brought up your petitioner to believe and feel that this would be the case.

"That during the said period of time the household of said John H. White, deceased, consisted of said White, your petitioner, and a hired man, James Q. White, and the other servants around the house and farm.

"That the said White was very affectionate to the said Lawrence, and said Lawrence was in turn very affectionate with his uncle, because he felt that he stood in the relation of parent to him, and was, practically speaking, the only father he ever knew in his life, as his own father died before he could remember much about him.

"Fourth. That your petitioner reached the age of 21 years old, and

was advised by said White that he should go away and learn something of the world, and that he was willing to allow him to go in the northern part of the country and work, provided that he would return home and care for the said White whenever he needed him. That your petitioner went up into the Northern States, and followed the trade of boiler-maker and continued this work for several years. That he and the said John H. White always kept in touch with each other, and your petitioner generally came home once every year to see his uncle and foster-parent, and was in turn visited by the said White at various intervals. The aforesaid relation of father and child was always continuing to exist during the said period, and correspondence by the use of the mail was kept up between them during this period.

(355) "That when your petitioner would return home to visit his uncle, and when said uncle and foster-parent would visit him, they would frequently advise together about the property and condition of said White and Lawrence, the said Lawrence aiding said White by suggestions, and said White aiding said Lawrence in this and other ways; and the said White always treated said Lawrence as his son and heir to his property.

"That about two years before the death of said White he advised your petitioner that he was getting too feeble and old to care for himself, and desired that he come home and take charge of him and his property until the time of his death, as he was the only child he ever had and the one he felt nearest to in the world.

"That your petitioner had married in the meantime and had his wife and two small children, and was engaged in the millinery business in Gloucester, New Jersey. His said business was prosperous and in good condition, but in obedience to the summons of his said foster-parent and uncle, he immediately sold the same out at a great sacrifice, and returned home to care for his said uncle.

"That from then on to the death of said White he and his wife remained at home of said White and cared for, nursed the said White, who was very feeble and old, in the same manner as he would have cared for his own parents, and cared for said farm and other property of said White, managed the same and had charge of said property in the same manner as said White would have had charge of same if he had been able. That during this period the said White frequently advised him that he regarded him as the only child he ever had in the world, and that upon his death he would receive the bulk of his property and estate. And the aforesaid relation of father and child extended up to the death of said White, which occurred in 1913.

"Fifth. That your petitioner is advised and believes, and so avers, that because of facts above stated the said relation of father and child between White and himself began when your petitioner was about 6 years of age and continued until the death of said White in 1913, and they stood in this relation within the meaning of the inheritance laws of the State of North Carolina, and that in assessing and appraising said estate of said White, and the property devised by said White to your petitioner, that the basis of the tax should be at the rate of $1 per $100 instead of $3 per $100, as provided for for persons in the relation of nephew and uncle."

Upon the hearing, the clerk found the facts as stated in the petition to be true, but held, as a conclusion of law thereon that defendant did not stand in this relation of child within the meaning of the inheritance tax law. On appeal, the judge of the district approved and affirmed the findings and judgment of the clerk, and petitioner appealed to this Court.

Pruden & Pruden, Gilliam & Davenport for appellant. (356)
No counsel contra.

HOKE, J., after stating the case: The law imposing a tax on inheritances, sec. 6, subsec. 1, provides, among other things: First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor or husband or wife of the person who died possessed of such property aforesaid, or where the person to whom such property shall be devised or bequeathed stood in the relation of child to the person who died possessed of such property aforesaid, at the rate of $1 for each and every $100 of the clear value of such interest in such property; and this clause shall apply to all cases where the taxes have not been paid by the executor or administrator or other representative of the deceased person. The clerk of the Superior Court shall determine whether any person to whom property is so devised or bequeathed stands in the relation of child to the decedent," and allows an exemption of $2,000 each on persons coming within the class described.

On persons taking beneficial interest in property by devise, inheritance, etc., and not coming within this description, a higher tax is imposed, and no exemption allowed. Referring to the language of the statute, it is clear that the words used, "or where the person to whom such property shall be devised or bequeathed stood in the relation of child to the person who died possessed of such property," are in addition to lineal issue or ancestors, these last being expressly named, and that

they are not restricted to persons formally adopted as children, for this could have been readily specified and expressed. The words, therefore, are more inclusive and, in our opinion, on perusal of the entire provision, including "and the clerk of the Superior Court shall determine whether any person to whom property is so devised or bequeathed stands in the relation of child to the decedent," the law referred and intended to refer the question to the courts: Primarily to the sound, legal discretion of the clerk, as a mixed question of law and fact, and that the words extend to and include all meritorious cases where the parties had assumed and continued to live in the relationship of parent and child or where they lived in mutual recognition of such relationship. This was held to be the correct construction of the statute in the recent case of *State v. Bridgers,* 161 N. C., 247, where the words in question were held to "include and apply to daughters-in-law who were in every way deserving and were treated and recognized as children by the testatrix." Speaking to the question in that case, the Court said: "In our view, however, these legatees should each be considered and dealt with as one standing in the relation of child to the decedent under clause 1,
(357) sec. 6, of the statute. This clause imposes a tax of ¾ of 1 per cent on legacies to the lineal issue or lineal ancestor of decedent or to his brother or sister or to 'one who stood in relation of child to such decedent,' this, in case of question, to be determined in the first instance by the clerk of the Superior Court. This provision, in our opinion, refers and was intended to refer to the case of widows or widowers, and other cases could be suggested to the decision of the courts and to relieve them, when legatees, from the higher rate imposed on strangers to the blood of the decedent in all cases where they were deserving of this favor. From a perusal of the will, showing the tenderest concern for these legatees, and from their known deserving, these daughters-in-law should be considered as standing in the relation of children and only be subject to the lighter tax imposed on the lineal issue of deceased." And the position has been recognized as sound in principle in other jurisdictions. Ross on Inheritance Taxation, sec. 138; 37 Cyc., pp. 1571-72.

The interpretation adopted is required by the general and inclusive nature of the descriptive words, "one who stood in the relation of child to decedent," and is more insistent in view of the additional clause, "and the clerk shall determine whether any person to whom property is bequeathed stands in the relation of child."

On the facts, as established, we are of opinion that the petitioner stood in the relationship of child to the decedent, within the meaning of the

law, and this will be certified, that judgment may be so entered and the taxes assessed and exemption allowed accordingly.

Reversed.

Cited: Trust Co. v. Doughton, 187 N. C., 267; *In re Davis,* 190 N. C., 361; *Waddell v. Doughton,* 194 N. C., 539.

STELLA W. HARRIS ET AL. v. NATIONAL COUNCIL JUNIOR ORDER UNITED AMERICAN MECHANICS.

(Filed 10 March, 1915.)

1. Fraternal Orders—Trials—Evidence—Prima Facie Case—Rules of Order—Burden of Proof.

Where in an action brought by the beneficiaries under a certificate of life insurance in a fraternal order, the plaintiffs offer evidence of a demand and proof of death of the assured, and introduce the certificate sued on, which upon its face and the evidence entitles the plaintiffs to the relief sought, they make out a *prima facie case,* and place the burden of proof upon the defendant to show the defense of nonpayment of dues or other matter to avoid the policy, if such is relied upon.

2. Fraternal Orders—Rules of Order—Appeal—Beneficiaries—Right of Action—Laches.

Where the rules of a fraternal insurance association provide for an appeal to the National department of the order upon refusal of the secretary-manager to pay a death claim under its certificate, and the beneficiaries of the policy are given no right of appeal, they have immediate right of recourse to the courts, and are not responsible for the inaction of the local branch of the association or bound by its laches; and under the circumstances of this case *it is held* that, by the lapse of time, the local branch had lost its right of appeal to the National department.

APPEAL by defendant from *Carter, J.,* at January Term, 1915, (358) of CHATHAM.

Civil action tried upon these issues:

1. Are the plaintiffs the legal dependents of W. R. Harris, deceased? Answer: "Yes."

2. Did the defendant issue to W. R. Harris the benefit certificate for $500, as alleged in the complaint? Answer: "Yes."

3. Was the deceased, W. R. Harris, in sound bodily health at the time he was enrolled in the Funeral Benefit Department of defendant? Answer: "Yes."

4. Was W. R. Harris, at the time of his death, a member in good standing in Silk Hope Council, No. 328, Junior Order United Amer-

ican Mechanics of the United States of America, as alleged in the complaint? Answer: "Yes."

5. Was W. R. Harris, at the time of his death, a member in good standing in the Funeral Benefit Department of the defendant, as alleged in the complaint? Answer: "Yes."

6. What sum, if anything, are plaintiffs entitled to recover of defendant? Answer: "$500, with interest from 1 October, 1912."

From the judgment rendered, defendant appealed.

Siler & Milliken, R. H. Hayes for plaintiff.
Douglass & Douglass for defendant.

BROWN, J. This is an action brought to recover $500 on a benefit certificate, No. 24, issued by the National Council, Junior Order United American Mechanics, of Silk Hope Council, No. 328, of the same order, for the legal dependents of W. R. Harris.

The certificate contains these conditions:

"Upon the condition that the said Silk Hope Council, No. 328, is now and shall be at the time of the death of the said W. R. Harris in good standing in the Funeral Benefit Department of the National Council, Junior Order United American Mechanics of the United States of North America; that is to say, that it has paid all assessments due to the Funeral Benefit Department at the time of the death of the said W. R. Harris, and has complied with all laws, rules and regulations governing the Funeral Benefit Department, and is in good standing with the National Council and State Council, having jurisdiction over said
(359) council.

"Also, upon the further condition that the said W. R. Harris was not received to membership nor retained as a member in violation of the laws and decisions of the order, and that at the time of his death he was a beneficial member in good standing of said Silk
[*Beneficiary* Hope Council, No. 328, and entitled to death benefits in
Degree accordance with the constitution and laws of that council
Seal.] and the State and National Councils now in force or hereafter adopted prior to said death."

The defendant moves to nonsuit:

(1) Because the plaintiff has failed to show by affirmative evidence that the conditions recited were complied with. The plaintiff offered evidence of a demand, introduced the certificate sued on, and proved the death of the assured, and thus made out a *prima facie* case. *Doggett v. Golden Cross,* 126 N. C., 477.

It is well settled that in an action upon a life insurance policy the burden of proof is upon the insurance company to show nonpayment of dues or other matters to avoid the policy, when the certificate of insurance has been put in evidence and the death has been shown. *Wilkie v. National Council,* 147 N. C., 637.

(2) Because the plaintiff failed to comply with the rules and regulations of the order in respect to appeals to the National Judiciary.

Section 23 of the rules and by-laws reads as follows: "In case of the refusal of the secretary-manager to approve a death claim, and the council desires to appeal from his decision, it shall be the duty of the council within sixty days to file with him a bill of particulars, giving all the facts of the case, whereupon it shall be the duty of the secretary-manager to prepare his reason for refusal to pay such claim, and forthwith present all papers in the case to the National Judiciary for final adjudication."

The insured was a member of the local council, but the beneficiaries are not and are given no right of appeal. If the council refuses to act, the beneficiaries have no protection except the courts. In this case the council refused or failed to act. It was admitted that the deceased died on 5 July, 1912; that proof of death was filed in August, and that this action was not begun until 18 February, 1913, more than six months after the proof of the death was filed. By delaying this long, the council had lost its right to appeal.

The plaintiffs are not responsible for the laches of the local council. They are not even members of it, and cannot have a voice in its management. They cannot thus be deprived of their right to appeal to the courts. The point is expressly decided in *Kelly v. Trimont Lodge,* 154 N. C., 97. In that case *Mr. Justice Manning,* speaking for this Court, said: "Where the question involved is the enforcement of a property right, such as is presented in this case, we hold that the courts can be invoked by a member to aid him in the enforcement or (360) protection of such rights without resorting in the first instance to the tribunals of the order."

The motion to nonsuit was properly overruled.

The remaining two assignments of error set out in the appellant's brief are without merit and need no discussion.

No error.

Cited: Lyons v. Knights of Pythias, 172 N. C., 410.

J. M. WILLIAMS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 March, 1915.)

1. Master and Servant—Duty of Master—Safe Place to Work—Negligence.

Where the master fails in his duty to furnish his servant a safe place to work, which is the proximate cause of a personal injury received by him in the course of his employment, the master is answerable in damages.

2. Same—Railroads—Brakeman — Obstructions Near Track — Contributory Negligence—Trials—Evidence—Nonsuit.

Where there is evidence that a railroad company has failed to provide a ladder at the end of a box car on its freight train, ordinarily used by its employees to reach the top of its box cars, and its brakeman, in the course of his employment, is prevented from climbing to the top of the car by the overhanging eaves of a car shed, from the position he was in after boarding the train; and that after passing from the shed at a speed of 10 or 12 miles an hour, and while climbing from his position towards the top of the car in the manner left open to him, the act of climbing requiring him to look upward, he was struck from the car by a shanty 7 feet high, 200 feet from the car shed and so close to the track as to render his passage between the car and the shanty impossible; and that the shanty could readily have been previously moved or placed by the defendant so as to have permitted the plaintiff to pass in safety. *Held:* Sufficient to be submitted to the jury upon the issue of defendant's actionable negligence in not providing the plaintiff a safe place to work; and that the courts would not hold as a matter of law that the plaintiff was guilty of contributory negligence.

3. Evidence—Nonsuit—Interpretation of Statutes.

In an action by an employee of a railroad company for damages for a personal injury alleged to have been negligently inflicted, a motion to nonsuit upon the evidence on the ground that the plaintiff was guilty of contributory negligence, since the enactment of chapter 6, Public Laws of 1913, cannot be sustained.

APPEAL by plaintiff from *Bond, J.*, at January Term, 1914, of WAYNE.

Action to recover damages for personal injury caused, as the plaintiff alleges, by the negligence of the defendant, in that it failed to provide him a reasonably safe place in which to work. Evidence was introduced by the plaintiff and the jury returned the following verdict:

(361) 1. Was the injury to plaintiff caused by the negligence of the defendant, as alleged? Answer: "Yes."

2. If so, did the plaintiff by his own negligence contribute to such injury? Answer: "No."

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

His Honor set aside the verdict as a matter of law, upon the ground that in no view of the evidence was the plaintiff entitled to recover, and the plaintiff excepted and appealed.

Langston, Allen & Taylor for plaintiff.
O. H. Guion for defendant.

ALLEN, J. The plaintiff was a brakeman, working in the yards of the defendant company at Rocky Mount, and while ascending a box car by the side ladder, in the performance of his duties, was struck by the eaves of a small shanty about 7 feet high, in such close proximity to the track that it was impossible to clear the shanty in the act of climbing the side of the car. The shanty was located about 15 feet south of a car shed. The plaintiff mounted the car about five car lengths from the shanty, but could not go to the top, as there was no end ladder on the car, until after he passed the car shed, because of the overhanging eaves. The train was running at a speed of 10 to 12 miles per hour. The shanty could not be seen from where he mounted the car, because a line of posts supporting the car shed obstructed his view. Immediately upon passing the car shed, he began to ascend the car, as his duties required him to do, looking up, and was struck by the shanty and seriously injured. Plaintiff knew that there was a shanty in the railroad yards, but did not know of its location with reference to the track and had not been warned of its dangerous proximity to the track, and had not been working on the job but three days when the injury occurred.

The plaintiff admitted that one standing on the ladder would have nothing to prevent him from seeing the shanty after he left the shed, and that a person in the act of climbing could not pass the shanty without being knocked off, unless he was paying particular attention, and then only by squeezing himself close to the ladder.

The contention of the defendant is that these facts present no case for the consideration of a jury; that they furnish no evidence of negligence on the part of the defendant, and, on the contrary, prove the contributory negligence of the plaintiff.

The correctness of the first position depends on the duty resting upon the defendant, and whether the facts show a breach of this duty, which proximately caused the injury complained of.

In *Buchanan v. Lumber Co., ante,* 40, *Justice Hoke,* speaking (362) for the Court, said: "It is fully established with us that an employer, in the exercise of reasonable care, must provide for his employees

a safe place to do his work, and a failure of duty in this respect will constitute negligence. *Cook v. Furnace Co.*, 161 N. C., 39; *Jackson v. Lumber Co.*, 158 N. C., 317; *Tanner v. Lumber Co.*, 140 N. C., 475. An examination of the authorities will show that the position is very insistent in the case of railroads where a breach of duty in this respect is not unlikely to result in serious and often fatal injuries." And this principle was applied to evidence tending to show that, for a week or more, the plaintiff's road had been left with a limb or snag deep in the ground at one end and leaning over towards the railroad track in such manner that it day by day scraped along the sides of the engine and cars and where it was liable, at any time, to cause an injury of some sort to the train or its employees.

In *Texas and Pacific Ry. Co. v. Swearingen,* 196 U. S., 61, the negligence alleged on the part of the company was the existence, in close proximity to a switch track, of a scale box, by striking against which the plaintiff was injured while doing duty as a switchman, and the Court, dealing with the question of negligence, said: *"Prima facie,* the location of scales where the tracks were only the standard distance apart, and where a space of less than 2 feet was left for the movements of a switchman between the side of a freight car and the scale box, encumbered, as he would be in the nighttime, with a lantern employed for the purpose of signalling, did not incontestably establish the performance by the defendant company of the duty imposed upon it to use due care to provide a reasonably safe place for the use of a switchman in its employ. And so far from the proof making it certain that the necessity of the situation required the erection of the structure between tracks Nos. 1 and 2 as existing, there was proof that the railway company owned unoccupied ground, intended for other tracks, to the south of track No. 4, justifying the inference that the distance between tracks Nos. 1 and 2 might have been increased, and the employment of the scales thus rendered less hazardous to switchmen, or that the scales might have been removed to a safer location.

"It was, therefore, properly a question for the determination of the jury whether or not the scales were maintained in a reasonably safe place, and if not, whether the plaintiff had notice thereof."

This statement of the law is peculiarly pertinent to the case before us in view of the evidence for the plaintiff that the shanty which caused the injury was used for employees working around the transfer shed to warm in, and that there would have been no danger if it had been turned round.

(363) In *Georgia Pac. Ry. v. Davis,* 92 Ala., 308, the plaintiff, a brakeman, was injured while on a side ladder by a rock project-

ing from the side of a cut, and it was said by the Court: "In view of the exigencies of the service, involving the use of ladders on the sides of cars by employees, and this while the train is in motion, and in view of the custom of resorting to such use, which the evidence here goes to show, we do not hesitate to affirm that it was the part of ordinary care on the part of the defendant—assuming, as the jury might have found, the truth of this testimony—to construct and maintain its roadway so as not only to admit of the safe passage of its cars, but also free from any projection or obstruction which would endanger the persons of employees in the use of these side ladders while the train is proceeding on its way, and that the defendant's failure in this regard rendered it liable to the plaintiff for any damages resulting to him from such failure, unless his own negligence proximately contributed thereto."

This principle was applied in *Dorsey v. Construction Co.*, 42 Wis., 584, in behalf of a conductor of a freight train, who was injured while ascending a side ladder by coming in contact with a cattle chute placed near the track; in *Flanders v. R. R.*, 51 Minn., 193, in behalf of a brakeman who was descending a ladder and was injured by striking a section house; and in *Allen v. R. R.*, 57 Iowa, in behalf of a brakeman injured by striking a cattle chute while getting off a moving train.

Heilig v. R. R., 152 N. C., 469, is also in point. In that case the plaintiff, an employee, was injured while riding on the steps of the engine, according to custom, by coming in contact with the posts of a coal chute. A judgment of nonsuit entered in the Superior Court was set aside, this Court saying: "It (the railroad) cannot permit obstacles to exist so close to the tracks traversed by such engines as to endanger the life and limb of its employees using its engines in accordance with a custom so long established."

The facts in all these cases were more favorable to the defendant than in the case before us, because in them the structures causing injury were built for convenience in operating the railroad, while in this case the shanty was to enable employees to warm, and could have been easily turned without inconvenience to any one so that it would have been safe to pass it.

Applying these authorities to the evidence, we are of opinion there was evidence of negligence in that the defendant failed to provide a reasonably safe place for the plaintiff to work, and that this failure of duty was the cause of his injury.

The second contention of the defendant, as to the contributory negligence of the plaintiff, cannot be raised upon a motion to nonsuit, as the injury occurred after the enactment of chapter 6, Public Laws 1913, which abolishes contributory negligence as a defense in (364)

actions by employees for personal injury. But if considered as the law was before that statute was adopted, it could not be held upon the evidence, as matter of law, that the plaintiff by his own negligence contributed to his injury.

It is true, he knew the general location of the shanty, but he had not passed it on the car, and did not know its distance from the track. He had not been warned of danger, and had the right to assume that the defendant had performed its duty to provide him a reasonably safe place to work.

It is also true that he could have seen the location of the shanty after he passed the car shed, but the shanty was not then more than 15 or 20 feet distant, and as the train was running 10 or 12 miles an hour, he had only a second of time, and was engaged in performing a duty (climbing to the top of the car) which would naturally cause him to look up.

In *Buchanan v. Lumber Co., supra,* a similar contention was made by the defendant, and the Court said, in dealing with it: "He was only out on this running board where the hands were accustomed to ride on their way to work, the train being in motion, and the duty on him, under such circumstances, to observe and note an obstruction of this character and correctly estimate its proper effect—a small stick, leaning over towards the rail—was a very different obligation from that incumbent on defendant company and its employees, charged with the especial duty of keeping the track and roadbed in a reasonably safe condition. In the latter case it would undoubtedly import menace tending to inculpate, whereas to the intestate it might very well be a question of debate and one that, under our law, must be referred to the jury. . . . The prayer, in effect, requested the Court to rule on the question of intestate's conduct as a matter of law, and his Honor submitted it for the consideration of the jury, and the position, as we have stated, is in accord with our decisions."

Also, in *R. R. v. Swearingen, supra:* "The record shows that there was evidence tending to establish that the track scale box was not erected in a reasonably safe place, and that although the plaintiff knew that the scale box was situated adjacent to track No. 2, he did not know that it was so near that it could not be passed, in the performance of his duties as a switchman, without danger. This is apparent when it is borne in mind that the plaintiff testified, in substance, that prior to the accident he had not closely inspected the scale box or taken measurements of the distance from the box to the north rail of track No. 2, and that he did not do more than cursorily observe the structure from a distance, and that he was unaware of the nearness of the scale box to the north rail of track No. 2. . . . The plaintiff was entitled to assume that the de-

fendant company had used due care to provide a reasonably safe place for the doing by him of the work for which he had been (365) employed, and as the fact that the defendant company might not have performed such duty in respect to the scale box in question was not so patent as to be readily observable, the court could not declare, in view of the testimony of the plaintiff as to his actual want of knowledge of the danger, that he had assumed the hazard incident to the actual situation."

In *Dorsey v. Construction Co., supra,* the evidence of contributory negligence was stronger than in this case, and the Court held it was a question for the jury, saying: "The safety of railroad trains depends largely upon the exclusive attention of those operating them, to the track, and to the trains themselves. It is not for the interest of railroad companies, or of the public—with like, if not equal, concern in the safety of trains—that persons so employed should be charged with any duty or necessity to divert their attention. And it appears to us very doubtful whether persons operating railroad trains, and passing adjacent objects in rapid motion, with their attention fixed upon their duties, ought, without express proof of knowledge, to be charged with notice of the precise relation of such objects to the track. . . . Be that as it may, the question cannot well be considered as arising here; for, though it certainly appears that the respondent knew of the general relation of the cattle chute to the track, it does not appear that he knew, or had such means of information as would charge him with knowing, its precise relation to the track, its distance, and its danger. . . . What constitutes negligence, or that want of care on the part of the person receiving the injury, which deprives him of any remedy, and neutralizes, as it were, the wrong of the party by whom the injury is inflicted, is a question depending on various circumstances. What may be negligence under some circumstances and conditions may not under others. As observed by counsel, it is not a fact to be testified to, but can only be inferred from the *res gestæ*—from the facts given in evidence. Hence it may, in general, be said to be a conclusion of fact to be drawn by the jury under proper instructions from the court. It is always so where the fact, or rather the conclusion, is fairly debatable, or rests in doubt. . . . Under this rule, it appears quite manifest that the court could not hold the respondent, as matter of law, guilty of contributory negligence. It was a question for the jury whether, under all the circumstances, he could have avoided the accident by the exercise of reasonable care. His general knowledge of the position and danger of the cattle chute, his means of knowledge, at the time, of its nearness to him, his necessity of being where he was when he was injured, and

his care or want of care for his own safety, under all the circumstances, were proper questions for the jury."

(366) We are therefore of opinion there is error in the ruling of his Honor, and the judgment of nonsuit is set aside and the verdict reinstated.

Judgment will be entered in the Superior Court upon the verdict.

Reversed.

Cited: Transou v. Director General, 182 N. C., 404.

MARTHA H. LEGGETT, EXECUTRIX, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 24 February, 1915.)

1. Carriers of Passengers—Intention to Become a Passenger.

One who has gone into a passenger station of a railroad company and is waiting for the coming of his train, in the room provided for the purpose, with the intent to become a passenger thereon, is entitled to the rights of a passenger.

2. Carriers of Passengers—Negligence—Passenger Depots—Duty of Carrier—Safety of Passenger—Lights at Night.

Common carriers are held to a high degree of care in providing, at their passenger stations, places and conditions by which passengers may board and alight from their trains in safety; and where a passenger received an injury at night, while attempting to board his train from an unguarded platform at a passenger depot, along which the track runs, the failure of the carrier to provide sufficient light is evidence of its actionable negligence.

3. Carriers of Passengers—Passenger Depots—Lights at Night—Contributory Negligence—Trials—Questions for Jury.

Under the circumstances of this case, the mere fact that a passenger attempted to board defendant's train at night from an insufficiently lighted platform cannot be held to bar his recovery as a matter of law, on the question of his contributory negligence. *Beard v. R. R.*, 143 N. C., 137; *Darden v. Plymouth,* 166 N. C., 492, cited and applied.

4. Negligence—Wrongful Death—Cause of Death—Trials—Questions for Jury.

In an action by an administrator to recover damages for the negligent killing of his intestate, when the evidence is conflicting as to whether the injury complained of caused the death, the issue of fact therein raised is for the determination of the jury.

APPEAL by plaintiff from *Bond, J.,* at March Term, 1914, of MARTIN.

Civil action to recover for negligently causing death of plaintiff's intestate.

On motion made by defendant, in apt time, there was judgment dismissing action as on nonsuit, and plaintiff excepted and appealed.

Martin & Critcher, Winston & Matthews, Winston & Biggs, and R. W. Winston, Jr., for plaintiff.

F. S. Spruill for defendant.

HOKE, J. There was evidence on part of plaintiff tending to (367) show that, on the night of 9 December, 1909, the intestate, with another, was in the waiting room of defendant's passenger station at Everett, N. C., with the purpose of taking next train to Williamston, N. C.; that the train was late and the schedule time was 6 p. m., at that time after dark; that the station was alongside of the tracks, some 18 feet from the main line, was something over 3 feet above the ground, and had a platform all around it without railing; that the tracks ran north and south and the platform next the tracks was without steps; that there were steps all along the west end of the building and, at the east end, the steps were 5 feet in length; that you entered from the west end, the usual way, came first to the colored waiting room, and, further along the platform, about 18 feet, was the entry to the white waiting room, where intestate was, and on the night in question there was no light on the platform or in the station grounds, the only light spoken of in the testimony being a small lamp in the ticket office; that about the time the train approached, the intestate and others went out of the waiting room for white people and, as they endeavored to go along the platform to the steps, intestate fell to the ground and was seriously hurt; that he suffered much and there is testimony permitting the inference that after lingering, he finally died from the effect of the injuries then received.

Upon this, the testimony as it now appears, we are of opinion that the plaintiff is entitled to have the cause submitted to the jury and that the judgment of nonsuit should be set aside. The intestate, having gone upon the premises and being in the waiting room of defendant company at or about the schedule time of the train and with intent to become a passenger thereon, is generally held to be or entitled to the rights of a passenger, and it is well understood that common carriers are held to a "high degree of care in providing, at their passenger stations, places and conditions by which passengers may board and alight from their trains in safety." *Roberts v. R. R.*, 155 N. C., 79; *Smith v. R. R.*, 147 N. C., 448; *Mangum v. R. R.*, 145 N. C., 153; Hutchison on Carriers (3 Ed.), secs. 1005 and 1006; Fetter on Carriers of Passengers, p. 592.

That the duty of the company, in respect to keeping safe station

premises, exists, and extends not only to passengers, but "to all who rightfully come upon its premises in pursuance of the invitation which it holds out to the public, and embraces all who come there on legitimate business to be transacted with its agent" (*Pineus v. R. R.*, 140 N. C., 450), and that, on the facts as they are now presented, the obligation, in this instance, to have the premises properly lighted, comes clearly within the principle. *Beard v. R. R.*, 143 N. C., 137; *Ruffin v. R. R.*, 142 N. C., 120; *Grimes v. R. R.*, 36 Fed., 72; Hutchison on Carriers (3 Ed.), sec. 936.

In *Grimes v. R. R., supra,* it was held to be "the duty of a (368) railroad company to properly light the platform connected with its depot within a reasonable time before the arrival and departure of its trains, so as to insure the safety of persons coming to the depot as passengers," and, in *Beard's case, supra, Connor, J.*, delivering the opinion, said: "There was no negligence in the construction of the steps, but it was the duty of the defendant to have and maintain sufficient light along the platform and near the steps or to have a railing so that their employees could use them with reasonable safety. *This* was a *positive duty,* the failure to perform which makes the *defendant liable,* unless the danger in using them was so manifest and obvious that no prudent man would do so in the absence of lights." And these and other authorities are to the effect that, on the same or similar facts to the case before us, the question of contributory negligence is for the jury. Thus, *Connor, J.*, pursuing the subject, in *Beard's case, supra,* and in reference to the conduct of plaintiff (in that case an employee of the company), said further: "It cannot, we think, be said that, using his senses, members, and knowledge of surrounding conditions as described by plaintiff, he was manifestly regardless of safety. Common observation teaches us that many persons, clearly within the pale of ordinary prudence, feel their way along steps in the dark. We can hardly think that, by doing so they can be said to be clearly and obviously negligent." And Fetter on Carriers of Passengers, p. 344, says: "A passenger is not, as a matter of law, guilty of contributory negligence in walking along an unlighted platform to see if there is another coach at the rear end of a train he is about to board," citing, among other cases, *Breulman v. R. R.*, 32 Minn., 390, in same section, *Ala. Gr. So. R. R. v. Arnold,* 84 Ala., 159.

There was nothing to show that intestate was not observant of the care required under conditions provided for him, and the case in this respect is not unlike that of *Darden v. Plymouth,* 166 N. C., 492.

While there are facts in evidence which tend to show that the injuries received on this occasion did not cause intestate's death, there is testi-

mony also, as stated, which permits the inference that these injuries were the cause of such death or contributed to it in a way to render defendant liable. *Penn v. Ins. Co.*, 160 N. C., 399; *Meekins v. R. R.*, 134 N. C., 217. It may be well to note that in *Penn's case, supra,* the existence of an additional cause contributing to plaintiff's injury was held to defeat a recovery, but that was by reason of the express stipulation in the policy that the company "should be liable for injuries attributable directly, and *independently* of all other causes, to external, accidental, and violent means."

There were exceptions by plaintiffs, also, to the rulings of the court below on questions of evidence, but as these are not necessarily determinative and may not arise on another trial or be presented (369) in the same manner, it is considered best not to refer to them more directly.

There was error in the judgment of nonsuit, and this will be certified, that the same may be set aside and a new trial had.

Reversed.

Cited: Lane v. R. R., 192 N. C., 294.

C. N. MASON v. A. H. STEPHENS.

(Filed 10 March, 1915.)

1. Equity—Injunction—Affidavit—Pleadings — Amendments — Court's Discretion—Appeal and Error.

When an affidavit has been used as a complaint in a suit to enjoin the cutting of timber, and so spoken of and regarded by the parties, it is error to dismiss the action upon the ground that no complaint had been filed; and while the action of the trial judge in refusing to permit an amendment to pleadings is usually a matter within his discretion and not reviewable (Revisal, sec. 505), it was error, under the circumstances, for the judge to refuse an amendment in effect to change the affidavit into the form of a complaint.

2. Equity—Injunction—Agreement—Superior Court—Incorrect Theory—New Action—Appeal and Error—Costs.

An agreement in a suit to enjoin the defendant from cutting trees on lands alleged to belong to the plaintiff, by which the defendant was to continue the cutting under a bond to pay damages, awaiting the final result of the action, renders it unnecessary for the original cause to be retained when a new action has since been brought to recover the damages; but the judge having dismissed the suit asking for injunctive relief upon the wrong theory, the costs of appeal is taxed against both parties to this appeal.

MASON *v.* STEPHENS.

APPEAL by plaintiff from *Peebles, J.,* at September Term, 1914, of CRAVEN.

W. D. McIver and R. A. Nunn for plaintiff.
H. L. Gibbs and A. D. Ward for defendant.

CLARK, C. J. The action was brought to obtain a restraining order and an injunction against the defendant cutting certain timber, which was granted. The affidavit was treated as a complaint, though it was not so entitled. The answer refers to it as the "complaint." During the progress of the cause the parties entered into an agreement by which the timber was to be cut by the defendant and the proceeds secured to await the final result of action. A new action was brought to recover such proceeds.

(370) Subsequently the defendant moved to dismiss the action because no complaint had been filed. The plaintiff, thereupon, moved to be allowed to amend his pleading so as to entitle his affidavit as a complaint. This motion the court refused, and dismissed the action.

It is true that the granting or refusal of a motion to amend pleadings is usually in the discretion of the court. Revisal, 505. But in this case the affidavit of the plaintiff had been treated as a complaint and the answer had recognized it as such, and the court was not justified in dismissing the proceeding upon that ground. Revisal, 495.

But the object of the action had been attained by the agreement between the parties that the defendant should cut the timber, securing the proceeds, and a new action having been brought by this plaintiff against the same defendant to recover such proceeds, there was no reason why the cause should have been retained longer on the docket. It was therefore properly dismissed, but for a different reason from that assigned by the court.

While the judgment should be affirmed, the cause of action having been admitted by the agreement which dispensed with the necessity of a restraining order, the costs below and the costs in this appeal should be divided between the parties.

Modified and affirmed.

C. N. MASON v. A. H. STEPHENS AND BLADES LUMBER COMPANY.

(Filed 10 March, 1915.)

1. Trials—Nonsuit—Joint Tort-Feasors—Release of One—Release Pro Tanto.

In an action against two defendants, A. and B.—against A. for wrongfully cutting timber on plaintiff's land and against B. for receiving a part of it and not paying therefor, it is error for the trial judge to enter judgment of nonsuit in A.'s case, because the case of B. had been compromised and nonsuit entered as to him, for a release of that demand could only be a release of A. *pro tanto.*

2. Judgments—Default and Inquiry—Nonsuit—Appeal and Error.

Where a judgment by default and inquiry has been taken and at a subsequent term the inquiry is being duly made, it is erroneous for the trial judge to order a nonsuit.

APPEAL by plaintiff from *Peebles, J.,* at September Term, 1914, of CRAVEN.

W. D. McIver and R. A. Nunn for plaintiff.
H. L. Gibbs and A. D. Ward for defendants.

CLARK, C. J. This is an action against the defendant (371) Stephens for wrongfully cutting timber on plaintiff's land, and against the Blades Lumber Company for wrongfully receiving part of the same and not paying therefor. Judgment by default and inquiry as to Stephens was taken at February Term, 1913, and at May Term, 1913, a nonsuit was taken as to the lumber company.

At the trial term the judge directed a nonsuit as to Stephens on the ground that the nonsuit as to the lumber company had been entered in consequence of a compromise and payment of the amount due by said lumber company. This was error. It appeared that the recovery was sought of the lumber company only for that part of the lumber which it had wrongfully received, and a release of that demand was not a release of Stephens except *pro tanto.* Besides, if it had been for the entire amount, an agreement for a valuable consideration not to sue one joint tort-feasor, or a dismissal of the action as to him, does not release the other, but only to the extent of the payment made. *Chicago v. Babcock,* 143 Ill., 385, Jaggard on Torts, sec. 117; 38 Cyc., 538. It does not have the same effect as the absolute release of one tort-feasor, which it has been held releases the other. Indeed, the lumber company received the lumber from the defendant Stephens, or rather cut it under a contract

with him, and the nonsuit as to the lumber company could do no harm to Stephens, who had no action against the company in any event.

It was also error to direct a nonsuit as to the defendant Stephens, against whom there was a judgment by default and inquiry, taken at a previous term, and which inquiry was then being duly made. *Jordan v. Pool,* 27 N. C., 105.

There was also error in excluding certain testimony offered, which it is not now necessary to discuss.

The judgment of nonsuit is

Reversed.

Cited: Slade v. Stephens, 175 N. C., 348; *Nowell v. Basnight,* 185 N. C., 147; *Braswell v. Morrow,* 195 N. C., 131.

BORDEN BRICK AND TILE COMPANY v. L. O. PULLEY, KING LUMBER COMPANY, ET AL.

(Filed 3 March, 1915.)

1. Mechanics' Liens—Contractual Relations—Interpretation of Statutes.

The claimants for liens for material, etc., furnished for building, under Revisal, secs. 2020 and 2021, are not only required to show, in order to establish their liens, that the materials were actually used in its construction, but that they were furnished to some one having contract relations to the work. Revisal, sec. 2019.

2. Mechanics' Liens—Notice—Contract—Amount Due.

One who has furnished material used in the construction of the building under contract with the subcontractor, by giving the proper notice to the owner is substituted to the rights of the contractor, and his lien is enforcible against any and all sums which may be due from the owner to him at the time of notice given or which are subsequently earned under the terms and conditions of the contract. Revisal, secs. 2019, 2020, 2021.

3. Same—Status of Contract.

One furnishing material to a subcontractor, which is used in a building, who gives to the owner the notice required by statute, before payment made to the contractor, acquires a right to enforce his statutory lien, regardless of the state of the account between the contractor and the subcontractor.

4. Mechanics' Liens — Contractor — Personal Judgment — Principal and Agent—Interpretation of Statutes.

The statutory lien on a building being only enforcible to the extent of the amount due the contractor by the owner at the time of receiving the required notice, etc., a personal judgment against the contractor for ma-

terials furnished his subcontractor cannot be rendered against the original contractor unless it is established that he has been guilty of some breach of duty, under the statute, working to the claimant's prejudice, or an agency of purchase rendering him personally responsible has been otherwise established.

APPEAL by defendant lumber company from *Connor, J.*, at Fall (372) Term, 1914, of WAYNE.

Civil action to enforce materialman's lien. On the hearing it was made to appear that, in 1912, the defendant Y. M. C. A. contracted with the King Lumber Company to build them a hall or home in the city of Raleigh at the contract price of $44,767.48, and that, in July, 1913, the said lumber company sublet the contract for the brick, stone, and cement work to L. O. Pulley for the sum of $12,700; to be paid 85 per cent of the value of material and labor in any one month to be paid by the 15th of the following month and the remainder on final completion and inspection of the work. The contract of Pulley, as stated, obligating said Pulley to furnish labor and material to do all masonry of every description, including plain and reinforced concrete work and brick work; except that the cut stone was to be furnished by the King Lumber Company. That the plaintiff, under contract with L. O. Pulley, supplied him with brick, which were used in said building, to the amount of $3,353.50, and on 31 January, 1913, there was a balance due on said account of $1,898, which the defendant Pulley failed to pay, and plaintiff thereupon served notice in proper form on the defendant the Y. M. C. A. and on the King Lumber Company, claiming a lien on said building for the amount due for said material, pursuant to the statute; that at the time of the said notice given and received there was due from the Y. M. C. A., the owner of the building, to the King (373) Lumber Company, the sum of $1,898, which sum having been attached by the plaintiff in this cause, has been paid into the court, subject to the judgment to be entered herein, and at the time of said notice the balance due and to become due on the contract from the King Lumber Company to L. O. Pulley was $1,669.87; that after the notice served upon contractor, the King Lumber Company paid L. O. Pulley the sum of $1,401.32, leaving a balance still due and owing from the King Lumber Company to said Pulley of $268.55.

There was evidence offered on the part of the King Lumber Company to the effect that, at the time it received the notice from plaintiff, in January, 1913, it had paid to L. O. Pulley all that was then due him under the contract for brick work, and that the $1,401.32 was for money subsequently earned by said Pulley, under the contract, and was for concrete and cement work done under said contract, after the receipt of said notice.

It was contended for plaintiff that, on the facts in evidence, the said L. O. Pulley acted as agent of the principal contractor in making these purchases, rendering such contractor directly liable for the whole amount. And, if not, that if Pulley was subcontractor, the entire amount could be collected under the statutes applicable to and controlling the subject; both positions being controverted by the King Lumber Company.

The jury rendered the following verdict:

1. Was L. O. Pulley at the time of the institution of this action, and is now, a nonresident of North Carolina? Answer: "Yes."

2. In what sum, if any, is L. O. Pulley indebted to plaintiff? Answer: "$1,898 and interest from 3 January, 1913."

3. Was defendant L. O. Pulley subcontractor or agent of defendant King Lumber Company? Answer: "Subcontractor."

4. In what sum, if any, was King Lumber Company indebted to L. O. Pulley under contract on 3 January, 1913? Answer: "$1,669.87."

5. Did defendant King Lumber Company pay any sum to defendant Pulley under its contract with him after plaintiff notified King Lumber Company of its claim for material furnished to L. O. Pulley? Answer: "Yes."

6. In what sum, if any, is King Lumber Company indebted to plaintiff for material furnished to defendant Pulley? Answer: "$1,669.89 and interest from 3 January, 1913."

Judgment on verdict for plaintiff against L. O. Pulley for $1,898 and, among other things, applying the $1,898 due the contractor from Y. M. C. A. to the judgment recovered against L. O. Pulley, and judgment against the King Lumber Company for $1,669.87, to be applied in discharge of the judgment against L. O. Pulley and of the lien
(374) against the Y. M. C. A. building. Defendant the King Lumber Company excepted and appealed, assigning for error, chiefly, the refusal to nonsuit plaintiff on motion made in apt time; second, for certain specified errors in the judgment as rendered.

Langston, Allen & Taylor, and Pace & Boushall for plaintiff.
Dortch & Barham for defendant.

HOKE, J. The statutes of this State, notably Revisal, secs. 2019, 2020, and 2021, provide for a lien on the property in favor of subcontractors, laborers, and materialmen supplying material for the erection, repair, or alteration for the building, when they come within certain conditions and give the notices contemplated and required by the law, and enforcible to an amount not to exceed the sum due from the owner

at the time of notice given. Section 2019 gives the lien to all subcontractors and laborers who are employed to furnish or who do furnish material for the building, etc. Section 2020 provides that any subcontractor, laborer, or materialman who claims a lien as provided in the preceding section may give notice to the owner or lessee of the real estate who makes the contract for the building or improvement at any time before settlement with the contractor, and if the said owner or lessee shall refuse or neglect to retain out of the amount due the contractor under the contract as much as shall be due or claimed by the subcontractor, laborer, or materialman, the latter may proceed to enforce his lien, and, after notice given, no payment to the contractor shall be a credit on or discharge of the lien herein provided. In section 2021 a contractor for building, altering, or repairing of a building, etc., is required to furnish the owner or his agent, before receiving any part of the contract price, an itemized statement of the amount owing to any laborer, mechanic, or artisan employed by such contractor, architect, or other person, or to any person for material furnished, and on delivery of such itemized statement it becomes the duty of the owner to retain a sufficient amount to satisfy these claims. And it is further provided that if the contractor fails to comply with this requirement, that any laborer, mechanic, artisan, or person furnishing materials may furnish to such owner or his agents an itemized statement of the amount due to such laborer, mechanic, or artisan employed by such contractor, etc. And the section provides further that *any person* may furnish to such owner or his agents an itemized statement of the amount due him for materials furnished for such purposes, and on delivery of such notice to such owner or his agent, the person giving the same shall be entitled to all the liens and benefits conferred by this section or by any other law of this State in as full and ample a manner as though the statement had been furnished by the contractor, architect, or other person.

From a careful perusal of the statute, it will appear that it is (375) not every claimant whose material has been used in a building that is entitled to a lien, but unless he is a laborer or mechanic supplying material, and who is given a lien by the express provision of section 2019, a material or lumber man in the strict sense of the term who claims a lien under the provisions of sections 2020 and 2021 will only be entitled thereto when he supplies material for the building to some one having contract relation to the work. And where such lien arises under the provisions of the statute it does so by substituting the claimant to the rights of the contractor, enforcible, as stated, against any and all sums which may be due from the owner at the time of notice given or which are subsequently earned under the terms and stipulations of the

contract. In well considered cases it is said to amount to an assignment *pro tanto* of the amount due or to become due from the owner to the principal contractor, and this regardless of the state of the account between the principal contractor and the subcontractor, who may be the debtor of the claimant.

We are not aware that the question has been heretofore directly presented in this State, but the position is in accord with authoritative cases in other jurisdictions construing statutes of similar import, and of our own decisions, in so far as they now bear upon the subject, and is justified and required by the clear and imperative language of the statute conferring on any person who has furnished material for the purposes of the building, and who gives a notice containing an itemized statement of his claim to the owner or his agent, all the liens and benefits conferred by this section or any other law of the State in as full and ample a manner as though the statement had been furnished by the contractor or architect. *Mfg. Co. v. Andrews,* 165 N. C., 285; *Wood v. R. R.,* 131 N. C., 48; *Clark v. Edwards,* 119 N. C., 115; *Lumber Co. v. Hotel Co.,* 109 N. C., 658; *Pinkston v. Young,* 104 N. C., 102; *Herd v. Holmes,* 113 Ga., 159; *Mack v. Colleran,* 136 N. Y., 617; *Van Clief v. Van Vechten,* 130 N. Y., 571; *Vogel v. Luitwieler,* 130 N. Y., 190; *Masset v. Mills,* 89 Texas, 162; 27 Cyc., pp. 91, 96, 97, 99.

Speaking to the question in *Vogel's case, supra,* at page 190, *Barker, P. J.,* delivering the opinion, said: "The respondent makes the further point that it does not appear that the contractor is indebted to the subcontractor, Poppet, for the work and labor and material furnished in painting the house, and for that reason the appellant did not establish a valid lien on the premises. We cannot assume that Poppet has been paid, and, until the contrary appears, it may be presumed that he has not been, as a liability once created is supposed to continue until it is shown that it has been discharged. But if it appeared that Poppet had been paid for the work and labor which he performed, the right of the appellant to place a lien upon the premises as a security for his
(376) debt was not thereby extinguished; for the right was secured to him by statute, and its validity is not made to depend upon the question whether his vendee had been paid by the party with whom the latter contracted to do the work and labor. Such a construction placed upon the statute would contravene and defeat its express objects and purposes, and so far as it was intended as a protection for materialmen and laborers it would enable the contractor and subcontractor, by concert of action, to deprive them of the benefits of the statute."

It is urged for the appellant that at the time he received notice of plaintiff's claim there was nothing then due from him to his codefend-

ant, Pulley, and that the $1,401.32 paid by him after receiving notice was for work done by Pulley after that date, and that no liability should attach by reason of such payments. Having held that plaintiff's lien, if otherwise valid, could be enforced regardless of the state of the account between the contractor and the subcontractor, the position may not avail to prevent the application of the sum due from the owner, and if it were otherwise, the money earned by Pulley was earned under the stipulations of the contract between the two, and even if plaintiff's lien had to be worked out through the amount due to Pulley, the authorities hold that the notice to the contractor would amount to an assignment *pro tanto* of all sums due to Pulley at the time of notice or subsequently earned by him under the contract. *Budd v. Trustees of Camden School,* 51 N. J. L., 36; *Meyer v. Muckler,* 50 N. J. L., 162; *Anderson v. Hough,* 49 N. J. Eq., 348.

While we approve the judgment in so far as it applies the balance due from the owner to the contractor in satisfaction of plaintiff's claim, we find nothing in the record to warrant or sustain a personal recovery for the $1,669.87 against the King Lumber Company. The statute gives the lien against the property, enforcible to the extent of the amount due from the owner to the contractor. This the plaintiff has obtained, and, the jury having rejected the position that Pulley bought as agent of the lumber company, unless it were established that the company has been guilty of some breach of duty, under the statute, working to plaintiff's prejudice, there is nothing to bring the company under pecuniary liability.

The personal recovery against the King Lumber Company, therefore, must be set aside, and, so modified, the judgment is affirmed.

Modified and affirmed.

Cited: Granite Co. v. Bank, 172 N. C., 358; *West v. Laughinghouse,* 174 N. C., 219; *Building Supplies Co. v. Hospital Co.,* 176 N. C., 89; *Powder Co. v. Denton,* 176 N. C., 432, 433; *Honeycutt v. Kenilworth Development Co.,* 199 N. C., 375; *Hardware Co. v. Burtner,* 199 N. C., 745.

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LAURA LANCASTER ET AL. V. J. L. BLAND ET AL.

(Filed 10 March, 1915.)

1. Appeal and Error—Certiorari—Appeal Dismissed—Newly Discovered Evidence—Superior Courts—Jurisdiction.

Where an appeal has been docketed and dismissed in the Supreme Court under Rule 17, for failure to prosecute it, the adjudication relates back to the final judgment appealed from, and the Superior Court judge is without jurisdiction to consider a motion for a new trial for newly discovered evidence.

2. Appeal and Error—Newly Discovered Evidence—Superior Courts.

An appeal will not lie from the refusal of the Superior Court judge, in his discretion, to grant a new trial for newly discovered evidence.

MOTION for *certiorari.*

W. D. McIver for petitioner.
D. L. Ward for defendant.

CLARK, C. J. This cause was tried and judgment entered at April Term, 1914, of CRAVEN. The plaintiff appealed, but did not perfect his appeal, and at the call of the district at the Fall Term of this Court the defendant docketed the required certificate and moved under Rule 17 to dismiss, which was allowed. Thereafter, at the November Term of the court below the plaintiff filed a petition for a new trial for newly discovered evidence.

His Honor properly held that he had no jurisdiction to entertain the motion. The case was terminated by the final judgment at the April Term of Craven, unless it had been kept alive by prosecuting an appeal. This not being done, the defendant could have had the case put off the docket at the next term in the court below, on motion, for failure to prosecute the appeal (*Avery v. Pritchard,* 93 N. C., 266, and cases citing the same in the *Anno. Ed.*), or the defendant could make the same motion in this Court by docketing the certificate and moving to dismiss under Rule 17. Whichever method the appellee might resort to, and whether the judgment dismissing the appeal for failure to prosecute was entered in the Superior Court or in this Court, such adjudication dates back to the final judgment from which the appeal was not prosecuted.

This case having been adjudged by the order of dismissal in this Court to have been terminated at the April Term, 1914, of the Superior

Court, the attempt to file a motion for a new trial for newly discovered testimony at the November Term of said Superior Court could avail nothing. The bare fact that the name of the case was still on the docket did not make it a live cause. It had been terminated, fully and completely, by the final judgment at the April Term from which the appeal had not been prosecuted.

The court below, therefore, correctly held that he had no (378) power to entertain a motion for a new trial, at a term subsequent to that at which final judgment had been entered. When judgment has been affirmed or reversed on appeal it is a live case till, on receipt of the certificate, judgment has been entered below in conformity therewith, unless final judgment is entered here. *Smith v. Moore,* 150 N. C., 158.

Black v. Black, 111 N. C., 300, and *Banking Co. v. Morehead,* 126 N. C., 279, were live cases in which proper motions could be made because, though the certificate had been sent down, judgment had not been entered in accordance therewith in the court below.

In the present case the adjudication was not on the merits, but simply that the appeal had been abandoned at April Term, 1914, of the lower court, and there was no judgment to be entered in accordance therewith, and no motion could be made in a dead case. The judge had no jurisdiction except to put the case off the docket. The case was not sent back to the lower court at all. Even if the court had jurisdiction and had refused the motion on its merits, no appeal lay. *Fleming v. R. R., ante,* 248.

Certiorari denied.

Cited: Allen v. Gooding, 174 N. C., 273; *Jordan v. Simmons,* 175 N. C., 540; *Sanford v. Junior Order,* 176 N. C., 448; *Godfrey v. Coach Co.,* 201 N. C., 266; *S. v. Casey,* 201 N. C., 623; *S. v. Edwards,* 205 N. C., 662.

NORTH CAROLINA MUTUAL AND PROVIDENT ASSOCIATION v. EDMUND EDWARDS AND WIFE ET AL.

(Filed 10 March, 1915.)

1. Judgments—Motions—Excusable Neglect — Fraud — Independent Action.

A motion refused and not appealed from, having formerly been made in the original action, to set aside a judgment rendered therein for excusable neglect, the independent action is considered, in this appeal, one to set aside a judgment, taken according to the course and practice of the court, and in all respects regular, upon the ground of fraud.

2. Judgments—Independent Action—Fraud—Proof—Sufficiency.

To set aside, in an independent action, a judgment on the ground of fraud, the fraud alleged as the basis of the present action must be shown in the procuring or rendition of the judgment, and it is insufficient when it affects only the validity of the original demand unless the plaintiff in the judgment, or some one for whose conduct he is legally responsible, has wrongfully prevented the opposing party from setting up the defense, or the judgment has been rendered in a court where such defense was not available to him.

3. Insurance — Principal and Agent — Fraud — Evidence — Independent Action.

Where a judgment has been obtained against an insurance company on one of its policies, allegations and evidence tending to show fraud on the part of the insured in obtaining the policy, or an adjustment between the insured and the company's agent, and the insured had received a part of the amount agreed upon, are legal defenses available in the original action and have no bearing upon the question of fraud in the procuring and rendition of the judgment sought to be set aside for fraud in an independent action.

4. Same—Collusion.

Where the conduct and misrepresentations of a local agent of the insurer tend only to show that the insurer was thrown off its guard and deprived of its opportunity to make defense in an action upon its policy, in which judgment had been rendered against it, without proof or suggestion of any collusion between the agent and the insurer, the result of the agent's misconduct is not attributable to the insurer, and furnishes no evidence of fraud in the procurement or rendition of the judgment, necessary to set it aside in an independent action.

(379) APPEAL by defendant from *Bond, J.*, at October Term, 1914, of BEAUFORT.

Civil action to set aside judgment against plaintiff in favor of defendants. The judgment, at November Term, 1912, had been entered by default final on a verified complaint, stating a definite amount due on a policy of insurance, and, so far as appears, was in all respects regular.

In the present action to set the same aside there was allegation with evidence on part of plaintiff tending to show that the original policy had been procured by fraudulent representations on the part of the insured, etc. Second, that the demand had been fully adjusted between the company and the claimants under the policy, and it was contended further by plaintiffs that the judgment complained of had been procured by fraud.

On answer, denying generally the averments in the complaint, issues were submitted and responded to by the jury as follows:

1. Was the issuance of policy for $250 mentioned in complaint procured by fraud on the part of Willie Edwards or Edmund Edwards? A. "No."

2. Was any answer or representation made to the agent or examining physician of plaintiff company falsely by Sophia Johnson which was fraudulent or which was material to the risk assumed by the policy? A. "No."

3. Had the $250 policy been settled or compromised before suit on it was brought, or judgment rendered? A. "No."

4. If there was any defense to suit on said $250 policy, did the company know the facts concerning same when suit on said policy was brought? A. "Yes."

5. Was anything done by either defendant, and if so, by which one, to prevent the plaintiff company from making any defense they had, if any, to the suit mentioned, or any agreement to drop said suit? A. "Nothing by any one."

6. Did the plaintiff company pay anything on said policy (380) before judgment rendered, and if so, how much? A. "Nothing."

7. When P. H. Bell brought said suit and prosecuted same as attorney, did he know that said policy had been procured by fraud, or that it had been paid or compromised, if such had been done? A. "No."

There was judgment on the verdict for defendants, and plaintiff excepted and appealed.

Small, MacLean, Bragaw & Rodman for plaintiff.
Ward & Grimes for defendant.

HOKE, J., after stating the case: The record shows that at a former term, and apparently as an independent proposition, a motion was made by defendant therein, the present plaintiff, to set the judgment aside on account of excusable neglect, and same was denied. No appeal having been taken from such order, the present plaintiff would seem to be concluded, on that question, and in any event, there being no error shown, the judgment will be upheld. *Smith v. Holmes,* 148 N. C., 210; *Scott v. Life Assn.,* 137 N. C., 516; *Cowles v. Cowles,* 121 N. C., 272; Clark's Code (3 Ed.), pp. 310 and 311, and authorities there cited.

The case presented, then, is an action to set aside a judgment taken according to the course and practice of the court and in all respects regular, on the ground of fraud.

While this is a well recognized ground of relief against a judgment, it is allowable, as a rule, when fraud is shown in the procuring or rendition of the judgment, and not when it affects only the validity of the original demand, unless, in this last case, plaintiff in the judgment, or some one for whose conduct plaintiff is legally responsible, has wrongfully prevented the opposing party from setting it up as a defense or

the judgment was rendered in a court where such defense was not available to him. *Mottu v. Davis,* 151 N. C., 237; *Levin v. Gladstein,* 142 N. C., 482; *Owens v. Van Winkle Co.,* 96 Ga., 408, S. E., 31, L. R. A., p. 767, and editorial note; Black on Judgments, secs. 370-378; 23 Cyc., pp. 1010, 1024-1025.

In Black on Judgments, sec. 370, the position suggested is stated as follows: "While it is true that equity will not generally listen to an impeachment of a judgment on the ground of fraud, when the fraud alleged was antecedent to the judgment and was or might have been litigated in the action at law, yet fraud practiced in the very matter of obtaining the judgment is regarded as perpetrated upon the court as well as upon the injured party, and a judgment so procured may be enjoined. The rule has been thus stated: 'The question of fraud which is open to examination in such case is as to something which intervened in the proceedings by which the judgment was obtained, and it (381) must have occurred in the very concoction or procuring of the judgment, and not have been known to the opposite party at the time, and for not knowing which he is not chargeable with neglect or inattention. The fraud must consist in something of which the complaining party could not have availed himself in the court giving the judgment, or of which he was prevented from availing himself there by fraud.' Or, as otherwise stated, the fraud alleged must be extrinsic or collateral to the matters involved in the issues or the trial at law." And again: "The rule is well settled and perfectly inflexible, that if the defendant in an action at law had a good defense, purely legal in its nature, of the existence of which he was aware, and which he had an opportunity to set up, but neglected to defend himself, he cannot come into equity seeking relief against the judgment in that action, on the same grounds which constituted that defense, unless his failure to make the defense was due to circumstances of fraud, accident, or surprise, entirely unmixed with negligence or fault on his own part. In other words, 'a court of chancery will not entertain a party seeking relief against a judgment at law in consequence of his default upon grounds which might have been successfully taken in the said (law) court, unless some reason founded in fraud, accident, surprise, or some adventitious circumstances beyond the control of the party be shown why the defense at law was not made." And in 23 Cyc., p. 1024: "When a defendant, in an action at law, has a good defense, but is prevented from setting it up by the fraud, artifice, direct or misrepresentative, of plaintiff, without negligence or fault on his own part, and a judgment is thereby obtained against him, it is a proper case for equitable relief, *but he must show* that he is free from the *charge* of *negligence* or *lack* of *due attention* to *his case.*"

In the present case the jury have determined all of the issues in favor of the defendants, who were plaintiffs in the judgment, and we are not required to pass upon the exceptions raised as to most of these issues, being of opinion that there is no testimony worthy of consideration tending to show fraud on the part of the defendants in procuring the judgment and none whatever which shows or tends to show that they or any one for whose conduct they are responsible have said or done anything which prevented the present plaintiff from presenting any defense it may have had to their demand. There is allegation and evidence tending to show fraud and misrepresentation on the part of the insured in obtaining the policy, and there are facts in evidence tending to show that these defendants had entered on an adjustment of their demand with the local agent of the company and had received part of an amount agreed upon between them, but both of these are legal defenses which could have been set up and made available in the action, and, as stated, we find nothing in the record to show that defendants are in any way responsible for plaintiff's default. On the contrary, the (382) facts in evidence tend to show that the company was thrown off its guard and deprived of its opportunity to make defense against this claim by the conduct and representations to it of its own local agent, and, there being no proof or suggestion of any collusion between such agent and defendants, the results of his misconduct are in no way attributable to them. And this position is also in support of the judge's ruling, who at a former term declined to set aside the judgment for excusable neglect. *Morris v. Ins. Co.*, 131 N. C., 212.

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

No error.

L. A. HARRISON, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 March, 1915.)

1. Pleadings—Conflict of Laws—Demurrer—Trials—Questions for Jury.

Where the complaint alleges a cause of action under the laws of this State for the negligent killing of plaintiff's intestate by a railroad company, and that the act complained of was caused in an adjoining State, the issue that under the laws of that State no cause of action has been stated cannot be raised by demurrer *ore tenus;* and when the issue is raised by the answer, it is determined here in accordance with the practice of our courts.

2. Same—Evidence.

Where a complaint alleges a cause of action for the negligent killing by a railroad company of the plaintiff's intestate, occurring in another State, and it is contended by the defendant that under the laws of that State there is insufficient evidence that its train struck and killed the deceased, the fact must be determined by the rules of evidence obtaining here.

3. Same—Jurisdiction—Trials.

Where the complaint alleges a cause of action against a railroad company for the negligent killing of plaintiff's intestate occurring in another State, and the defendant pleads the law of that State in bar of recovery, the measure of duty owed by the defendant to the intestate and its liability for negligence must be determined according to the law of that State.

4. Conflict of Laws—Decisions of Other States—Construction—Trials—Questions for Court.

While the laws of another State, when applicable to the controversy, are ordinarily to be determined by the jury when the evidence is conflicting, this rule does not obtain when the decisions of the courts of the other State are alone introduced in evidence, upon the controverted matter, without objection, for then the interpretation of these decisions is exclusively a matter of law for the courts.

5. Same—Trials—Instructions—Appeal and Error.

Where the laws of Virginia are alone applicable in an action brought here against a railroad company for the negligent running upon and killing the plaintiff's intestate, and it appears that, from the interpretation of the decisions of that court introduced in evidence by consent, the plaintiff was a trespasser on the defendant's track at that time, to whom the defendant owed the duty only not to willfully injure him after discovering his helpless and perilous condition upon the track, a charge of the court to the jury, laying down different principles of law to govern the jury, is reversible error, though the instructions were correctly given according to the principles obtaining here.

6. Conflict of Laws—Issues.

An issue framed according to our own laws in an action brought here, but controlled by the laws of another jurisdiction, differing from ours, should be so framed as to be responsive under the laws of the other State.

(383) APPEAL by defendant from *Bond, J.*, at November Term, 1914, of NORTHAMPTON.

Civil action tried upon these issues:

1. Was C. H. Harrison killed by the negligent running of the defendant's engine, as alleged in the complaint? Answer: "Yes."

2. Was there contributory negligence on his part? Answer: "Yes."

3. After said C. H. Harrison put himself in peril, might the killing have been avoided by the exercise of proper care and prudence on the part of the defendant company's engineer? Answer: "Yes."

4. What damage, if any, is plaintiff entitled to recover of defendant? Answer: "$1,000."

From the judgment rendered, defendant appealed.

Peebles & Harris, Gay & Midyette for plaintiff.

W. A. Townes, F. S. Spruill, Mason, Worrell & Long for defendants.

BROWN, J. The complaint alleges that plaintiff's intestate was killed by the negligence of defendant's engineer on the trestle crossing Fountain Creek in the State of Virginia; that the intestate was in a helpless condition on the track crossing the said creek; that a north-bound train was approaching and the engineer failed to keep a proper lookout, so that the engine ran against or over the intestate and killed him.

The defendant denied that its train struck or killed Harrison, and set up that the injury, if it occurred, was in the State of Virginia, and to be governed by the law of Virginia, and that if plaintiff's intestate was struck and killed, it was the result of his contributory negligence in trespassing upon the track of the defendant.

1. It is contended that under the laws of Virginia the com- (384) plaint fails to state a cause of action, in that it fails to allege that the engineer actually discovered the defendant's condition and could have prevented the injury by the exercise of due care.

The complaint alleges a cause of action under the law of North Carolina, and the point that no cause of action is averred under the laws of Virginia cannot be raised by demurrer *ore tenus*. The law of Virginia is properly pleaded in the answer, and an issue is raised to be determined as issues of fact are determined under the practice of our courts.

2. For a similar reason, the contention that under the rulings of the courts of Virginia there is no sufficient evidence that the intestate was struck and killed by the train cannot be sustained. This fact must be determined by the rules of evidence obtaining in this State, and under our decisions there are circumstances in evidence which justified the court in submitting that disputed fact to the jury. *Henderson v. R. R.*, 159 N. C., 581; *Kyles v. R. R.*, 147 N. C., 394.

3. It being alleged in the complaint that the intestate was killed in the State of Virginia, and the law of that State being pleaded in bar of a recovery, it is well settled that the measure of duty the defendant owed to the intestate and the liability of the defendant for negligence must be determined according to the law of that State. *Hancock v. Tel. Co.*, 142 N. C., 163; *Harrill v. R. R.*, 132 N. C., 656.

When the law of another State is pleaded in bar of recovery, an issue of fact is raised to be determined generally by the jury. It is usual to

prove the law of another State by introducing witnesses learned in the laws of that State, or their depositions. Where there is a conflict of opinion of such witnesses, it is for the jury to determine the matter as to whom they believe. But on this trial no witnesses as to the law of Virginia were introduced.

By consent, the decisions and opinions of the Court of Appeals, the court of last resort in the State of Virginia, were introduced in evidence and read to the court and jury. No other evidence as to the law of Virginia was introduced by either party.

When the statute law of another State is material to the decision of a controversy, and the statute is in evidence, it is for the court and not the jury to construe it. So when the decisions and opinions of the highest court of another State are in evidence, and constitute the only evidence, as in this case, of the law of another State, it is for the court and not the jury to interpret them.

Upon the same principle, where a deed or written contract is admitted in evidence it is for the court and not the jury to construe and expound its meaning. It is manifest from the form of the third issue and the charge of the court that the measure of duty the defendant owed
(385) the intestate and its liability for negligence was determined according to the law of this State and not according to the law of Virginia, as expounded by its highest Court.

The defendant excepted to several parts of the charge, the substance of which was that it was the duty of the engineer to keep a vigilant lookout ahead, and if he could by the exercise of reasonable care have seen the intestate in time to have stopped his train, it was negligence if he failed to do so.

That is a fair statement of our law, but it is not the law of Virginia, according to all the admitted evidence in this case. That evidence consisted of the following decisions of the Virginia Court of Appeals: *R. R. v. Joyner,* 92 Va., 354; *Tucker v. R. R.,* 92 Va., 549; *R. R. v. Wood,* 99 Va., 156; *R. R. v. Hall,* 103 Va., 778; *R. R. v. Farrow,* 106 Va., 137; *Hortenstine v. R. R.,* 102 Va., 914; *R. R. v. Bailey,* 110 Va., 833.

These decisions appear to be uniform and clear. They all establish the fact that the Virginia law differs from that of North Carolina in that no duty was owing to Harrison, a trespasser, to anticipate and watch out for him upon the track, and its sole duty was not to willfully injure him after his helpless condition and peril was discovered, and the burden of proof is on the plaintiff to establish that the engineer *did actually see him* in a helpless condition. We quote from some of them:

R. R. v. Wood, 99 Va., 156 (37 S. E., 846), above quoted, holds:

"Ordinarily, the only duty a railroad company owes a trespasser on its premises is to do him no intentional or willful injury. It does not owe him the duty of caution and vigilance until it has such notice or reason to believe that he may be in danger, as would necessarily put a prudent man on the alert."

In *R. R. v. Farrow, supra,* (55 S. E., 569), the Court held: "A railroad company is not required to anticipate and make provision for trespassers upon its tracks; but after it has discovered a trespasser upon its tracks, it must exercise reasonable care to avoid doing him an injury, and if his danger be obvious and imminent, it must use all the means which are available for his protection, which are consistent with its higher duties to others. *R. R. v. Joyner,* 92 Va., 354 (23 S. E., 773)."

The sixth syllabus of this case is as follows: "When a licensee on a railroad track is killed by a moving car, the doctrine of the last clear chance had no application, it appearing that defendant's servant on the train did not see deceased, being engaged in the performance of a necessary duty which he could not neglect."

According to the law of Virginia, as expounded by its Court of Appeals, the intestate was a trespasser and wrongfully on the defendant's trestle. The defendant's engineer did not owe him the duty to keep a lookout for him. When the engineer has actual notice that a trespasser is on the track and in danger, he then owes the duty (386) of protection as far as possible consistent with his higher duty to passengers. *Tucker v. R. R.,* 92 Va., 156; *R. R. v. Joyner, supra.*

His Honor, therefore, erred in charging the jury.

The third issue is misleading to the jury, as the case is governed by the Virginia law and not ours, and it should be framed accordingly.

New trial.

Cited: Hipps v. R. R., 177 N. C., 475; *Tieffenbrun v. Flannery,* 198 N. C., 401; *Howard v. Howard,* 200 N. C., 576, 577; *Wise v. Hollowell,* 205 N. C., 289; *Rodwell v. Coach Co.,* 205 N. C., 295.

J. H. HYATT v. HUGH HOLLOMAN.

(Filed 10 March, 1915.)

1. Bills and Notes—Solvent Credits—Payment of Taxes—Interpretation of Statutes.

A possessory action to recover a horse secured by chattel mortgage, brought by the assignee of the mortgage note against one to whom the

mortgagee had sold the horse, is not an action upon the note upon which the statute requires that the taxes be given in and paid before the owner may be permitted to sue thereon. Revenue Act, Laws of 1911 and 1913.

2. Same—Postponement of Action—Payment Into Court.

Where the assignee of a note has failed to list or pay taxes thereon as a solvent credit, his right of recovery by appropriate action is only postponed until the taxes are paid; and his paying into court a sufficient amount for his taxes after the time fixed therefor by the statute has passed permits him to proceed to judgment.

APPEAL by defendant from *Connor, J.*, at July Special Term, 1914, of HERTFORD.

Civil action tried upon these issues:

1. Is the plaintiff Hyatt the owner of and entitled to the possession of the property described in the complaint? Answer: "Yes."

2. Is the defendant Hugh Holloman in the wrongful possession of said property, and does he wrongfully withhold possession thereof from plaintiff Hyatt? Answer: "Yes."

3. What was the value of said property when the defendant Hugh Holloman replevied and retook the same? Answer: "$100."

4. Did the plaintiff Hyatt, with a view to evade the payment of taxes, fail or refuse to give in to the assessing officer the note and debt referred to in the pleadings? Answer: "Yes."

His Honor rendered judgment in favor of the plaintiff and against the defendant for the possession of the horse taken in the claim and delivery proceedings in this action. The defendant appealed.

Winston & Matthews for plaintiff.

Alex. Lassiter, Winborne & Winborne for defendant.

(387) BROWN, J. The facts in evidence are that one Pell Powell executed and delivered to Godwin & Co. a note for $300, secured by a chattel mortgage on a number of horses. Godwin & Co. transferred the note to the plaintiff. The horse in question was one of those conveyed in the chattel mortgage securing the note, and had come into the possession of Holloman subject to the mortgage by purchase from Pell Powell.

The only ground upon which the defendant resists the judgment is that the owner of the note had not listed it for taxes and paid the taxes thereon, and that, therefore, the note could not be collected under the Revenue Act until the taxes were paid and the note listed.

The section of the Machinery Act of 1911 (section 41) relied on by the defendant is in these words: "(11) If any person shall, with a view

to evade the payment of taxes, fail or refuse to give in to the assessor or the assistant assessor any bonds, notes, claims, or other evidence of debt which are subject to assessment and taxation under this act, the same shall not be recoverable by action at law or suit in equity before any of the courts of this State until they have been listed and the tax paid thereon." This provision is also brought forward in the Revenue Act of 1913, being subsection 12 of section 40 of chapter 203, Public Laws of 1913.

The contention of the plaintiff that this is not an action on the note, and that no judgment can be rendered upon the note against this defendant, and that, therefore, the case does not come within the purview of the statute, is well taken. The mortgage is on a horse and is mere evidence of the right of possession and title. The mortgagor had disposed of the mortgaged property subject to the mortgage.

The plaintiff, the assignee of the mortgage, simply took it from one who had no right to it. This being an action against a stranger in possession of property for the recovery thereof, cannot be considered in any sense an action on the note within the meaning of the statute, as no recovery can be had on the note against this defendant. If that were not so, the record shows that the plaintiff paid to the clerk of the court the sum of $10, a sum sufficient to pay the taxes on the note, and filed with it a written statement insisting that he had properly listed and paid all taxes on the note, but nevertheless paid the same into the court and asked that it be applied to the payment of the taxes on the note. The evidence was conflicting as to whether this particular note had been listed for taxes and the taxes paid.

Under our revenue law solvent credits are listed in a lump sum under oath, and the taxpayer deducts therefrom the amount of his individual personal indebtedness. It is, therefore, difficult to ascertain whether a particular note of small amount is included.

Nevertheless, in deference to the verdict of the jury, the plain- (388)
tiff, the assignee of this note, offered to pay the taxes and paid a sum sufficient in court. This all took place long after the tax listing time was over, and it is too late to correct the tax list.

We have said in *Martin v. Knight,* 147 N. C., 564, that a failure to list a solvent credit pursuant to the statute does not prevent recovery in an action thereon, but postpones the recovery of judgment until it is listed and the taxes are paid.

We think it was proper for the court to permit the plaintiff to pay the sum of money into court in order that it may be applied to the payment of the taxes. It was not the purpose of the General Assembly to confiscate property for the nonpayment of taxes, whether it be real or personal.

In the taxation of real estate the law is very liberal and gives the landowner twelve months within which to redeem it after the land has been sold. It is, therefore, not to be supposed that the Legislature intended to confiscate the property of a citizen simply because it is in the form of a note or other solvent credit.

We think, therefore, that the whole purpose and spirit of the statute was complied with when the plaintiff, who is the mere assignee of the note, pays into court the sum sufficient to reimburse the county for any loss of taxes thereon.

The judgment of the Superior Court is

Affirmed.

Cited: Corey v. Hooker, 171 N. C., 232; *Rankin v. Oates,* 183 N. C., 523; *Wooten v. Bell,* 196 N. C., 657.

W. A. ROBESON ET AL. v. C. MOORE.

(Filed 24 February, 1915.)

1. Estates—Rule in Shelley's Case.

The rule in *Shelley's case* is a rule of property without regard to the intent of the grantor or devisor, and is recognized as such and applied in the courts of this State in proper instances.

2. Wills—Interpretation—"Lend"—Words and Phrases.

In the construction of a will, the word "lend" will be taken to pass the property to which it applies in the same manner as the words "give" and "devise," unless it is manifest that the testator intended otherwise.

3. Estates—Limitations—Rule in Shelley's Case.

Where, under a will, a tract of the testator's land is "loaned" to T. during the term of his natural life, and at his death it is devised to his heirs at law in fee simple, the rule in *Shelley's case* applies and T. takes the land in fee simple.

(389) APPEAL by defendant from *Ferguson, J.,* at December Term, 1914, of MARTIN.

Controversy submitted without action.

On the hearing it appeared that plaintiffs, having contracted to sell and convey to defendant a certain piece of land at a stated price, defendant refused to comply with the contract, claiming that the title offered was defective.

On the facts agreed upon, the court, being of opinion that deed ten-

dered would convey a good title, gave judgment for plaintiffs, and defendant excepted and appealed.

H. W. Stubbs and A. A. Dunning for plaintiff.
Clayton Moore for defendant.

HOKE, J. The immediate grantor of plaintiffs was James G. Taylor, devisee of the tract of land in question, under the will of his father, Jesse Erwin Taylor, and, on the facts agreed, the title offered was properly made to depend upon the construction of the will of said Jesse, in terms as follows:

"ITEM 5. I loan to James G. Taylor during the term of his natural life the following described tract of land, beginning at a gum in Bee Branch, Moye P. Taylor's corner, and running along said Taylor's line $42\frac{5}{100}$ chains; thence S. 55 W. to the line of the lands devised to my daughter, Mollie Smith, in Item 4; thence along said line and along Julian H. Purvis's line and Mrs. Ruth Taylor's line and M. P. Taylor's line to a dead elm in Bee Branch; thence up said branch to the first station; containing 190 acres, more or less; and at the death of said James G. Taylor I give and devise the said land to his heirs at law in fee simple forever."

The case states that James G. Taylor is now living and has two children, and defendant contends that, under said clause, the devisee took only a life estate.

It is established by repeated decisions of the Court that the rule in *Shelley's case* is still recognized in this jurisdiction, and where the same obtains it does so as a rule of property without regard to the intent of the grantor or devisor. *Jones v. Whichard,* 163 N. C., 241; *Price v. Griffin,* 150 N. C., 523; *Edgerton v. Aycock,* 123 N. C., 134; *Chamblee v. Broughton,* 120 N. C., 170; *Starnes v. Hill,* 112 N. C., 1.

In *Jones v. Whichard, supra,* a very accurate statement of the rule is given, with approval from Preston on Estates, as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without interposition of another estate of an interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in suc- (390) cession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."

It is further held here and elsewhere that, in the construction of a will, the word "lend" will be taken to pass the property to which it applies in the same manner as the words "give" and "devise," unless it

is manifest that the testator intended otherwise. *Sessoms v. Sessoms,* 144 N. C., 121, citing *Cox v. Marks,* 27 N. C., 361; *King v. Utley,* 85 N. C., 59, and other cases.

Applying the principles as approved and stated in these cases, we think it clear that plaintiff's grantor, James G. Taylor, took a fee-simple estate, the devise giving him an estate in the property for life and then to his heirs general to take in succession forever.

There is no error, and the judgment below is

Affirmed.

Cited: Smith v. Smith, 173 N. C., 125; *Cohoon v. Upton,* 174 N. C., 89; *White v. Goodwin,* 174 N. C., 726; *Byrd v. Byrd,* 176 N. C., 114; *Nobles v. Nobles,* 177 N. C., 245; *Wallace v. Wallace,* 181 N. C., 161; *Curry v. Curry,* 183 N. C., 84; *Bank v. Dortch,* 186 N. C., 512; *Fillyaw v. Van Lear,* 188 N. C., 775; *Waller v. Brown,* 197 N. C., 510.

CHARLES BRINN v. INDEPENDENT STEAMBOAT LINE ET AL.

(Filed 10 March, 1915.)

Vendor and Purchaser—Possession of Purchaser—Payment Upon Condition—Libel—Other Liens—Title—Liability of Purchaser.

A sale of a boat having been made upon agreement that the purchaser take immediate possession and the check for purchase price be retained in the hands of a third person until the seller had canceled of record a certain mortgage on the property. *Held:* The title to the boat passed to the purchaser upon his taking possession, and upon the cancellation of the mortgage the seller was entitled to the purchase price, notwithstanding the boat had been libeled in the meanwhile and a lien thereon for damages to its cargo, while in the purchaser's possession, had been established by judgment of the court.

APPEAL by defendant from *Peebles, J.,* at September Term, 1914, of CRAVEN.

D. L. Ward for plaintiff.

R. A. Nunn for defendant.

CLARK, C. J. On 27 December, 1912, the plaintiff Brinn sold a certain boat called the "H. L. N." for $300 to the defendant steamboat line, who took possession of same. A bill of sale was drawn by Brinn and a check for $300 by the defendant and both were deposited with

one Hardison to be held until the mortgages on the boat should be canceled, when the bill of sale should be recorded and the check delivered to Brinn. The mortgages were canceled 4 February, 1913, but the defendant company notified Hardison not to deliver said check nor to record said bill of sale and refused to pay the $300, (391) to recover which this action was brought.

The defendant alleged and offered evidence that it bought the boat upon the express condition that it should be delivered free from all encumbrances; that besides the mortgages which have been canceled, there was a lien on the machinery for $38 and another on the boat for $83, and that before the bill of sale was recorded the vessel was libeled for damages to its cargo, and that in the proceedings to enforce collection of such damages the holders of the above liens intervened and the boat was sold under the decree of the United States Circuit Court, and the proceeds of the sale were applied to such damages and these two small liens.

The plaintiff contends that as the damages to the cargo were sustained after the defendant took charge of the boat, no liability attaches to the plaintiff therefor. The defendant contends that title had not passed at the time and that the mortgages were not canceled when the vessel was libeled, and hence the plaintiff cannot recover.

The court being of opinion that as between the parties the title passed without recording the bill of sale upon the delivery of the boat, instructed the jury that if they believed the evidence there was a delivery of the boat to the defendant, and that when the mortgages were canceled on 4 February, 1913, Brinn became entitled to the check, and gave judgment that he should recover $300, with interest from that date. The court was evidently of the opinion that the two small liens for $38 and $83 above stated were not embraced in the agreement for the cancellation of the mortgages, or that the defendant, having taken possession of the vessel, was liable for such liens, or at most had a claim against the plaintiff for the amount of such encumbrances. In this there was

No error.

RICHMOND CEDAR WORKS v. ROPER LUMBER COMPANY.

(Filed 10 March, 1915.)

1. Deeds and Conveyances—Words of Inheritance—Estates for Life.

A deed to lands without the use of the word "heirs" in connection with the name of the grantee, executed prior to 1879, conveys only a life estate to the grantee.

2. Reformation of Instruments — Equity — Mutual Mistake — Lapse of Time—Evidence Lost.

Courts of equity will reform and correct a deed upon the ground of mutual mistake of the parties, in proper instances; but its jurisdiction should be cautiously exercised by the courts, and the relief should be denied except in clear cases, particularly when the parties to the deed are dead and the evidence relating to the transaction has been lost by lapse of time; and an unexplained delay for an unreasonable time, with the adverse party in possession (in this case, for twenty years), will deny the right to the party seeking it.

3. Reformation of Instruments — Equity — Mutual Mistake — Deeds and Conveyances—Connected Paper Title—Color—Evidence.

The fact that a party seeking to reform a deed for mutual mistake does so to enable him to set up adverse possession under color thereof against a party having the true and connected title will have weight in equity against the relief prayed for.

4. Deeds and Conveyances—Words of Inheritance—Limited Warranty—Intent—Estates for Life.

It is held that a deed to swamp lands, made in 1857, conveying all the grantor's right, title, and interest in and to the lands, with sufficient description, without the use of the word "heirs" in connection with the name of the grantee, reciting it was purchased by the grantor at a certain commissioner's sale in 1832, but no deed therefor had been received, with warranty only as to the grantor and heirs, and no other person, affords no evidence within itself that by mutual mistake the words of inheritance, necessary to create a conveyance in fee at that time, had been omitted from the instrument by mutual mistake; but, to the contrary, only a life estate was intended to be and was conveyed.

5. Reformation of Instruments—Equity—Right to Reform—Estates—Limitation of Actions—Adverse Possession.

The right to reform a deed to lands for mutual mistake is not an estate in the lands, and, when corrected, the reformed instrument cannot relate back so as to render seven years possession of the lands theretofore held by the claimant such as to ripen his title therein, as against the rights of one having the connected paper title.

6. Reformation of Instruments—Equity—Lost Deeds—Evidence.

The principles obtaining in actions for the reëxecution of lost deeds do not apply to suits to reform conveyances of land for mutual mistake.

(392) APPEAL by plaintiff from *Long, J.*, at June Special Term, 1914, of GATES.

Petition to rehear an appeal disposed of at the last term without an opinion, the Court being equally divided, *Associate Justice Brown* not sitting.

The action is to determine the title to land and to recover damages for trespass thereon.

The plaintiff introduced a grant from the State to John Fontaine, of date 10 July, 1788, for the purpose of showing title out of the State.

The next deed offered by the plaintiff was one from Joseph Allyn to George T. Wallace, of date 16 March, 1857, which reads as follows:

"This deed, made this the 16th day of March, in the year 1857, between Joseph T. Allyn, grantor, to George T. Wallace, for the consideration of $200 paid by the said Wallace, and the said (393) Allyn doth give, bargain, and sell to the said Wallace all of his right, title, and interest in and to a juniper swamp, called the Fountain Swamp, situate, lying, and being in the county of Gates in the State of North Carolina, and described as follows: [Here follows description.]

"One-third of the above tract of land was sold to the late George Douglas more than twenty years since, and the said Douglas' portion was divided off by writing signed by the parties, and his third part is not included in this sale. The said tract of land was purchased of the commissioners of the estate of the late T. Proctor in June, 1832, and no deed had been made to the grantor; and the said Allyn conveys *all* right and title that is vested in him and his *heirs* and warrants against them, and no other person. Witness my hand and seal.

"JOS. T. ALLYN. [SEAL]"

The plaintiff then offered a deed from George T. Wallace to the Richmond Cedar Works, Limited, dated 3 April, 1885, and a deed from the Richmond Cedar Works, Limited, to the plaintiff, dated 2 July, 1891.

The plaintiff alleged in its complaint that the word "heirs" in connection with the name of the grantee was omitted from the deed of Allyn to Wallace by mutual mistake, but it offered no evidence in support of this allegation except the deed itself.

The plaintiff offered evidence tending to locate the land described in the Fontaine grant, and evidence tending to show that the land described in the deed from Allyn to Wallace and the deed from Wallace to Richmond Cedar Works, Limited, and the deed from Richmond Cedar Works, Limited, to Richmond Cedar Works lay within the bounds of said grant, and locating the land described in said deed.

The plaintiff offered evidence tending to show that the land in controversy was swamp land and in a swamp of more than 2,000 acres.

There was evidence tending to show that George T. Wallace, the grantee in the deed from Allyn to Wallace, had been in adverse possession of the land in controversy continuously for more than seven years prior to 1884, but neither plaintiff nor those under whom it claims have had any possession since 1884.

The defendant introduced a number of deeds beginning with deed from the heirs of John Fontaine and deeds to those under whom it claims from them to itself, and introduced parol evidence tending to

locate these deeds as covering the *locus in quo,* and also evidence of continuous adverse possession in itself of the land in controversy for more than twenty years prior to 1904.

At the close of all the evidence the defendant moved for judgment of nonsuit.

The motion was allowed, and the plaintiff excepted and appealed.

(394) *Winston & Biggs for plaintiffs.*
Small, MacLean, Bragaw & Rodman for defendants.

ALLEN, J. The deed from Allyn to Wallace under which the plaintiff claims conveyed only a life estate, as it was made before 1879, and the word "heirs" is nowhere used in connection with the name of the grantee (*Cullens v. Cullens,* 161 N. C., 344), and as the grantee therein is dead, there is a failure of title in the plaintiff unless the deed is reformed and converted into a fee.

The jurisdiction of a court of equity to reform and correct a deed upon the ground of mutual mistake is well established, but it is a jurisdiction which should be cautiously exercised and should be denied except in clear cases, particularly when the parties to the deed are dead and the evidence relating to the transaction has been lost by lapse of time.

The duty devolving upon the Court and the degree of proof required are well and accurately stated in *Ely v. Early,* 94 N. C., 1, which has been frequently approved, where the Court says: "That the Court may, in the exercise of its equitable jurisdiction, correct a mistake in a deed or other written instrument, such as that alleged in the complaint, is not controverted; but it will do so only where the mistake is made to appear by clear, strong, and convincing proof. The Court must be satisfied from the evidence, beyond reasonable question, of the alleged mistake. By the solemn agreement of the parties to it, the deed at once upon its execution becomes high and strong evidence of the truth of what is expressed in it, as between the parties to it. One of its chief purposes is to make such evidence, and it ought not to be changed or modified except upon the clearest proof of mistake. . . . It must stand until by a weight of proof greater than itself a court of equity, in the exercise of a very high and delicate jurisdiction, shall correct it. The Court always acts in such cases with great caution and upon the clearest proof, and in *Wilson v. Land Co.,* 77 N. C., 445, *Mr. Justice Bynum,* having reference to a deed, said: 'The whole sense of the parties is presumed to be comprised in such an instrument, and it is against the policy of the law to allow parol evidence to add to or vary it, as a general rule. But if the proofs are doubtful and unsatisfactory,

and the mistake is not made entirely plain, relief will be withheld upon the ground that the written paper must be treated as the full and correct expression of the intent until the contrary is established.' The same doctrine is laid down in Story's Eq. Jur., pars. 153, 157; Pomeroy Eq. Jur., par. 859; *Rawley v. Flannelly,* 30 N. J. Eq., 612; *Burger v. Dankle,* 100 Pa. St., 113; *Browdy v. Browdy,* 7 Pa. St., 157."

Diligence is also a duty imposed upon the party seeking relief, the maxim of equity being *Vigilantibus non dormientibus equitas subvenit,* and of this maxim Mr. Bispham in his treatise on (395) Equity, sec. 39, says: "It is designed to provoke diligence, to punish laches, and to discourage the assertion of stale claims. By virtue of this maxim such claims are rejected in equity, independently of any statute of limitations. . . . This defense is peculiar to chancery courts, which in such cases act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, and refuse to interfere where there has been gross laches in prosecuting the claim or long acquiescence in the assertion of adverse rights."

In *Simmons v. R. R.,* 159 U. S., 278, the Court says: "It has always been a principle to discourage stale demands; laches are often a defense wholly independent of the statute of limitations." And the same principle was declared in *Capehart v. Mhoon,* 58 N. C., 180, and in *Clements v. Ins. Co.,* 155 N. C., 57.

In the application of the maxim equitable relief was denied in *Tate v. Conner,* 17 N. C., 224, after the lapse of thirty-four years, in *Lewis v. Coxe,* 39 N. C., 199, after forty years, and in *Ditmore v. Rexford,* 165 N. C., 620, after fifty-seven years, the reason being, as stated in the *Lewis case, supra,* that the Court cannot be sure it sees the transaction clearly "through the dim obscurity of so long an interval."

We speak of a delay for an unreasonable time, unexplained and without excuse, and the evidence also shows the element of acquiescence in the assertion of a hostile and adverse claim—the possession of the defendant for twenty years.

Another consideration which weighs against the equitable relief prayed for is that the plaintiff is asking a court of equity to reform a deed to enable it to set up an adverse possession under color against a defendant, who has the true title by mesne conveyances connecting itself with the grant, upon which the plaintiff has to rely to show title out of the State.

Let us, then, examine the deed in the light of the authorities, and in connection with the circumstances that have transpired since its execution.

The strongest position in behalf of the plaintiff is that the grantor, Allyn, undertakes to convey not only his own interest in the land, but also the interest of his heirs; the argument being that if he had not had an estate of inheritance and had not intended to convey it, the word "heirs" would not have been used.

This view is entitled to consideration, but by the use of the word it also appears that he knew its meaning and effect, and an examination of the whole deed indicates caution and circumspection. The grantor is careful in wording the deed so that it shall convey, not the land, but his interest in it, and his warranty is restricted to himself and his heirs.

(396) The reason for this is apparent upon the face of the deed, as the deed itself shows that he had no title at the time of its execution, because while he says he bought the land in 1832, he also states that he had never received a deed, although twenty-five years had elapsed, and he could not well have acquired title by possession if the *locus in quo* is correctly described in the petition as a juniper swamp, not fit for cultivation and not inhabitable by man, a part of the Great Dismal Swamp, a fit abode for bears and other wild beasts.

Instead of the deed affording clear indication of an intention to convey a fee, it shows upon its face that the grantor did not have a fee, and manifests a purpose to cut down the estate conveyed as far as possible, and a purpose to minimize liability in the event of a claim against him.

It also appears that the deed was made fifty-eight years ago, that the plaintiff has held the deed under which it claims more than twenty-four years, that neither the plaintiff nor any one under whom it claims has ever had possession of the land except that prior to 1884 George T. Wallace held possession for seven years, and that during all this time there has been no effort to assert the claim that the deed of 1857 was intended to convey a fee simple, although the evidence introduced by the defendant shows that it has been in possession for about twenty years since 1884.

Giving full effect to the whole deed and considering the attendant circumstances, we are of opinion that the relief prayed for by the plaintiff should be denied.

If, however, the deed should be reformed and converted into a fee, the plaintiff would still be without title, as upon the facts in this record the decree of reformation would not relate back so as to enable the plaintiff to claim that the seven years adverse possession of Wallace was under the deed as reformed.

Color of title and adverse possession ripening it into a true title must go hand in hand, and when Wallace was holding adversely, it was under a paper purporting to convey a life estate and not a fee; and if he was

entitled to reform the deed, it was a mere right in equity, and not an estate.

In the case of *Henley v. Wilson,* 77 N. C., 216, the plaintiff claimed under a deed from one Stone to one McClennahan for life, and contended upon the trial that it appeared from the deed that it was intended to convey a fee simple, and that this vested in him an equitable estate in fee upon which he could recover; and the Court, dealing with this contention, says: "The plaintiff's counsel, on the argument, took the ground that he could maintain the action as equitable owner in possession under the provisions of C. C. P., sec. 55. That provision does not apply; for the plaintiff has *no equitable estate* as a purchaser in possession or other *cestui que trust,* but has only a *right* in (397) *equity* to have Stone converted into a trustee and decreed to execute a deed in fee simple; and the fact that Stone, pending the action, executed the very deed that he would have been required to execute does not vary the case; for the deed took effect only from the time of its delivery, and Stone had no power to make it relate back to the time of the execution of the deed to McClennahan. Indeed, a court of equity has no such power, and could only have required Stone to do what he has done, namely, execute a deed in conformity to the intention of the parties."

It will be noted that the plaintiff is not asking to reform a deed which is a link in a chain of title, nor does the principle apply applicable to the reëxecution of lost deeds, as illustrated by *Hodges v. Spicer,* 79 N. C., 223, and *Phifer v. Barnhardt,* 88 N. C., 333.

The petition to rehear will be dismissed and the judgment of the Superior Court affirmed.

Petition dismissed.

Cited: Glenn v. Glenn, 169 N. C., 730; *Grimes v. Andrews,* 170 N. C., 523; *Johnson v. Johnson,* 172 N. C., 532; *Evans v. Brendle,* 173 N. C., 153; *Boone v. Lee,* 175 N. C., 384; *Hubbard & Co. v. Horne,* 203 N. C., 209.

H. W. OWENS v. BRANNING MANUFACTURING COMPANY AND A. MELSON.

(Filed 3 March, 1915.)

1. Mortgages—Foreclosure—Mortgagee—Trusts.

The right of a mortgagee to foreclose under a power of sale given in mortgage of lands, recognized here, and regulated by our statute, to some

extent (Revisal, secs. 1040-1042 *et seq.*), requires in its exercise the utmost degree of good faith, the mortgagee being regarded as a trustee for the owner as well as the creditor.

2. Same—Assignee of Mortgage—Voidable Sales—Purchasers.

Where the mortgagee of land purchases at his own sale, either directly or indirectly, the transaction, as between the parties and at the election of the mortgagor, is ineffective as a foreclosure, without the necessity of showing actual fraud, and continues the relationship of mortgagor and mortgagee under the terms of the instrument; and this principle applies to the assignee of the mortgage, or the debts secured by it, when it is shown that he or his agent or attorney was in control or charge of the sale.

3. Mortgages—Foreclosure—Voidable Sales—Mortgagee in Possession—Waste—Equity—Accounting.

Where the foreclosure under a mortgage is rendered ineffectual by the purchase of the lands by the mortagee, or his assignee, at the foreclosure sale, who has taken over the property and holds it, he is held to account to the mortgagor for spoil and waste done upon the lands which he has committed or intentionally authorized, while in his possession.

4. Mortgages—Voidable Sales—Waste—Accord and Satisfaction—Trials—Questions for Jury.

The question of accord and satisfaction by the mortgagor's accepting a reconveyance of the land by the mortgagee in possession, under the circumstances of this case, was properly submitted to the jury under conflicting evidence and a correct instruction from the court.

(398) APPEAL by defendant from *Carter, J.*, at Fall Term, 1914, of TYRRELL.

Civil action to recover damages for wrongfully cutting timber on the lands of plaintiff.

There was allegation with evidence on part of plaintiff tending to show that plaintiff, owning a tract of land in said county on which there was valuable timber of pine and gum mortgaged same to one John E. Sykes, the mortgage containing power to foreclose by sale, and afterwards said Sykes sold and transferred the notes to defendant Alonzo Melson; that said Melson held the same till 1910, when he caused the property to be advertised and sold at public sale, and bought same (the notice being signed both by Sykes and Melson) for $31 and took a deed from said Sykes as the mortgagee; that in September, 1911, said Melson sold and conveyed the timber trees on said land to his codefendant, the Branning Manufacturing Company, for $225, granting said company for five years from date the right to cut and remove said trees and to construct on the land "all roads, rollways, cartways, railways, etc., as may be required for the purpose, etc."; that said company, acting under said grant and conveyance, cut and removed all the timber from said

land to the estimated value of $800 to $1,200, and afterwards Melson conveyed back the land to plaintiff, same, so denuded of timber, being worth not more than $50.

Defendants denied that the sale was invalid, contending that it was conducted and made by Sykes, the mortgagee, and was in all respects fair and regular; denied that the timber on said land was worth anything like the amount claimed by plaintiff; alleged that plaintiff took a deed for the land, after the timber was cut, in accord and full satisfaction of any claim he may have had by reason of the cutting. And the Branning Manufacturing Company, in separate answer, alleged that it purchased and paid full value for the timber and cut same under a deed purporting to confer the right to do so, and without any notice or knowledge of any claim or rights of plaintiff in the property, etc.

On issues submitted, the jury rendered the following verdict:

1. Was the sale of John E. Sykes, mortgagee of the land in controversy, valid? Answer: "No."

2. Has there been any accord and satisfaction, as alleged in the answer? Answer: "No."

3. Did the defendants wrongfully cut the timber on the land (399) in controversy, as alleged? Answer: "Yes."

4. What damage, if any, has plaintiff sustained by reason of the wrongful cutting of said timber? Answer: "$500."

The court set aside the verdict against the Branning Manufacturing Company and entered judgment against defendant Melson for $500, the amount of damages assessed, less the mortgage debt and interest, the said debt not having been paid nor any credits entered thereon.

Defendant Melson, having duly excepted, appealed, assigning for error that the court charged the jury, if they believed the evidence, they would answer the first issue "No."

Aydlett & Simpson, Ehringhaus & Small for plaintiff.
M. Majette and I. M. Meekins for defendants.

HOKE, J., after stating the case: The right of foreclosure of a mortgage by sale under the provisions of the instrument and without the interposition of the court has long been recognized in this State and is, to some extent, regulated with us by our statute law. *Averitt v. Elliott,* 109 N. C., 560; *Joyner v. Farmer,* 78 N. C., 196; Revisal 1905, secs. 1040-1042 *et seq.*

In exercising such a right, however, the utmost degree of good faith is required, the mortgagee being looked upon as a trustee for the owner as well as the creditor, and, in applying the principle, it is very gen-

erally held that such a mortgagee is not allowed, either directly or indirectly, to become the purchaser at his own sale, and where this is made to appear the transaction, as between the parties and at the election of the mortgagor, is ineffective as a foreclosure, and the relationship of mortgagor and mortgagee will continue to exist. *Pritchard v. Smith,* 160 N. C., 79; *Jones v. Pullen,* 115 N. C., 465; *Gibson v. Barbour,* 100 N. C., 192.

Under well considered decisions here and elsewhere, the position extends to the case of assignees of the mortgage or the debt secured by it when it is shown that such an assignee, by himself, his agent or attorney, was in control and charge of the sale; the mortgagee only participating by allowing the use of his name for the purpose. *Whitehead v. Hellen,* 76 N. C., 99; *Kornegay v. Spicer,* 76 N. C., 95; *Dyer v. Shurtleff,* 112 Mass., 165; *Gaines v. Allen,* 58 Mo., 537; 27 Cyc., p. 1485.

In the present case and on perusal of the facts in evidence, we concur in the view of his Honor that, in any aspect of the testimony, the sale, in this instance, was in the entire control of the defendant Melson, assignee of the mortgage debt, and he having bought and taken the conveyance under such circumstances, and plaintiff having elected to disregard it, we must hold that, as between plaintiff and said defendant, there has been no valid foreclosure of the mortgage. It is not (400) necessary, in cases of this character, that actual fraud or imposition should be established. The agent and attorney of defendant in this matter is known to be an upright man and an honorable practitioner, and we are well assured that neither existed; but the principle prevails by reason of the position of advantage held by the mortgage creditor and of the temptation and opportunity to exercise it to the debtor's prejudice if a purchase by the trustee or vendor, at his own sale, should be upheld.

Having held that there has been no foreclosure, and it appearing that defendant Melson has acquired the property under circumstances stated by conveyance of the mortgagee, and for which he has heretofore paid nothing, so far as appears, it follows that said defendant has taken over and holds the property as mortgagee, the plaintiff having so elected to treat him, and, as such, he must account to the mortgagor for spoil and waste done upon the land which he committed or intentionally authorized. *Green v. Rodman,* 150 N. C., 176; *Morrison v. McLeod,* 37 N. C., 108; Jones on Mortgages (6 Ed.), sec. 1123. And the principle has been applied to the case where one, knowingly and wrongfully, sells the timber on a tract of land to a lumber company with a view and purpose of having same cut and removed. *Locklear v. Paul,* 163 N. C., 338, citing *Dreyer v. Ming,* 23 Mo., 434.

The subsequent reconveyance of the land to the mortgagor by the defendant Melson may or may not have been in accord and satisfaction of said mortgagor's claims and demands, according to the agreement between them, and this, under a charge to which there is no exception, has been resolved by the jury against the defendant.

There is no error, and the mortgage debt having been very properly deducted from the amount awarded, the judgment against the defendant is affirmed.

No error.

Cited: Morris v. Carroll, 171 N. C., 762; *Roberson v. Matthews,* 200 N. C., 245; *Lockridge v. Smith,* 206 N. C., 179; *Elkes v. Trustee Corp.,* 209 N. C., 833.

K. G. MORRIS ET AL., TAXPAYERS, v. CITY OF HENDERSONVILLE.

(Filed 17 February, 1915.)

Cities and Towns—Paving Streets—Street Railways—Cost of Paving—Direct Liability—Interpretation of Statutes.

Where legislative authority is given a city to pave its streets and to assess one-third of the cost against the property owners on each side thereof, with the further provision that whenever a railroad or street railway is located thereon it may be required to grade and pave that portion of the street to a certain width, etc., constituting the cost a charge against the railroad, etc., to be collected by appropriate action, the charge against the company should be regarded as a primary liability which will relieve the owners upon the street where the railway is located, as well as the city, of that part of the expense.

APPEAL by defendant from *Webb, J.,* at November Term, 1914, (401) of HENDERSON.

Civil action heard on case agreed.

Plaintiffs, taxpayers, and abutting owners on Fifth Avenue, seek to correct an assessment against them for the cost of paving said avenue, alleging that same has been erroneously apportioned by the city authorities: (1) That a portion of paving assessed against a street railroad along the avenue was not first deducted from the estimated cost. (2) That abutting owners were not chargeable with any portion of cost for paving street at point of intersection with cross streets.

There was judgment for plaintiffs on the first position, and defendant excepted and appealed.

Staton & Rector and J. E. Shipman for plaintiff.
McD. Ray and E. W. Eubank for defendant.

HOKE, J. The charter of the city of Hendersonville authorized the municipal authorities to pave the streets under certain conditions, and section 13 in effect provides that when this is done pursuant to the specified requirements, the costs thereof shall be charged according to the amount of paving done in front of their respective premises, one-third each by the property owners on each side of the street and one-third by the city.

In section 14 of the charter it is further provided that whenever a railway or street railway runs its tracks along an avenue, street, or railway, it may be required to grade and pave that portion of the street, avenue, or alley lying between said tracks and 1 foot immediately outside of each rail, etc., and if the owners or operators of said track shall fail or neglect to make the improvement, the city shall make the same and charge the cost thereof to the owners or operators, etc., and the claim shall constitute a debt in favor of the city, to be collected by appropriate action, etc.

In this case it appears from the facts agreed upon that the avenue in question extends from Main Street about 1 mile to the corporate limits; that the Laurel Park Street Railway extends and is operated along the entire length, occupying 7 feet, including the 1 foot on the outside of each rail, and that the city authorities, under the power conferred by the charter, has assessed the railway with the cost of paving that portion of the avenue occupied by its railroad, as above defined, and has assessed against plaintiffs and other abutting owners two-thirds of the entire cost of paving the avenue, without deducting the amount assessed against the railway.

Upon these facts, we concur with his Honor in the view that in making the costs of paving a charge against these owners, in the
(402) proportion of one-third to each, it was intended to make them bear equally in that proportion the costs for which they were liable, and if a portion of the avenue has been paid for by a railroad company, occupying the street, or the same has been lawfully assessed against such company pursuant to the charter and is collectible, the amount should be deducted before apportioning the assessment between the city and the abutting owners. The assessment against the railroad, having been made pursuant to the provisions of the charter, has the effect of imposing the charge against the company as a primary liability, and should be held to relieve the landowner and the city equally to the extent indicated.

This, we think, by fair intendment, is the correct interpretation of the charter provisions and is in accord with authoritative decisions elsewhere. *City of Shreveport v. Prescott et al.,* 57 La. Annual, 1895; *Philadelphia v. Spring Garden, etc.,* 161 Pa. St., 522.

We were referred by counsel for defendant to *Hager v. Melton,* 66 W. Va., 62, as an authority against this position. There is some distinction in that case, as the charter there was silent as to imposing assessments for paving purposes against street railways, and the city authorities, having assessed the abutting owners with two-thirds costs of paving the street, required a street railway to pave between its tracks as a condition for granting the franchise. In any event, the decision, which was by a divided Court, may not be recognized on the facts presented here.

It may be well to note that, on the second position, the judgment below was in favor of the city, and the plaintiffs not having appealed, the question is not before us.

We find no error in the record as presented, and the judgment below is Affirmed.

Cited: Carpenter v. Maiden, 204 N. C., 116.

CLAUDIA L. SINGLETON ET AL. v. M. L. CHERRY ET AL.

(Filed 17 March, 1915.)

1. Husband and Wife—Deeds and Conveyances—Presumptions—Gifts—Uses and Trusts.

The law presumes a gift by the conveyance of land made directly from the husband to his wife, or where he causes it to be conveyed to her, and no resulting trust arises by implication therefrom.

2. Husband and Wife—Deed to Husband—Separate Property—Probate—Interpretation of Statutes.

Chapter 109, Laws of 1911, known as the Martin Act, providing that a married woman may contract and deal with reference to her real and personal property as if she were a *feme sole,* does not alter the effect of Revisal, sec. 2107, requiring certain findings and conclusions by the probate officer to a conveyance of her lands directly to her husband, and her deed not probated accordingly, is void.

APPEAL by defendants from *Ferguson, J.,* at February Term, (403) 1914, of BEAUFORT.

Civil action tried upon this issue:

1. Is the plaintiff the owner of a one-fourth interest in the land described in the complaint? Answer: "Yes."

From the judgment rendered, the defendants appealed.

Ward & Grimes for plaintiffs.

Small, MacLean, Bragaw & Rodman for defendants.

BROWN, J. This suit was instituted by the *feme* plaintiff against the defendants to recover an undivided one-fourth interest in the home place of Robert C. Cherry, who was the father of the defendants and of the former husband of the *feme* plaintiff.

The plaintiffs allege that the land belonged to Harriet C. Cherry or Cornelia H. Cherry, the wife of R. C. Cherry, and that upon her death it descended to her four sons as her heirs at law, and that the interest of Alonzo Cherry, one of her sons, passed by his will to Mrs. Singleton, the wife of Alonzo Cherry, now deceased.

Mrs. Cornelia Cherry died intestate in 1886, and her husband, Robert C. Cherry, died in 1911, leaving a will in which he devised the land to Macon, Claud, and Villa Cherry, the defendants in this action. Alonzo Cherry, the other son, died without issue, 10 January, 1903, leaving a will in which he devised all of his property to the *feme* plaintiff, except such as he might inherit from his father's estate, "which will go to my half-brothers and sisters." He had no half-brothers and sisters, the defendants being his full brothers, but he had one half-sister, a minor child by his father's second wife. The land in question was sold under an execution on 1 July, 1878, issuing against Robert C. Cherry, and was purchased at that sale by George H. Brown, for the sum of $5.

On 10 April, 1879, Brown and wife executed a deed in fee to Cornelia Cherry. On 19 April, 1886, she executed a deed to her said husband. This deed was witnessed by one Congleton and probated and recorded 4 September, 1893, after the grantor's death. No privy examination was ever taken and none appears in the probate.

On 6 November, 1882, Cornelia Cherry executed a deed to her said husband for said land, which was probated and privy examination taken by a justice of peace 6 November, 1882. The defendant has abandoned the position that Cornelia Cherry acquired no title through the Brown deed, and now claims under the two deeds above recited.

(404) It is not necessary to consider the charge of the judge as to the presumption of delivery arising from registration after the death of the grantor, as we are of opinion that both deeds by Mrs. Cherry to her husband are void on their face for lack of proper probate. The deed of 1886 has no privy examination, and we find no sufficient evidence that Mrs. Cherry held the land in trust for her husband.

It is well settled that even where the husband conveys his property direct to the wife, or causes it to be conveyed to her, the law presumes that it is a gift, and no resulting trust arises.

The other deed of 6 November, 1882, from Cornelia Cherry to her husband, under which the defendants claim, has the ordinary privy examination in due form, but the provisions of the Revisal, sec. 2107, have not been complied with. This section requires certain findings and conclusions of the probate officer to be made with reference to contracts between the wife and husband in relation to her separate property.

While the act of 1911, chapter 109, known as the Martin Act, provides that a married woman may contract and deal so as to affect her real and personal property as if she were a *feme sole,* it excepts contracts between herself and her husband. We are of opinion that in a conveyance of the landed estate of a wife by herself to her husband, the requirements of section 2107 must be observed.

In this case, so far as the evidence shows, the wife undertook to convey to the husband her entire landed estate. At least the evidence does not disclose that she had any other real property.

We do not think that the Martin Act intended, in such a transaction between the husband and wife, that the safeguards provided by the statute for the protection of married women should be set aside. It is a mistake to suppose that the case of *Rea v. Rea,* 156 N. C., 530, relied upon by the defendant, applies to the facts of this case, or is any authority that, in the conveyance of real property by the wife to the husband, the provisions of the statute, Revisal, 2107, are dispensed with. In the *Rea case, supra,* the wife owned some shares of stock in the cotton mills and indorsed them to her husband, intending them as a gift. The majority of the Court held that that particular transaction was a valid transfer of the stock, without complying with the said statute. *Vann v. Edwards,* 135 N. C., 661.

No error.

Cited: Butler v. Butler, 169 N. C., 586, 587, 599; *Wallin v. Rice,* 170 N. C., 417; *Frisbee v. Cole,* 179 N. C., 472; *Davis v. Bass,* 188 N. C., 209; *Tire Co. v. Lester,* 190 N. C., 416; *Carter v. Oxendine,* 193 N. C., 480; *Caldwell v. Blount,* 193 N. C., 562; *Bank v. Crowder,* 194 N. C., 315; *Capps v. Massey,* 199 N. C., 198; *Wise v. Raynor,* 200 N. C., 570.

(405)

ALVIN ROYAL ET AL. v. MRS. GEORGIA A. SOUTHERLAND ET AL.

(Filed 17 March, 1915.)

1. Husband and Wife—Wife's Separate Property—Suretyship of Wife—Direct Obligations—Interpretation of Statutes.

A wife by becoming surety on the obligations of her husband creates a direct and separate liability to the creditor of the husband which makes her personally responsible, under chapter 109, Public Laws of 1911, known as the Martin Act, without requiring the statutory formalities necessary to the validity of certain contracts made directly between the wife and her husband.

2. Same—Constitutional Law.

The State Constitution, Art. X, sec. 6, providing that the separate property of the wife shall not be liable for the debts of the husband, has no application to the obligation of the wife as surety of her husband, such obligation being regarded as a direct one between the creditor and herself within the intent and meaning of the Martin Act, ch. 109, Public Laws of 1911.

3. Husband and Wife—Wife as Surety—Fraud—Trials—Evidence.

In an action to recover on a note given under seal by the husband as principal and his wife as surety, representations made to the wife by the husband, unknown to the creditor, can afford no evidence of fraud in the procurement of the instrument set up by the wife as a defense.

4. Husband and Wife—Wife as Surety—Contracts, Written—Parol Evidence—Statute of Frauds.

Where the wife signs as surety on a note of her husband, which she further secures by a mortgage on her lands, evidence on behalf of the wife that she only intended to pledge her land for the payment of the debt is in contradiction of the note, and is incompetent as contradicting the written instrument by parol evidence.

5. Husband and Wife—Married Women—Actions—Parties.

Chapter 109, Public Laws of 1911, known as the Martin Act, in conferring on married women the right of freedom of contract, carries with it the privilege of suing and being sued alone.

APPEAL by *feme* defendant from *Daniels, J.*, at August Term, 1914, of SAMPSON.

Civil action to recover balance due on a note under seal, executed by *feme covert* defendant with her husband, R. B. Southerland, as his surety. The note was given for $1,000, and to secure same a second mortgage on the wife's land was also executed. The land having been sold under decree of foreclosure, the sum of $757.50 was realized thereon as the portion applicable to the present note, and this sum having

been properly entered as a credit, there was recovery against the *feme* defendant for the balance due. Judgment on the verdict for balance due on note, and defendant excepted and appealed, assigning a number of errors.

B. H. Crumpler for plaintiff. (406)
John D. Kerr for defendant.

HOKE, J. The statute of 1911, ch. 109, known as the Martin Act, authorizes married women to contract and deal as if they were unmarried except in reference to conveyances of real estate and as to contracts between the husband and the wife, in both of which cases certain formalities are required to make these conveyances and contracts efficient and binding.

It is the obvious intent and meaning of the statute that a *feme covert* may bind herself by her ordinary contracts (*Lipinsky v. Revell,* 167 N. C., 508), and we see no reason why the privilege or capacity does not extend to contracts of suretyship for her husband when the same are otherwise valid; and the same view has prevailed in other States having laws of similar import. *Pelzer v. Campbell,* 15 S. C., 581; *Major v. Holmes,* 124 Mass., pp. 108-109; *May v. Hutchinson,* 57 Maine, 547.

This is not primarily a contract between the husband and the wife, but, so far as this statute is concerned, is to be properly considered as one between the husband and wife on the one part and the creditor on the other.

It is urged that to allow recovery on the facts presented would be in contravention of Article X, sec. 6, of our Constitution, which provides that the "real and personal property of any female in this State, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female and shall not be liable for any debts, obligations, or engagements of her husband," etc.

The purpose of this section was to protect the estate of the wife from liability for her husband's debts arising under the common law by reason of the coverture, but it was not intended by that section to protect the property from her own obligations. *Vann v. Edwards,* 135 N. C., 661; *Brinkley v. Balance,* 126 N. C., 393.

By the enactment of the Martin Act, conferring the capacity to contract on married women as if they were *femes sole,* when she signs and delivers a note, though it may be as surety, in reference to the creditor or holder the obligation is hers and not his, and the constitutional provision referred to has no application.

It was further contended that his Honor committed error in excluding testimony tending to show certain representations on the part of the husband to the wife as to the effect of putting her signature on the note, but there is no claim or suggestion that these representations were made known to the payee of the note or that he had any part in them.

(407) The note is under seal and given for valuable consideration, and, under the circumstances appearing, the representations to the wife by the husband may not be allowed to affect the creditor.

Again, it is insisted that error was committed in not allowing the *feme* defendant to testify that in signing the note and mortgage to secure the same she only intended to pledge her land for the debt, and did not intend to come under any further obligation; but this would be in express contradiction of her written note, and it is well understood that when the entire agreement is in writing and the language is clear and meaning plain, the same may not be contradicted or varied by parol. In such case, and in the language of the *Chief Justice* in *Walker v. Venters,* 148 N. C., 388, "The written word abides." *Deering v. Boyles,* 8 Kans., 529.

There seems to be no question of parties raised in the record, but there is high authority for the position that in conferring on married women the absolute freedom of contract the right carries with it the privilege and liability of suing and being sued alone. *Patterson v. Franklin, ante,* 75; *Lipinsky v. Revell,* 167 N. C., 508; *Worthington v. Cooke,* 52 Md., pp. 297-309.

We find no error in the record, and the judgment in plaintiff's favor is Affirmed.

Cited: Estes v. Rash, 170 N. C., 342; *Warren v. Dail,* 170 N. C., 410; *Thrash v. Ould,* 172 N. C., 731; *Grocery Co. v. Bails,* 177 N. C., 299; *Croom v. Lumber Co.,* 182 N. C., 219; *Richardson v. Libes,* 188 N. C., 113; *Tise v. Hicks,* 191 N. C., 613; *Taft v. Covington,* 199 N. C., 57; *Barnes v. Crawford,* 201 N. C., 438; *Boyett v. Bank,* 204 N. C., 645.

THE JAMES LEFFEL COMPANY v. W. I. HALL.

(Filed 17 March, 1915.)

Vendor and Purchaser—Contracts—Goods Sold—Conditional Credit.

A contract consists of the coming together of the minds of the parties into an agreement upon the subject-matter, and not what either of them independently supposed the agreement to have been; and in the sale of

an engine, wherein the seller took the note of the purchaser, and it was agreed that an allowance would be made on the note for an old engine belonging to the purchaser in such sum as the former, in his discretion, would fix, and the latter refused the amount thus named, there is no evidence of an agreement upon the amount of the credit to be allowed for the old engine.

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

Action for the recovery of personal property, viz., a 9½ by 12 horse-power engine and a 40 horse-power boiler, which had been sold to the defendant by the plaintiffs, and for which the former had given his note for $318, dated 23 February, 1905, and due one year after its date, plaintiffs retaining the title to the property until the note was paid. The only question in the case is whether defendant is entitled to a credit on the note for the value of an old engine under the fol- (408) lowing circumstances: It appeared that defendant shipped the "old engine" to plaintiffs, subject to their inspection, and if a price for it could be agreed upon by the parties, the same was to be credited on the note; that after an inspection by the plaintiffs, they offered defendant $39 for it, which he refused to take, and they failed to agree as to the price. Plaintiffs thereupon notified the defendant that the old engine was held subject to his orders and directions, it having been shipped, as stated, to the plaintiffs for their inspection and the offer of a price. They wrote to defendant on 25 August, 1909, as follows: "We have your favor of the 20th inst., and as this matter is now in the hands of our attorney, we cannot recall it and will have to let the matter run its course. We trust that you can arrange in some manner to make payment of this claim, so that you will not lose possession of the machinery. In regard to allowance for the old engine, we are willing to take it back and allow you what we can for it. If your railway agent has not been able to secure you a rate so as to ship it as scrap iron, perhaps you had better direct his attention to same again."

There was evidence as to the value of the old engine.

The court instructed the jury that if they found the facts to be as stated by the witnesses, their verdict should be in favor of the plaintiffs for the amount of the note, subject to the admitted credits, and without any credit for the value of the engine. There was a verdict accordingly and judgment thereon, from which defendant appealed.

Gavin & Wallace for plaintiff.

George R. Ward and Stephens & Beasley for defendant.

WALKER, J., after stating the case: There is a suggestion in defendant's brief of fraud on the part of the plaintiffs, but we have failed to find any evidence of it in the case. The agreement was not that the plaintiffs would allow the defendant the value of the old engine, but that, after examining it and knowing its then condition, they would offer him such a price for it as they could afford to give under the circumstances. It was left to them to fix the price that they would be willing to pay, and there was no promise by them to pay its value as fixed by the defendant or any one else, or by the jury. If the defendant wanted any such offer, he should have stipulated for it in language susceptible of that meaning. We cannot make the contract for the parties, but can only construe that which they have made for themselves. We find it expressly stated in the case that the property was shipped to the plaintiffs subject to their inspection, and if the parties could agree upon the price, it should be credited upon the note for $318. This certainly is not a contract to pay the value of the engine, the amount to be left open for future determination, but a definite sum to be agreed upon. The minds of the parties must meet upon one
(409) and the same thing, and the meaning of their contract must be ascertained from its words, and the mutual agreement of the parties, and not merely from the intention, belief, or understanding of one of them. *Bailey v. Rutjes,* 86 N. C., 517; *Pendleton v. Jones,* 82 N. C., 249; *Brunhild v. Freeman,* 77 N. C., 128; *King v. Phillips,* 94 N. C., 555; *Hedgepeth v. Rose,* 95 N. C., 41; *Wilson v. Scarboro,* 163 N. C., 380. "A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree." *Prince v. McRae,* 84 N. C., 674. "It is not the understanding, but the agreement of the parties that controls, unless that understanding is in some way expressed in the agreement. Even if the defendant had clearly shown that it so understood the agreement, it will not do, as the court proceeds not upon the understanding of one of the parties, but upon the agreement of both. No principle is better settled." *Lumber Co. v. Lumber Co.,* 137 N. C., 431. The court, therefore, properly refused to submit the issues tendered by the defendant as to the value of the engine, as there was no evidence to support them, and the other exceptions must be overruled for the same reason.

No error.

Cited: Golding v. Foster, 188 N. C., 217.

BENJAMIN SUMMERLIN ET AL. v. D. G. MORRISEY.

(Filed 17 March, 1915.)

Judicial Sale—Commissioner's Deed—Correction by Court—Appeal and Error—Costs.

A commissioner appointed by the court to sell land involved in the controversy is not a party to the action and has no interest in the subject of it which will give him the right of appeal; and where an appeal of this character has been taken, the costs are taxed against the commissioner personally.

MR. JUSTICE ALLEN did not sit upon the hearing of this opinion.

THIS is an appeal by Henry L. Stevens, one of the commissioners appointed by the former decree of the Superior Court of DUPLIN County, to sell certain lands described in the pleadings in this cause, heard at the January Term, 1915, before *Peebles, J.*

Stephens & Beasley for H. L. Stevens, appellant.
Henry A. Grady, Henry E. Faison, H. D. Williams for appellees.

BROWN, J. This is a motion to dismiss the appeal of Henry L. Stevens, commissioner. It appears from the record in this cause that it is an action brought to sell certain lands for the payment (410) of a debt. At November Term, 1888, W. R. Allen and H. E. Faison were appointed commissioners to make the sale. At February Term, 1889, the appellant, Henry L. Stevens, was substituted by decree in the place of H. E. Faison. At January Term, 1915, the cause came on to be heard before his Honor, *Judge Peebles,* upon a motion to correct the deed made by the commissioners to D. G. Morrisey, the purchaser.

Upon said hearing, his Honor found as a fact "that the deed from H. L. Stevens and W. R. Allen, commissioners, to D. G. Morrisey does not convey the entire tract of land, as described in their report and plat thereto attached, in that one of the lines is left out of the said deed."

The court decreed that the said Allen and Stevens, commissioners, be directed to execute a deed in fee in accordance with the descriptions contained in their report and plat. The commissioner Allen makes no objection to the said decree. One of the commissioners, Henry L. Stevens, excepts to the said judgment and appeals to this Court.

We are of opinion that the appeal should be dismissed. The commissioner is not a party to this action and has no personal interest whatever in the subject of it. It is his duty to obey and not to review judgments of the court appointing him. No judgment has been ren-

dered against him, and if the court has made a mistake, as the appellant contends, that is a matter for the parties to correct by appeal, if they are inclined to do so, and it is not a matter for the commissioner. *Loven v. Parson,* 127 N. C., 301; *Blount v. Simmons,* 118 N. C., 9.

While these authorities are not on all-fours with this case, the principles laid down therein are inconsistent with the idea that a person who is not a party to the action and not affected in any way personally by the judgment of the court can cause its judgments to be reviewed.

The case cited by the appellant from West Virginia, *Ruhl v. Ruhl,* 24 W. Va., 279, is a direct authority against the appellant's position. In that case it is held that "A special commissioner in a chancery cause, or a receiver of the court, is simply an officer of the court, and as such he has no right to intermeddle in questions affecting the rights of the parties, or the disposition of the property in his hands. His holding is the holding of the court, and he cannot interfere in the litigation or ask for the revision of any order or decree affecting the rights of the parties; but when his own accounts or his personal rights are affected, he has the same means of redress that any other party so affected would have." *Blair v. Core,* 20 W. Va., 255; *In re Colvin,* 3 Md. Ch. Dec., 303; *Hinchley v. R. R. Co.,* 94 U. S., 467; *Horey v. McDonald,* 109 U. S., 140.

The appeal is dismissed at the cost of the appellant, Henry L. Stevens. Dismissed.

MR. JUSTICE ALLEN did not sit upon the hearing of this appeal.

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(411)

W. L. WATTERS v. LULA WATTERS.

(Filed 17 March, 1915.)

1. Divorce—Marriage—Mental Incapacity—Voidable Contracts—Ratification—Interpretation of Statutes.

Where one of the contracting parties to a marriage is mentally incapable in law, at the time, to make the contract, it does not *ipso facto* render the ceremony void, but it is only voidable until set aside by an appropriate action, which will not be decreed when it appears that the party seeking the relief has not been misled or in any manner deceived at the time and has knowingly continued the relationship for years, resulting in the birth of several children of the marriage, for therein he will be held to have ratified the contract of marriage. Revisal, secs. 1560, 2083.

2. Divorce—Subsequent Incapacity—Interpretation of Statutes.

Insanity afterwards afflicting a party to a contract of marriage is not a ground for divorce. Revisal, secs. 1560, 2083.

3. Divorce—Mental Incapacity—Fraud.

A marriage contract will not be set aside by the court on the ground of mental incapacity of a party except at the instance of the other party thereto, except when he has entered therein or was induced thereto by reason of fraud, without knowledge of the existing conditions.

4. Divorce—Void Marriages—Interpretation of Statutes.

Construing Revisal secs. 1560 and 2083 together, *it is held* that the only marriages that are void *ab initio* are those within the proviso of section 2083, *i. e.*, where one of the parties was a white person and the other a Negro or an Indian or of Negro or Indian descent to the third generation, inclusive, or bigamous marriages.

APPEAL by plaintiff from *Daniels, J.*, at September Term, 1914, of DUPLIN.

Stephens & Beasley for plaintiff.
Thad Jones for defendant.

CLARK, C. J. This action was instituted August, 1911, to declare void a marriage celebrated between the plaintiff and defendant on 28 July, 1895, upon the ground that at the time of the marriage the defendant Lula Watters was incapable of making or entering into the contract of marriage, for the want of will or understanding. The plaintiff lived with the defendant from the date of the marriage till September, 1903, at which time she was declared a lunatic and placed in a hospital at Goldsboro, where she has remained since, demented and incurable. While the plaintiff lived with his wife she became the mother of five children. There was evidence on the part of the defendant that at the date of the marriage she had sufficient mental understanding to make and enter into a marriage contract. There was also evidence that on the date of the marriage she was weak-minded, and that her condition grew worse until she was finally sent to the hospital. (412) Upon the issue submitted to the jury, they found that the defendant on the date of her marriage had sufficient mental understanding to make and enter into a marriage contract.

There are two exceptions, both to the charge. There is, however, only one point which is clearly presented by the second exception, which is because the court charged: "If the jury shall find from the evidence that the defendant's mind was so weak at the time she was married to the plaintiff that she was not able to understand the marriage contract, and that she did not have sufficient mental capacity to understand the

relations into which she was then entering, and that the plaintiff at the time was not aware of her mental condition, and that he afterwards discovered her mental condition, and that after discovering the same he continued to live with her, and to have children by her, then the plaintiff would be estopped to bring and maintain this suit, and the jury will answer the first issue 'No.' "

Revisal, 2083, "Who may not marry," specifies the instances in which parties are forbidden to marry, and that such marriages "shall be void," naming among the instances, "between persons either of whom is at the time . . . incapable of contracting for want of will or understanding." But mentions, also, among others, where the male person is under 16 or the female person is under 14 years of age, and there is this proviso to the whole section: "No marriage followed by cohabitation and birth of issue shall be *declared void* after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a Negro or an Indian or of Negro or Indian descent to the third generation, inclusive, and for bigamy."

It will be seen from this that the only marriages that are absolutely void are those in the *proviso.* As to the others, they are not void *ipso facto,* but must be declared so—that is, they are voidable. In *Koonce v. Wallace,* 52 N. C., 194, it is said that when at the time of the marriage the female was under 14 years of age, and the parties continued to live together as man and wife after that age, this amounted to a confirmation of the marriage.

In *S. v. Parker,* 106 N. C., 711, it is declared that the only marriages which were absolutely void are those between a white person and a Negro or an Indian, and bigamous marriages; the others need to be declared void. If the parties after arriving at the specified age of consent continue to live together as man and wife, this is a ratification.

This view is clearly set out in Revisal, 1560, under authority of which this action is brought, and specifies "What marriages may be declared void." It provides that the Superior Court, on application of "either party to a marriage contracted contrary to the prohibitions con-
(413) tained in the chapter entitled 'Marriage,' or declared void by said chapter, may declare such marriage void from the beginning, subject, nevertheless, to the proviso contained in said chapter." This recognizes that the only absolutely void marriages are those named in the proviso to Revisal, 2083, and that the others need to be *"declared void."* Though the declaration may be, if granted, that the marriage was void *ab initio,* such marriage is valid until this declaration is made by the court after hearing and trial.

In *Lea v. Lea,* 104 N. C., 603, it is held that an action to have a marriage declared void because of preëxisting disqualifications to enter into marriage relations is an action for divorce. It is only when the marriage comes within the proviso to Revisal, 2083, that the marriage is absolutely void. In other cases the marriage can be ratified by the conduct of the party, who is entitled to make the application for such divorce. The ground for such application can be put forward only by the party who has been imposed on and who has not subsequently ratified the contract and waived the disqualification.

One who was himself competent to contract the marriage, or who has afterwards ratified it, cannot be heard to ask for a divorce on the ground of his own misconduct or fraud in contracting the marriage. In this case there is no contention that the husband was not competent to make the marriage nor that he was deceived, and he has ratified it to the fullest extent. He lived with his wife for eight years, during which time she bore him five children. There is no allegation nor proof of any fraud or force to trap him into the marriage.

There are cases in which marriages have been set aside on the ground that one of the parties seeking it was mentally incapable of contracting the marriage. But in all cases the action was brought at the instance of the party imposed on. In *Crump v. Morgan,* 38 N. C., 91, the action was brought by the guardian of the wife, and it appeared that she had been married clandestinely and under duress by a young man 20 years of age; that the woman was nearly double his age, was notoriously a lunatic and under the care of her guardian, and that she was married by the defendant with knowledge of that fact and in the manner stated in order to get possession of her property. The decree in that case, drawn by *Chief Justice Ruffin,* is clear and full, reciting the facts and pronounces her to be free and divorced from the defendant and of course that the marriage was null and void *ab initio.*

In *Sims v. Sims,* 121 N. C., 297, the action was brought by the guardian of the lunatic, and it appeared that she had been declared a lunatic three days before the marriage, which was declared void *ab initio.* In that case numerous authorities were cited to the same effect. It was held that even though the party seeking relief had not been adjudged a lunatic at the time of the marriage, the court had (414) power to declare the marriage a nullity, citing *Johnson v. Kincade,* 37 N. C., 470; *Setzer v. Setzer,* 97 N. C., 252; *Lea v. Lea, supra.* Though the court has jurisdiction to declare a marriage in proper cases void *ab initio,* they are not *ipso facto,* but must be so declared by a decree of the court, for only in the instances set out in the *proviso* to Revisal, 2083, can they be treated as void in a collateral proceeding. *Setzer v. Setzer, supra.*

In all the cases of our Reports it will be found that the decree was made at the instance of the next friend or guardian of the party wronged, or incompetent. In *Smith v. Morehead,* 59 N. C., 360, the action was brought by the wife herself, who had been imposed upon by fraud, though not a lunatic.

In all cases on the subject, as already stated, though the marriage is declared null and void *ab initio,* it is not held that the marriage relation was dissolved *ipso facto,* but only by the declaration of the court and at the instance of the party entitled to the relief by reason of the fraud of the other party. His acquiescence with full knowledge and capacity is a ratification. *Taylor v. White,* 160 N. C., 38.

Contracts, even conveyances, by persons of nonsane memory "are voidable, but not void." 2 Black. Com., 291; 2 Kent Com., 451, and other authorities cited in *Odom v. Riddick,* 104 N. C., 515. Such contracts can be set aside by action in behalf of the lunatic only, and not by the other party. As in the contract of marriage, the contract is then declared null and void *ab initio,* in behalf only of the person *non compos mentis.*

It is true that, in this case, the plaintiff avers that the defendant's mind at the time of the marriage was such that she was "incapable of making or entering into the contract of marriage with the plaintiff, for the want of will or understanding, which said want of will or understanding was unknown to the plaintiff at the time of the marriage," but at the trial he neither offered evidence nor tendered an issue as to the allegation of want of knowledge on his own part, though he was a witness in his own behalf. He merely says that "soon after the marriage plaintiff discovered that defendant's mind was wrong, and it continued to grow worse." He does not allege nor testify that her mental condition was concealed from him nor that there was any fraud or imposition practiced upon him. Though he testified at the trial that his wife did not have mental capacity to enter the contract of marriage, he continued to remain with her for eight years and until she had borne five children. By his conduct he is estopped to assert that during all those years he did not ratify and confirm the marriage relation. The mental condition of his wife evidently became worse from time to time, whatever it may have been at the date of the marriage and whatever
(415) the cause. Of this we have no information, nor can the Court go into that matter unless our statute made insanity subsequent to the marriage ground of divorce.

The condition of the plaintiff is one that calls for sympathy. But he took his wife "for better or for worse," and our statute does not afford him the right to a divorce because of her present unfortunate condition.

As the court charged, he is estopped, by maintaining the marital relation for so many years, to now assert that she was imbecile or lunatic at the time of the marriage.

No error.

Cited: Sawyer v. Slack, 196 N. C., 700; *Pridgen v. Pridgen,* 203 N. C., 537.

W. P. CLARK v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 17 March, 1915.)

Water and Watercourses—Permanent Damages—Limitation of Actions—Trials—Questions for Jury.

In an action for permanent damages to land alleged to have been caused by a wrongful diversion of the natural flow of surface waters by the upper proprietor, the statute of limitations runs within five years next before the commencement of the action from the time of the commission of the act complained of, which issue is to be determined by the jury, upon conflicting evidence.

APPEAL by plaintiff from *Peebles, J.,* at September Term, 1914, of PITT.

Action to recover damages for the diversion of water.

The defendant denied that it had diverted any water to the injury of the plaintiff, and relied upon the plea of the statute of limitations.

The action was commenced 1 March, 1912, and was tried in September, 1914. Plaintiff introduced the following evidence:

W. P. Clark, plaintiff, testified: That he is the owner of the land described in the complaint, which is the same land described in the deed from John T. Bruce to himself, and that he has been living on said land since 1896. That said land is located about 2 miles from the town of Greenville, and about 1 mile east of the line of the Norfolk Southern Railroad. That said tract of land lies along and is drained through Patrick's Branch. That prior to 1908 his land lying along said branch did overflow slightly during very heavy rains, but that the water would run off quickly. That during 1908 about 17 acres of his land was overflowed and has remained overflowed ever since. That prior to 1908 he always made a good crop on said 17 acres of land, but that since that time he has been unable to make any crops on said piece of land. That prior to 1908 said land was worth $100 per acre, and by reason of the water standing thereon since that time it has been damaged fully

(416) one-half of its value. That said 17 acres of land has been damaged $50 per acre. A great deal more water comes down Patrick's Branch than prior to 1908. Prior to 1908 water would overflow that piece of land, but it would not stand long; now it stands on it all the time.

W. Harvey Allen, a witness for plaintiff, testified: "I am acquainted with the Clark land, and also acquainted with the line of the Norfolk Southern Railroad running from Greenville to Farmville, and I am acquainted with the pocosin through which the railroad runs. Lying about 1 mile west of Clark's line the railroad company cut ditches through a large pocosin which, before the railroad was built, was a flat basin piece of land, and there were several long slashes in there that drained in various courses, and after the railroad company built their railroad there they cut those slashes in little fish holes right down the railroad. Part of it was done at the time they were building the road and part since then. That those slashes or fish holes before the railroad was built emptied into Chinquapin Branch, which emptied into Forbes' mill-pond. After the railroad was built the water from Chinquapin Branch run down the ditches of the Norfolk Southern Railroad and into Patrick's Branch. The second ditches were cut a year or so after the railroad was built. I have been living on the Plank Road, the main road which Mr. Clark's land lies, and I never saw the said road at Patrick's Branch overflow but what a man could go through there dry footed until the Norfolk Southern turned the water down there, and since the railroad turned the water I have been across there at times when it come over my buggy axle, and the land has been so wet that a man could not afford to tend a crop. I think between 15 and 20 acres of cleared land now overflows, and is damaged half or more. The Norfolk Southern Railroad was built six or seven years ago. I cannot say exactly what year it was built."

There was also evidence as to the amount of damages.

At the close of the evidence his Honor said he would charge the jury that the plaintiff could not recover, on the ground that the plaintiff's action was barred by the statute of limitations, and in deference thereto the plaintiff submitted to a judgment of nonsuit and appealed.

F. G. James & Son for plaintiff.
L. I. Moore for defendant.

ALLEN, J. The statute of limitations applicable to the plaintiff's cause of action is section 394, subsection 2, of the Revisal, which limits the time within which an action may be brought to five years from the

time the cause of action accrues, and in *Duval v. R. R.*, 161 N. C., 448, the Court, speaking of this section, says: "Construing the section, the Court has several times held that for such an injury recovery must be for the entire wrong, and the cause of action accrues when the first substantial injury is caused by reason of any structure of a (417) railroad of a permanent nature"; and to the same effect are *Campbell v. R. R.*, 159 N. C., 586; *Stack v. R. R.*, 139 N. C., 366; and *Staton v. R. R.*, 147 N. C., 428.

Applying this rule to the evidence, it is clear that his Honor was in error in holding that upon any view of the evidence the plaintiff's cause of action was barred.

The evidence of the plaintiff himself tends to prove that the first substantial injury was in 1908, but if we discard his evidence, the witness, Harvey Allen, who was testifying at September Term, 1914, said that the road was constructed six or seven years ago, and if we accept the longest period, seven years, this would furnish evidence that the road was constructed in September, 1907, which would be less than five years from the commencement of the action, 1 March, 1912.

This witness also testified that after the road was built the defendant cut ditches down the railroad, a part of the ditches being cut at the time the road was built and a part a year or so thereafter, and that these ditches diverted water.

The only other witness who speaks of the time when the road was constructed is T. E. Hooker, who says: "I think the road was built in 1906"; but this would at most only furnish a conflict in the evidence which would have to be settled by the jury.

For the error pointed out a new trial is ordered.

New trial.

IN RE CHARLES A. BROWN AND G. W. BROWN.

(Filed 17 March, 1915.)

1. Contempt of Court—Adjournment—Publication—Jurisdiction—Power of Court.

The judge of the Superior Court ordinarily has the inherent power to hear and determine matters of contempt of his court, both as to direct and constructive contempts, without the intervention of the jury; but in proceedings relating to constructive contempt by publication of false and scurrilous matters relating to the acts, conduct, and habits of the presiding judge, or concerning his official or personal conduct, published after the adjournment of the court, it becomes a matter personal to the judge, and he must seek redress by the ordinary methods and bring his cause before an impartial tribunal.

2. Same—Statutes—Constitutional Law.

While a statute is unconstitutional which unduly interferes with the inherent power of the Superior Courts to summarily hear matters in contempt of court and punish the offenders, objection may not be taken to Revisal, ch. 17, secs. 939 *et seq.*, on this ground, the provisions being in accordance with the modern doctrine; and having reference to the history of this statute, the context and the language employed, the authority expressly given therein with reference to constructive contempts arising by means of publication, etc., is construed and upheld as written, that the power to punish summarily for defamatory reports and publications, etc., about a matter that is past and ended, no longer exists.

3. Contempt of Court—Jurisdiction—Motion to Dismiss.

The refusal of the court to sustain a motion to dismiss the summary proceedings for contempt was proper in this case, it appearing that the newspaper containing the published matter was circulated in the county wherein the court was held at the time in question.

4. Reference—Discretion—Contempt of Court.

A motion for a reference under section 875, Revisal, is addressed to the discretion of the Superior Court judge, and exception to the order refusing the reference is without merit.

(418) APPEAL by defendant from *Peebles, J.*, in contempt proceedings, heard on rule to show cause, in NORTHAMPTON, in August, 1914.

Attachment for contempt, heard on rule to show cause.

From the facts in evidence it appeared that shortly after the adjournment of May Term of Wayne Superior Court, the same having been held by *Judge Peebles,* assigned to hold the courts of the Fourth Judicial District, in which said county is situate, the defendants, editors and proprietors of the *Weekly Record,* a newspaper published weekly in the city of Goldsboro, N. C., published an editorial article in said paper severely reflecting on the conduct of Judge Peebles, both as an individual and in reference to his manner and methods as judge in presiding over said court. It appeared also that several copies of the paper had been circulated in the county of Northampton, where Judge Peebles resided and where the hearing was had.

On the return day defendants, having first moved for a reference under section 875 of the Revisal, and to dismiss the proceedings for want of jurisdiction, both of which motions were overruled, answered the rule, disavowing an intent to misrepresent or bring the court into contempt or disrepute; alleged that the article was written in good faith and on information believed to be reliable, etc. An affidavit of Mr. G. A. Norwood was also offered, tending to support some of the charges as written.

There were several affidavits from attorneys practicing in the courts of the county and district and elsewhere, and from others, in support of the rule, and tending to show that Judge Peebles was a humane man, a capable, upright, and learned judge, and that nothing improper or unseemly occurred in the conduct of that or any other court presided over by him.

The character and contents of the publication can be suffi- (419) ciently determined by the findings of fact made by the judge at the hearing, and were embodied in the judgment as follows:

"The court finds the following facts:

"1. That the statement published in the *Goldsboro Record* of June 6, 1914, that R. B. Peebles frequently went to sleep on the bench and woke up suddenly and played hell, was false and without foundation in fact.

"2. That the statement in the said issue that R. B. Peebles was so full of whiskey that he went into the solicitor's room for his own room is absolutely false and without foundation in fact; that the said judge had not touched a drop of intoxicating liquor within five and a half hours previous to that time; that it is true that the said judge went to the solicitor's room, which said room was opposite his own room, and lay down to rest at about 6 o'clock in the evening; that said judge went to the solicitor's room for the purpose of resting himself, for the reason that the solicitor had inadvertently locked the door to the judge's room and had kept the key in his pocket, and that at the time when said judge returned to the hotel from the courthouse the solicitor was not present in the hotel, and the said judge went to the solicitor's room to rest purposely, because of the fact that the solicitor had the key to his own room and he could not gain an entrance into his own room until the return of the solicitor with the key to the door thereof.

"3. That the statement that said Judge R. B. Peebles, published in said issue, played setback, or pitch, at night, and while playing said setback or pitch took a drink every ten minutes, and got very drunk, was false and without foundation in fact.

"4. That the publication in said paper, of said issue, that Judge Peebles is unfit to occupy the high and responsible position of judge of the Superior Court of North Carolina, is absolutely false and without foundation in fact.

"5. That the statements contained in an editorial published in said paper of 27 June, 1914, reiterating all of said charges and statements, except the charge that Judge Peebles went to sleep upon the bench and woke up suddenly and played hell, were all false and without foundation in fact.

"6. That each one of the false statements contained in the editorials of the said *Goldsboro Record* of the issue of 6 June, 1914, were made with the intent to defame, degrade, and injure the reputation of said judge, R. B. Peebles.

"7. That all of said charges contained in said issue of said paper on 27 June, 1914, in an editorial, were false, and each charge made in said editorial was made with the intent to defame, degrade, and injure the reputation of said judge, R. B. Peebles.

(420) "8. That the court finds from the facts that said issues of said *Goldsboro Record* of 6 June and 27 June, 1914, containing the said editorials mentioned above, were both circulated and read in Northampton County. I find this fact from inspection of the issues of said paper."

And, upon such findings, the court adjudged respondents to be in contempt, and sentenced them each to pay a fine of $250 and to be imprisoned in the common jail of Northampton County for thirty days.

Defendants excepted and appealed, assigning several errors in the proceedings and judgment.

W. S. O'B. Robinson & Son, M. H. Allen, W. F. Taylor for appellants.
Peebles & Harris, W. H. S. Burgwyn for appellee.

HOKE, J. At common law, the power of courts of record of general jurisdiction to punish for contempt and, in certain instances, by summary procedure, has existed time out of mind; as said by *Judge Blackstone,* "as far as the annals of the law extend."

It is a power inherent in any court engaged in administering justice as a governmental function, and, in the higher courts, established and existent under constitutional provision and in matters essential to the proper and efficient exercise of their jurisdiction, it may not be destroyed or sensibly impaired by legislative enactment. *Ex Parte McCown,* 139 N. C., 95; *In re Gorham,* 129 N. C., 481, and concurring opinion of *Clark, J.,* 489; *In re Deaton,* 105 N. C., 59; *Scott v. Fishblate,* 117 N. C., 265.

While it is understood with us that, in mere matters of procedure and in courts below the Supreme Court which comes under the influence of a special constitutional provision, the question presented may be to some extent regulated by legislation, it is also held that, both as to direct and constructive contempts, the trial is properly had by the court without the intervention of the jury, and usually by the court against which the offense has been committed. *In re Deaton, supra; Baker v. Cordon,* 86 N. C., 116; *Herndon v. Ins. Co.,* 111 N. C., 384; *Horton v. Green,* 104 N. C., 400.

The power in question is conferred to enable a court to command respect and obedience, and it would go far to weaken and, in case of direct contempt, would well-nigh destroy it if the occasion of its present exercise would have to be referred for decision to some other tribunal or agency.

In reference to this procedure by contempt, it was very generally if not universally recognized as the proper method of maintaining order in the courts and of enforcing obedience to their decrees and mandates, and in case of constructive contempt, often arising from false and defamatory publications concerning court trials and pro- (421) ceedings, the power was not infrequently exercised, and this, in earlier times, whether these trials were pending or had terminated. This last position has, however, been very much modified, and owing in a great measure to a different and, to our minds, a truer concept of the nature and extent of this power, and in part, no doubt, to the unusual method of procedure which, in its practical application, usually required that a judge, keenly and at times vitally interested in the result, should consider and determine the questions involved, many of the courts of this country have long held it for law that the right to punish for constructive contempt by reason of false and defamatory publications concerning proceedings in court should be properly confined to such publications about a trial or proceedings still pending; that it was only because and when such publications were calculated to obstruct or unduly interfere with the due administration of justice that such a power could be properly exercised, and that it was only when and to the extent that the judge was presently engaged in dispensing the State's justice that he could be considered as embodying in himself the majesty of the State's law and authorizing him to enforce obedience and respect to the courts and to his official acts; but, after a court had ended and a trial had finally terminated, if false, defamatory, or scurrilous publications were made concerning his official or personal conduct, this became a personal matter, and he must seek redress by the ordinary methods and bring his cause before an impartial tribunal.

In this position, the doctrine of contempt by "scandalizing the court," a term used, I believe, by *Lord Hardwicke,* and without reference to its effect or tendency to obstruct or interfere with the administration of justice, has no place, and the same will be found approved, substantially as stated, in many well considered decisions of the State courts of this country, as, *In re Hart,* 104 Minn., 88; *Story v. The People,* 79 Ill., 45; *Cheadle v. The State,* 110 Ind., 301; *Percival v. The State,* 45 Neb., 741; *Ex Parte Greene,* 46 Tex. Crim. App., 546; *S. v. Anderson,* 40 Iowa, 207, and many others could be cited, is in accord with the rule

prevailing in the Federal Court, both by statute and precedent (*Patterson v. Colorado,* 205 U. S., 454; 1 U. S. Comp. Statutes, sec. 725), and, as a practical proposition, obtained in England in 1899 and for a long period prior to that date. *McLeod v. St. Albans,* Appeal Cases 1899, pp. 549-561. In that case *My Lord Morris,* while asserting the existence of the power as described and stated by *Lord Hardwicke,* in delivering the judgment, said further: "Committals for contempt of court are ordinarily in cases where some contempt *ex facie* of the court has been committed, or for comments on cases pending in the courts. However, there can be no doubt that there is a third head of contempt of court by the publication of scandalous matter of the court itself. *Lord Hardwicke* so lays down without doubt in the case of *In Re Read* (422) *and Huggonson.* (1) He says, 'One kind of contempt is scandalizing the court itself.' The power summarily to commit for contempt of court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person. He must resort to action for libel or criminal information. Committal for contempt of court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. Hence, when a trial has taken place and the case is over, the judge or the jury are given over to criticism. It is a summary process, and should be used only from a sense of duty and under the pressure of public necessity, for there can be no landmarks pointing out the boundaries in all cases. Committals for contempt of court by scandalizing the court itself have *become obsolete in this country.* Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."

True, in the next year, this power was exerted in England in the case of *Reg. v. Gray,* 2 L. R., Q. B. Div., 1900, p. 36, though it may be noted that, in delivering judgment, *Lord Russell* referred to the fact that the article in question, containing scurrilous abuse of the judge and in reference to his conduct as judge while sitting under the Queen's commission, "was published in a newspaper and circulated in the town where he was still holding court."

There are courts in this country, of eminent ability and learning, which still adhere to the earlier position, a notable case being that of *S. ex inf. Crow, Atty.-Gen., v. Shepherd,* 177 Mo., 255, a case very fully commented on in Thomas on Constructive Contempt and *Burdett v. Commonwealth,* 103 Va., 838, and *S. v. Morrill,* 16 Ark., 384; and other decisions are to like purport. And, in North Carolina, this doctrine in reference to constructive contempt was undefined and altogether uncertain until 1870-71, when the Legislature, having its attention called

to the subject by the case of *In re Moore,* then recently decided by the Supreme Court (63 N. C., 397), passed an act (chapter 216, Laws 1870-71) amending our statute on contempt, chapter 177, Laws 1868-69, and which, after reciting that doubts existed as to the extent of the power of the court in the premises, and that it was "due, alike to judicial authority and the freedom of the citizen, that *all* offenses, and especially those for which summary punishments without trial by jury may be imposed by the courts, should be distinctly known and the nature of the punishment defined and prescribed by law," added to section 7 of the former law, "The publication of grossly inaccurate reports of the proceedings of any court," the words, "about any trial or other matter then pending before said court, made with intent to misrepresent or bring into contempt the said court." The amending statute, among other things, then declared: "That the several acts, (423) neglects, omissions of duty, malfeasances, misfeasances, and nonfeasances specified in the former law as amended were the only acts, etc., that should be the subject of contempt of court, and that, if there were any parts of the common law then in force which recognized any other acts, etc., besides those specified, the same were repealed and annulled."

This statute, appearing in Revisal 1905, ch. 17, sec. 939 *et seq.,* has been several times approved in its principal features by decisions of this Court, beginning with *Ex Parte Schenck,* 65 N. C., 353; *In re Walker,* 82 N. C., 95; *In re Patterson,* 99 N. C., 407, and many other cases. And, so far as we can now see, as construed and interpreted in the cases cited and others, notably *Ex Parte McCown, supra; In re Deaton, supra; Scott v. Fishblate, supra,* it recognizes as valid every power that can rightfully be considered as essential to the respect and dignity of the court and the due and orderly administration of justice therein. The act, in different sections and in comprehensive language, purports to confer on the court the power to punish summarily or on notice any and all disorderly behavior tending to interrupt its proceedings or to impair the respect due to its authority—any such conduct before its referees or juries, while engaged in official duties; any breach of the peace, noise, or other disturbance directly tending to interrupt its proceedings; disobedience of or resistance to its lawful decrees, orders, or processes; contumacious or unlawful refusal of any person to be sworn as a witness or to answer any legal or proper interrogatories after being sworn; misbehavior of any and all subordinate officers of the court in any official transaction; and, in reference to constructive contempts, arising by means of publications, etc.: "The publication of grossly inaccurate reports about any trial, or other matter pending before the court," etc.

Having reference to the history of this statute, the context and the language employed, it was clearly the purpose and meaning of the act to restrict the power of the court, in this last respect, to the publication of grossly inaccurate reports about a trial or other matter still pending, and, this being in our view the proper and only permissible occasion for the exercise of such a power in reference to these publications, we are of opinion that the provision of the statute should, in this respect, be upheld as written, and the power to punish summarily for defamatory reports and criticisms, about a matter that is past and ended, no longer exists.

It may be that if a grossly indecent or scurrilous publication about a judge in reference to his official conduct should be made and circulated in the community where he was presently holding court, and about his rulings in such court, conditions might be created where the exercise of the power could be upheld as essential to the due and orderly administration of public justice (a case presented in *Reg. v. Gray, supra*), (424) but no such conditions appear in this record, the facts showing that the publications complained of were made after the court had adjourned, and, so far as appears, after any and all matters referred to concerning the official conduct of the judge had terminated. Under the principles stated, therefore, the respondents may not be dealt with by process of contempt, but, however reprehensible their conduct may have been, redress must be sought before another tribunal and by ordinary methods of procedure.

The motion to dismiss for want of jurisdiction was properly overruled. The court finds as a fact that copies of the publication were circulated in the county of Northampton, where the trial was held, and, if it were otherwise, except in cases to enforce obedience to an order or a decree in a suit pending, this, regarded as an independent or collateral matter, is held to be a question of venue. *Herring v. Pugh,* 126 N. C., 852, and, ordinarily, a change of venue is not allowed in proceedings of this character. 9 Cyc., p. 35. And the exception to his Honor's refusal to order a reference, under section 875 of the Revisal, is without merit. Even if the section applied, it clearly leaves the matter in his Honor's discretion.

For the reasons heretofore stated, the judgment of the lower court must be reversed and judgment entered that defendants go without day.

Reversed.

Cited: S. v. Little, 175 N. C., 745; *In re Fountain,* 182 N. C., 53; *S. v. Hooker,* 183 N. C., 767.

PAUL C. DUPREE ET AL. v. HENRY BRIDGERS ET AL.

(Filed 17 March, 1915.)

1. Attorney and Client—Contingent Fees—Contracts, Written.

A written contract of employment, made with an attorney, that the attorney should prosecute, as such, litigation over lands and receive a part of the lands in compensation for his services upon the contingency of success, will be upheld in accordance to its written terms when there is no element of fraud or undue influence.

2. Same—Lands—Equitable Assignment.

A valid written contract for the compensation of an attorney, that he is to receive a certain part of the lands in controversy for his fee in prosecuting the action, as such, is not revoked by the death of the client, when the compensation is earned by the attorney in accordance with its terms, but is binding upon the lands as an equitable assignment thereof *pro tanto.*

3. Attorney and Client—Contingent Fee—Lands—Compromise—Interpleas—Procedure.

Where a valid written contract for compensating an attorney has been made, by which the attorney is to receive for his services a certain part of the lands, the subject of the litigation, contingent upon recovery; and the attorney starts the suit and continues to do what is necessary for its prosecution, but is stopped therein by a compromise effected by his client, without his knowledge, by which the client has obtained a part of the land, the attorney is entitled to receive the proportionate part of the land thus obtained, in accordance with his contract of employment, and an interplea in the original cause is the proper procedure for him to pursue in enforcing his demand.

4. Issues—Attorney and Client—Contingent Fee.

The issues tendered by the plaintiffs in this action, relating to the value of the services of the interpleader rendered to the estate of the deceased, as attorney, are held not to be responsive to the inquiry, the proper issues being those relating to the value of such services rendered to one of the heirs at law of the deceased, as a party to the action.

APPEAL by plaintiffs Tabitha DeVisconti and B. S. Sheppard (425) and wife from *Peebles, J.,* at October Term, 1914, of PITT.

Petition of interveners Harry Skinner and F. G. James in above entitled cause. His Honor rendered judgment in favor of the interveners upon the pleadings, exhibits, records, affidavits, orders, judgments, and decrees in the cause.

Plaintiffs Tabitha DeVisconti and B. S. Sheppard and wife, Sue May Sheppard, appeal.

J. L. Horton, W. H. Lyon, Jr., for plaintiffs.
Winston & Biggs for interveners.

BROWN, J. The record discloses that on 3 November, 1910, Addie G. DeVisconti made two contracts with Henry Clark Bridgers, whereby she undertook to convey to him one-half of 25 acres of land in the town of Farmville. The said land was to be developed and laid off into lots and she was to have one-half of the lots and Henry Clark Bridgers the other half, and the depot was to be located upon the property when the railroad was completed to Farmville. She also conveyed to him for the consideration of $1 a right of way 100 feet wide through her lands near the town of Farmville, and depot site.

Mrs. DeVisconti lived about one year, and died in November, 1901. She left surviving her one son by a former marriage, named Paul C. Dupree, and two daughters, Tabitha DeVisconti and Sue May DeVisconti. These last two were infants, and F. M. Dupree, their uncle, was their guardian.

After the death of Mrs. Addie DeVisconti, her sister, May Sue Albritton, qualified as guardian of her three infant children, Paul C. Dupree, Tabitha DeVisconti, and Sue May DeVisconti, and employed the petitioners, F. G. James and Harry Skinner, to bring suit to set aside and declare void the above deeds which Henry Clark Bridgers had secured from her sister, on the ground of mental incapacity on the part of the said Mrs. DeVisconti and the unconscionableness of the bargain.

(426) The guardian employed the interveners to bring the above entitled action to set aside the contracts. She made frequent visits to said attorneys and consulted with them in reference to the matter, in consequence of which the action was instituted by said attorneys, who prepared and filed the elaborate complaint set out in the record, and otherwise prepared the case for trial after the defendant had answered and joined issue. Mrs. Albritton died and F. M. Dupree was appointed guardian for the two *feme* infants. Paul C. Dupree had become of age, and then this instrument, it is admitted, was duly executed:

Memorandum of agreement made this the 10th day of March, 1911, between Paul C. Dupree and F. M. Dupree, guardian of Tabitha DeVisconti and Sue May DeVisconti, parties of the first part, and Harry Skinner and F. G. James, parties of the second part:

Witnesseth, that in consideration of $100 and legal services to be performed, the parties of the first part agree to allow and pay to the parties of the second part one-half of their recovery in the case of Paul C. Dupree and F. M. Dupree, guardian of Tabitha DeVisconti and Sue May DeVisconti, against Henry Clark Bridgers, and to this end the parties of the first part have bargained, sold, and conveyed to the parties

of the second part a one-fourth interest in the lands fully described in the first and twelfth sections of the complaint filed in this cause.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year above.

PAUL C. DUPREE. [SEAL]
F. M. DUPREE. [SEAL]

Witness: WINNIE SKINNER.

Paul C. Dupree verified the complaint. The defendant Bridgers employed counsel and filed an answer and otherwise defended the action.

Pending the action, Paul C. Dupree died and his interest in the lands descended to his two sisters, Tabitha and Sue May. It is admitted that on 2 April, 1913, Tabitha DeVisconti, Sue May, who meanwhile had married Ben. S. Sheppard, and Paul C. Dupree, without their attorneys' knowledge and consent, conferred with Henry C. Bridgers, the defendant, compromised and settled the action by a written agreement entered into and set out in the record, whereby certain parts of the lands sued for were relinquished and conveyed by said defendant to the plaintiffs. A consent decree was entered by *Judge Daniels* in the cause, carrying out the compromise and discharging Henry C. Bridgers from the case.

This decree provides, "that it is made without prejudice to the matters and things in controversy between the plaintiffs and the interveners in this action, which said matters are retained for further orders."

Under the written agreement of 10 March, 1911, the inter- (427) veners claim only a share of the land recovered for Paul C. Dupree, who executed the contract or conveyance after he became of age. His Honor, *Judge Peebles,* refused to give judgment for any portion of the *feme* plaintiff's shares, as they are under age, but adjudged that as Paul C. Dupree was admitted to be of age when he executed the agreement, the interveners were entitled to recover one-half of one-third of 5½ acres of land recovered for him under the written agreement.

The plaintiffs demanded a jury trial and tendered certain issues, viz.:

At the hearing of said petition the said Mrs. Sheppard and Miss Tabitha DeVisconti tendered the following issues:

Did the intervener, Harry Skinner, render any service to the estate of Tabitha DeVisconti and Sue May Sheppard? Answer: .....

If so, what was the value of such service? Answer: .....

Did the intervener, F. G. James, render any service to the estate of Tabitha DeVisconti and Sue May Sheppard? Answer: .....

If so, what was the value of such service? Answer: .....

His Honor very properly refused to submit these issues. The execution of the agreement by Paul C. Dupree is admitted and the interveners

claim nothing of the other plaintiffs, although it is certain that they profited largely by the action; but plaintiffs, Tabitha and Sue, deny that they "added anything to their comfort or estate in doing so." At the same time they admit they compromised the action without their attorneys' knowledge and recovered some very valuable land in consequence thereof, although they aver that their mother was fully competent to make the deed to Henry C. Bridgers and allege that this action ought never to have been brought.

If these are the real views of the plaintiffs, it would seem that they should return the land to the defendant. The services which the interveners rendered appear in the record in this case. It is admitted that they advised, after many conferences and examinations, the bringing of this suit. It appears that they issued the summons, filed the bond, prepared and filed the complaint, and prepared the case for trial. They were prevented from trying it by the action of the plaintiffs and defendant. The interveners do not claim upon a *quantum meruit,* and no such issue is raised by the pleadings in this case. The interveners claim Paul C. Dupree conveyed to them, by the instrument above set out, a certain interest in the lands describd in the complaint.

It is not alleged that the said paper-writing was obtained by fraud or that any undue advantage was taken of the grantor in it by these interveners. It is well settled, when an attorney and his client agree in writing as to the amount of compensation to be paid, such agreement is valid, in the absence of fraud. Weeks on Attorneys, p. 580. Nor (428) is this agreement revoked by the death of Paul C. Dupree. It is held that when a party entered into a contract with an attorney, fixing his fees for the recovery of property, the death of the maker of the contract did not revoke it, but that the same was binding upon the funds and constituted an equitable assignment of the same. 15 Howard's Practice Reports, p. 416.

Written contracts between attorneys and their clients are to be treated and enforced as all other contracts, and in the absence of fraud, coercion, or undue advantage, the amount of compensation agreed upon in the contract is held to be conclusive and binding between the parties. Weeks on Attorneys, p. 582; 4 Cyc., p. 987, and numerous cases cited in Note 78; 3 A. and E., 434.

An agreement between an attorney and client that the attorney shall have a lien on the judgment is decisive as to the existence of the lien and its amount. 4 Cyc., p. 1006.

We think, furthermore, that the interplea in the original cause is the proper remedy. That was the remedy pursued in the case of *Barnes v. Alexander,* 231 U. S., 117, where it was held that when attorneys had

contract for one-quarter of the amount recovered, this contract was valid, although contingent, and that the decree of the court awarding compensation to the attorneys under said contract was proper. See, also, Weeks on Attorneys, sec. 368.

The judgment of the Superior Court is

Affirmed.

BRINKLEY & LASSITER v. NORFOLK SOUTHERN RAILROAD COMPANY AND TOWN OF GREENVILLE.

(Filed 17 March, 1915.)

1. Appeal and Error—Unanswered Questions.

The exception that witness for appellant was not permitted by the court to answer his question cannot be considered on appeal unless it is in some way made to appear of record that the answer would have been in appellant's favor.

2. Surface Water—Drainage—Negligence—Evidence—Appeal and Error—Harmless Error.

Where damages to goods stored in a warehouse located in a basement, in a damp, soggy place, are sought in an action alleging it was caused by a wrongful diversion of the flow of surface waters, it cannot be considered for error on appeal that a witness, not having qualified as an expert, was permitted to testify that the water would rise in a basement of this character unless built with concrete floor and walls, as such would naturally be inferred by an intelligent jury from their own knowledge of such conditions, and especially where the question was undisputed in the evidence of both parties at the trial.

3. Appeal and Error—Evidence—Answer to Questions—Harmless Error.

An exception to an answer of a witness that he did not know the information sought to be elicited by the question, cannot be considered as prejudicial, and will not be considered as error on appeal.

4. Surface Waters—Drainage—Negligence—Evidence—City Engineers—Due Care.

In an action against a city and a *quasi*-public corporation for damages to goods from the rising of water in a basement wherein they were stored, alleged to have been caused by an improper or insufficient sewer constructed by the defendant, etc., to carry the water off, with evidence that the defendant city had put in a 24-inch pipe, under a street, and the defendant corporation had continued the same drain across its property below, the minutes of the defendant city, showing the appointment of engineers to construct the drainage of the town, are competent to be shown upon the question of the exercise of due care.

5. Surface Waters—Drainage—Negligence—Evidence—Ordinary Rainfall —Appeal and Error—Harmless Error.

Where damages are sought upon the grounds that they were caused to plaintiff's goods by water rising in his cellar, occasioned by insufficient drainage constructed by the defendant and heavy rains, it cannot prejudice the plaintiff that a witness was permitted to testify that the drainage was sufficient to carry off the water in an ordinary rainfall, when that fact is not controverted on the trial.

6. Surface Waters—Drainage—Ordinary Care—Negligence—Anticipated Rainfalls—Trials—Instructions.

In this action against a city and a *quasi*-public corporation to recover damages to plaintiff's property alleged to have been caused by the negligence of the defendants in providing an insufficient drain for carrying the water off from his lands from rainstorms which should reasonably have been anticipated in that locality, *it is held* that the instructions of the court to the jury correctly imposed upon the defendants the duty of exercising ordinary care and correctly charged upon the question of their liability for their negligence in not doing so. The charge is approved.

(429) APPEAL by plaintiffs from *Daniels, J.*, at March Term, 1914, of PITT.

Action in which the plaintiffs are asking for damages from the defendant railroad company and the town of Greenville for building a culvert and closing a ditch which ran through their land and across Dickinson Avenue immediately under where the railroad crosses. In putting in the improvements, the defendants placed two 24-inch drain tile parallel in said ditch, and built a culvert between 4 and 6 feet high at the opening of said drain tile in the lower edge of plaintiffs' property. Plaintiffs claim damage from the ponding of water by reason of the insufficient opening to carry off the water coming down said ditch, which ran along parallel and near to the walls of their brick warehouse,
(430) alleging that the water caused the walls of said building to give way and crack, and soaked the basement used for ordering and grading tobacco. This was denied by the defendants.

The evidence tended to show that many years before this place at the street was a low flat, and the town constructed a wooden drain at the street crossing of the drain 18 inches wide; that subsequently one line of 24-inch pipe was put in under the street, and it was raised some; that thereafter the town authorities paved Dickinson Avenue and put in two lines of 24-inch pipe and carried this drain across the street, and the railroad company had continued the same drains across its property below Dickinson Avenue for about 30 feet. The plaintiffs built their buildings on the ditch and did not cement the basement, and complain because the water rose in the basement.

The jury returned the following verdict:

1. Has the plaintiffs' property been damaged, as alleged in the complaint, by the negligence of the defendant Norfolk Southern Railroad Company? Answer: "No."

2. Has the plaintiffs' property been damaged, as alleged in the complaint, by the negligence of the defendant the town of Greenville? Answer: "No."

Judgment was entered upon the verdict in favor of the defendants, and plaintiffs appealed, assigning the following errors:

1. In that the court committed an error in permitting the witness to answer the question as to whether there would have been any ponding in 1910 if the drainage had been properly put there.

Q. Mr. Moore called attention to some rains in 1910, and asked you about the ponding of water then. Would there have been any ponding if the drainage had been properly put in there?

2. In that the court permitted the witness to answer the question as to whether any basement could be depended upon to be free from danger of seepage that does not have concrete floor and wall in a damp, soggy place.

3. In that the court permitted the defendant's counsel to ask T. J. Smith, who was not qualified as an expert, or by practical experience, to answer the following:

Q. From your knowledge and experience of drainways and the area and territory naturally drained into this drainway, I ask you if that drainway is sufficient to carry that water off with reasonable rapidity?

4. In that the court permitted defendant's witness C. H. Harvey to answer the following question, although no expert, or qualified as an expert:

Q. I ask you, from your experience, if in heavy rainy seasons water will rise in a basement that is located in low, springy land that has no concrete floor and concrete side wall? A. Yes, sir; I (431) have seen water rise in basements. I believe concrete is used as a preventative to keep basements dry.

5. In that the court permitted the introduction of the minutes of the board of aldermen, without showing the purpose for which introduced, as having no bearing on the question at issue before jury.

6. In permitting witness E. H. Evans to answer the question set forth in the record, page ...., as to the sufficiency of the opening for drainage, without expert knowledge or experience, to answer question as to proper drainage, basing his opinion on what he had seen.

7. Court's permitting W. H. Dail, Jr., to answer a question as to the water in a previous basement, without showing that conditions were the same, or that he was familiar with conditions now.

8. The plaintiffs, appellants, rely on the exceptions 9, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28.

S. J. Everett, Harry Skinner, and I. G. Cooper for plaintiff.
L. I. Moore for defendant N. S. R. R. Co.
Jarvis & Wooten and F. G. James & Son for defendant town.

ALLEN, J. The first assignment of error cannot be sustained, because the record fails to disclose what would have been the answer of the witness or what the plaintiff expected to prove. *Lumber Co. v. Childerhose,* 167 N. C., 40. The evidence both for the plaintiff and the defendants was to the effect that the ponding of water referred to in 1910 was the result of an extraordinary rainfall, and we cannot infer from the evidence what the opinion of the witness as to its effect if the drainage had been properly put in, and cannot see that the answer would have been favorable to the plaintiff.

The second and fourth assignments of error present substantially the same question, and we see no reversible error in permitting the witness to answer the questions propounded.

In the first place, in the absence of any evidence, an intelligent jury would know that a basement in a damp, soggy place, without a concrete floor, would not be free from the danger of seepage. And again, the record shows that there was really no dispute as to this fact.

The plaintiff testified: "The rear end of our warehouse was built on soft land. The only way that water could come into our basement had to come by seepage or going under the walls and rising up. We have no concrete walls in our basement," and a witness for the plaintiff, S. D. Pruitt, who was manager for the warehouse company, said: "Our boiler-room is built right down close to the edge of this run. If you build a house on springy land and don't put in a concrete floor, the water will rise in it."

(432) The third assignment of error is without merit, because if the question was objectionable, the answer of the witness could not affect the controversy. He said in reply to the question, "I don't know who put in the second pipe, whether the railroad or town."

The minutes of the board of aldermen, the subject of the fifth assignment, showing the appointment of engineers to construct the drainage for the town of Greenville, was competent upon the question of the exercise of due care.

The questions asked E. H. Evans, referred to in the sixth assignment of error, and the answers thereto, are as follows:

Q. Knowing, as you do, that ditch, and knowing the size of that tile, and knowing the usual rainfall in this community, have you an opinion satisfactory to yourself as to whether that tile is sufficient to carry off that water that comes down that ditch in ordinary rainfall? A. "I should say it was."

The fact embodied in this question and answer was not in dispute, as there is no evidence upon the part of the plaintiff that the plaintiff was injured by ordinary rains or that the pipes would not carry off such rains.

The civil engineer introduced by the plaintiff testified: "I think the drainways in question are sufficient to take off the water in ordinary times."

D. S. Spain, a witness for the plaintiff, said: "Whenever the ditch was full of water it was after a heavy rain; I never saw that condition after an ordinary rain."

The seventh assignment of error is not supported by the record, which shows that before the witness was permitted to answer, the court asked him about the construction of the cellar, and that he said: "It was very much the same as now."

We might decline to consider the exceptions in the eighth assignment of error upon the ground that they do not conform to our rules, but we have examined the entire charge and the exceptions to it taken by the plaintiff, and find nothing of which he can justly complain.

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

"What duty did the town of Greenville and the railroad company owe the plaintiff? The town of Greenville had the right to, and it was the duty of its board of aldermen to exercise their discretion in grading and improving the streets of the town, and in doing that they improved this avenue and raised the surface of the street, placing drains under it for the purpose of carrying away the water which naturally came across it from the land of the plaintiffs, and the duty they owed plaintiffs under these circumstances was to provide the streets with sufficient drains to carry off said water without injury to the plaintiffs.

"It was the duty of the town of Greenville to exercise ordinary (433) and reasonable care in the improvement of its streets to provide for such rains as could with the exercise of ordinary care be foreseen, taking into consideration the weather conditions in the community in which the work was done. The plaintiffs allege that the defendant town of Greenville failed to exercise this care, and was thereby guilty of negligence, and that the railroad company participated in this, and there was evidence tending to show that the railroad company took up the first drain pipe across Dickinson Avenue and put that down again,

and still another, and that a bulkhead was placed against plaintiffs' property through which these drain pipes ran. The allegation is that these two pipes are not sufficient provision against ordinary rainfalls, that could be foreseen with the exercise of ordinary care. The defendant town of Greenville can't be held liable because it failed to make provision against extraordinary rainfalls, a cloudburst, or unusual or unexpected rain which could not be foreseen in the exercise of ordinary care by a man of reasonable prudence, and the same rule applies to defendant railroad. You can only answer this issue as to the defendants if they failed to exercise reasonable care to provide against the ordinary conditions which a man of reasonable prudence could have foreseen were likely to happen in reference to this drainway. They only fail in duty when they fail to exercise ordinary care and prudence.

"The law holds the city liable where they fail to exercise that care and where their failure to do so is the cause of injury such as is alleged in this case. You will note that it must be a breach of a duty that the defendants owed to the plaintiffs that justifies the finding upon these first two issues, and the only duty that the defendants owed the plaintiffs in this case was to exercise ordinary care to provide such drains as to remove without injury to plaintiffs such surface water as from experience and knowledge of the past might be reasonably anticipated to fall and to be ponded against. They are not required to provide against such extraordinary and excessive rains as could not be reasonably foreseen and provided against."

This imposed upon the defendants the duty of exercising ordinary care and made them liable for negligence, which is in accordance with our authorities. *Dorsey v. Henderson,* 148 N. C., 423; *Hoyle v. Hickory,* 164 N. C., 79.

We find no error upon the record.

No error.

Cited: Wilson v. Scarboro, 169 N. C., 658; *Newbern v. Hinton,* 190 N. C., 111.

W. C. WHITE AND WIFE, KATE, v. MUMFORD GUYNN, ADMINISTRATOR OF J. S. WHITE, DECEASED.

(Filed 17 March, 1915.)

1. Pleadings—Verification—Judgments.

It is held that the complaint in this case was verified substantially in the words of the statute, and the refusal of the trial judge to render judgment for the defendant on the pleadings was proper.

2. Evidence—Deceased—Transactions, etc.—Trials — Instructions — Expressions of Opinion.

In an action on a note brought by husband and wife against the administrator of the deceased, it is incompetent for the husband to testify that he was present at the time and saw the deceased receive the money for the note, for this is evidence of a transaction with the deceased by an adverse party in interest, forbidden by the statute; but where this testimony has been given without objection, it is not an expression of opinion upon the evidence for the trial judge to state the law to the jury and remark that he would have ruled it out had it been objected to, for this is only a caution to the jury that they should scrutinize his testimony, and does not cast any imputation upon the truthfulness of the witness.

APPEAL by plaintiff from *Peebles, J.*, at October Term, 1914, of PAMLICO.

Civil action tried upon this issue:

In what amount, if any, is the defendant indebted to Mrs. Kate G. White? Answer: "None."

From the judgment dismissing the action, the plaintiff appealed.

D. L. Ward for plaintiff.

Guion & Guion, Z. V. Rawls for defendant.

BROWN, J. The plaintiffs, W. C. White and Kate G. White, brought this action to recover of the defendant administrator of J. S. White, deceased, the sum of $500, alleged to have been loaned to the defendant's intestate by the *feme* plaintiff.

(1) The plaintiff moved for judgment on the pleadings because the verification of the answer was insufficient:

Mumford Guynn, administrator of J. S. White, deceased, being duly sworn, deposes and says: That he has read the foregoing answer, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those, he believes it to be true. MUMFORD GUYNN.

This verification was duly sworn to before a justice of the peace. We are of opinion that in form it is a substantial compliance with the statute; in fact, it is almost in the words of the statute. *McLamb v. McPhail,* 126 N. C., 217.

(435) (2) There was evidence offered upon the part of the plaintiff tending to prove that Mrs. White loaned $500, as alleged in the complaint, to the defendant's intestate. The plaintiff's husband was put upon the stand for the plaintiffs and testified without objection that the deceased asked his wife to lend him the $500, and that he saw her deliver him the money, and that all three were present at the time.

The court, among other things, charged the jury as follows: "Mrs. White claims the money was loaned by her to the deceased, Joel S. White, and she introduces her husband, W. C. White, to prove the loan. W. C. White, being a party to the suit, was not a competent witness. If his testimony had been objected to, I would have ruled it out; but as it was allowed to go in without objection, it is your duty to consider it; but in considering it, you must remember that the burden of proof is upon the plaintiff to satisfy you by the greater weight of the evidence that this money was loaned. If you are not satisfied under all the circumstances that the money was loaned, then it is your duty to answer the issue 'Nothing.'"

This is excepted to as an expression of opinion upon the part of the judge. We do not think that it can be fairly interpreted as an expression of opinion sufficiently injurious to the plaintiff to justify us in directing another trial. It was a mere caution to the jury that they should scrutinize the testimony of the plaintiff's husband, as a party to the suit and having at least a moral interest in the result.

The fact that his Honor told the jury that if the testimony had been objected to he would have ruled it out as incompetent does not cast any imputation upon the truthfulness of the witness. As a matter of law, the husband, being a party to the action, was incompetent to testify to the transaction between him and his wife and the defendant's intestate. *Bunn v. Todd,* 107 N. C., 266.

We have examined the other exceptions contained in the record, and find them to be without merit.

No error.

FRANK ALLEN v. A. P. McPHERSON.

(Filed 24 March, 1915.)

1. Judgments—Excusable Neglect—Findings—Appeal and Error.

On appeal from the refusal of a motion to set aside a judgment for excusable neglect, the findings of fact by the trial judge are not reviewable, except in cases of gross abuse or where the findings are not supported by any evidence.

2. Same—Matters of Law.

Upon motion to set aside a judgment for excusable neglect, where the findings of fact of the trial judge are supported by evidence, whether as a matter of law the neglect was excusable is reviewable on appeal.

3. Same—Court's Discretion—Interpretation of Statutes.

Where under the findings of fact the trial judge correctly concludes that the neglect of a motion to set aside a judgment was not excusable, it concludes the matter; but where he correctly concludes that the neglect was excusable, the question of setting aside the judgment is a matter in his discretion, except in cases of gross abuse, and is not reviewable on appeal. Revisal, sec. 513.

4. Appeal and Error—Attorney and Client—Laches of Counsel—Duty of Client.

The neglect of counsel, intrusted with the prosecution of an action, is chargeable to the client, for he must personally see that his appeal is regularly prosecuted within the time and in accordance with the rules prescribed.

5. Judgments—Excusable Neglect—Appeal and Error—Meritorious Defense—Findings of Trial Judge.

Upon appeal from the refusal of the trial court to set aside a judgment against a defendant for excusable neglect, a finding is necessary that there is a meritorious defense which could be set up if the judgment is set aside.

6. Judgments—Default and Inquiry—Burden of Proof.

A judgment by default and inquiry establishes merely the plaintiff's cause of action, carrying the costs, but still leaves the burden of proof on the plaintiff as to the inquiry.

ALLEN, J., did not sit.

APPEAL by the defendant from the refusal by *Cooke, J.*, at (436) March Term, 1914, of WAKE, of a motion to set aside the judgment on the ground of excusable neglect.

Armistead Jones & Son and W. C. Harris for plaintiff.
Charles Ross and W. C. Douglass & Son for defendant.

CLARK, C. J. This was a motion to set aside the judgment on the ground of excusable neglect. The summons was issued 25 January, 1913. Time to file complaint was extended and it was filed at April Term, 1913. The defendant was allowed till next term to file answer, but he did not then file answer, and at the fifth term after filing the complaint the plaintiff moved for and obtained judgment by default and inquiry. The defendant had employed a lawyer living at Lillington, in Harnett County (where the defendant himself lived), and did not employ any resident or local counsel in Wake, where the cause was pending, to represent him. The motion to set aside the judgment was not made till November Term, 1913, of Wake.

(437) On a motion to set aside a judgment for excusable neglect, the findings of fact by the judge are conclusive and irreviewable, and we cannot look into the affidavits to contradict his findings, except on allegation that there is no evidence to sustain the findings, which is not the case here. On the findings of fact, whether as a matter of law there was or was not excusable neglect is reviewable on appeal. If the judge finds correctly that the neglect was not excusable, that concludes the matter. If, however, he finds that the neglect was excusable, whether in such case he shall set aside the judgment is a matter in his discretion, and not reviewable, except in a case of gross abuse. This section (Rev., 513) was analyzed and fully discussed in *Norton v. McLaurin,* 125 N. C., 185. See, also, citations to that case in the Anno. Ed.

In *Norton v. McLaurin, supra,* the Court held: (1) The negligence of counsel will not excuse, if the client himself has been neglectful. (2) Before granting an application to set aside a judgment, the Court must find, as a material fact, that the defendant has a meritorious defense. In this case the facts show that the client himself was neglectful. A client cannot place his case in the hands of his counsel and pay no further attention to it. "It is not enough that parties to a suit should engage counsel and leave it entirely in his charge. They should, in addition to this, give it that amount of attention which a man of ordinary prudence usually gives to his most important business." *Roberts v. Allman,* 106 N. C., 391; *Pepper v. Clegg,* 132 N. C., 315. See, also, numerous cases cited in that opinion and the citations thereto in the Anno. Ed. In *Pepper v. Clegg, supra,* we said: "When a man has a case in court, the best thing he can do is to attend to it." This has been quoted with approval, *McClintock v. Ins. Co.,* 149 N. C., 35, and in *Lunsford v. Alexander,* 162 N. C., 528.

In *S. v. Downs,* 116 N. C., 1064 (quoted and approved *S. v. McLean,* 121 N. C., 589; *Barber v. Justice,* 138 N. C., 20), we said that the

ignorance of law by counsel would not be an excuse for a client, for if it were, "the more ignorant counsel could manage to be, the more he might be in demand." For the same reason, if the negligence of counsel were an excuse, when the client himself pays no attention to the case, then "the more negligent counsel could manage to be, the more valuable he would become."

In *Manning v. R. R.*, 122 N. C., 824, we discussed the duty of clients to look after their lawsuits and not surrender the matter entirely to the hands of their counsel, and deprecated the system of employing counsel nonresident in the county where the action is pending, or not regularly attending that court, and said: "Our laws do not recognize this leisurely, kid-glove and dilettante manner of attending to legal proceedings at long range." To same effect, *Osborn v. Leach,* 133 N. C., 427; *Bank v. Palmer,* 153 N. C., 501.

It is also essential for the judge to find that the defendant has (438) a meritorious defense which could be set up if the judgment is set aside. *Stockton v. Mining Co.,* 144 N. C., 595, and cases there cited; *Minton v. Hughes,* 158 N. C., 587. The additional finding that "The defendant denies the obligation set out in the complaint," is not the finding that he has a meritorious defense.

In this case it so happens, fortunately for defendant, that the judgment is only by default and inquiry, and the burden is still upon the plaintiff to prove his case, as such judgment is practically only a judgment for costs. It establishes merely that the plaintiff has a cause of action. *Stockton v. Mining Co., supra; Osborn v. Leach, supra.*

The refusal of the motion to set aside the judgment is

Affirmed.

ALLEN, J., did not sit.

Cited: Armstrong v. Asbury, 170 N. C., 162; *Queen v. Lumber Co.,* 170 N. C., 503; *Seawell v. Lumber Co.,* 172 N. C., 325; *Ham v. Person,* 173 N. C., 74; *Lumber Co. v. Cottingham,* 173 N. C., 328; *Cohoon v. Brinkley,* 176 N. C., 10; *Gillam v. Cherry,* 192 N. C., 199; *DeHoff v. Black,* 206 N. C., 688.

W. J. FOY AND C. E. IPOCK v. A. H. STEPHENS ET AL.

(Filed 24 March, 1915.)

1. Pleadings—Demurrer.

Upon demurrer to a complaint every reasonable intendment and presumption must be taken in favor of the pleader; and however inartificially the complaint may be drawn, the demurrer should not be sustained if by a reasonable interpretation of the pleading a good cause of action is alleged.

2. Same—Defective Statement.

An amendment should be allowed to a complaint which defectively states a good cause of action, rather than dismiss the action upon demurrer.

3. Pleadings — Demurrer — Deeds and Conveyances — Collateral Agreements—Cancellation—Conditions—Bills and Notes.

In an action to invalidate a transaction in the sale of land the complaint alleged that the defendant represented the entire tract to contain 5,000 acres, showing a plat thereto, and the deed was delivered and certain cash payments made to a third party and notes given in payment of the purchase price, to be held by him upon condition that the land should be found to contain the acreage represented and that the title should be found to be an indefeasible fee simple by investigation and certificate of a certain named attorney; that the tract was found to contain 3,315 acres, of which 2,109 acres were held and claimed by superior titles, and that the attorney reported the title to the whole tract defective. The plaintiffs offered to execute a reconveyance of the land and prayed an injunction against the negotiation and transfer of the note, alleging irreparable injury otherwise; that the money be repaid to them, and that the note be delivered for cancellation. *Held:* The complaint alleged a good cause of action, and a demurrer thereto was bad.

4. Bills and Notes—Mortgages—Registration—Void Notes.

Where a note is delivered upon conditions which are not fulfilled, and the note is consequently void, a mortgage given upon lands securing the note is also void as between the original parties, and the fact that the mortgage was recorded cannot avail anything.

5. Bills and Notes—Delivery—Intent—Trials—Evidence—Questions for Jury.

In order to make a valid delivery of a note, the act of delivery and the intent must concur, and where there are no intervening rights, the question of intent is ordinarily one for the jury.

6. Deeds and Conveyances—Fraud—Intent—Pleadings—Amendments.

In order to set aside a conveyance of land for fraud, the representations must not only have been false, and knowingly so, by the party making them, but with the intent to deceive, and positively alleged in the complaint, and not by implication; but under the circumstances of this case *it is held* that the plaintiff intended to charge a fraudulent intent, and an amendment should be allowed if this defense is relied on by him.

APPEAL by plaintiff from *Peebles, J.,* at November Term, 1914, (439) of CRAVEN.

Civil action. The complaint and the answer were read and then the defendants demurred *ore tenus* upon the ground that the complaint failed to state a cause of action. His Honor sustained the motion and dismissed the action. The plaintiffs appealed.

Guion & Guion for plaintiffs.
D. L. Ward, Robert Ruark for defendants.

BROWN, J. The only question presented relates to the sufficiency of the complaint to make out a cause of action. We have held that a demurrer will not be sustained to the extent of dismissing the action, unless it entirely fails to state a cause of action.

If in any portion of it 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, a very 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. This case is affirmed and cited with approval in the recent case of *Hoke v. Glenn,* 167 N. C., 594.

Where it is manifest that the complaint defectively states a good cause of action, and the defect can be cured by amendment, the courts will allow the amendment rather than dismiss the action. This is in the interest of justice and the speedy trial of actions.

The complaint states substantially these facts: That the defendant Stephens contracted to sell certain tracts of land to the plaintiff for $24,000, at the same time representing to the plaintiff that (440) the said lands had been fully surveyed and platted, and exhibited to plaintiffs a blueprint thereof, which survey purported to cover one entire tract or body of land containing 5,000 acres.

The defendant further represented that he had a good and indefeasible title to the land.

The plaintiffs further allege that they had no knowledge or information whatever concerning the acreage, boundaries, or title to the land other than that imparted by the defendant; that they agreed to purchase said land at the price named upon condition that the tract contained the acreage as represented, and that the title was good and indefeasible.

It was agreed between the plaintiffs and the defendant that the plaintiffs should proceed to survey and plat the land and employ a lawyer to

investigate the title upon the agreement of the defendant to convey the full boundaries and acreage by deed in fee. The defendant executed to the plaintiffs a deed, which was duly recorded. The plaintiffs further allege that it was agreed that the plaintiff Foy pay into the hands of George H. Roberts $7,000, to be held by him to await the survey of the land for the purpose of ascertaining the acreage, as well as determining the title.

It was agreed that D. E. Henderson, an attorney, should investigate the title and the money should be paid over upon his certificate that the titles to said land were good and indefeasible. Upon like condition the plaintiff Foy executed his note for $4,000, which was deposited as aforesaid, and the sum of $1,000 was paid by Foy to the attorney, as per agreement with the defendant, to pay attorneys' fees and expenses, the residue, if any, to be turned over to the defendant in case the purchase was finally consummated.

The plaintiff Ipock executed his note for $12,000, secured by mortgage on his one-third interest in said lands so contracted to be conveyed. This note was delivered to the defendant with the distinct understanding and agreement that the defendant was to hold the same to await the report of the attorney as to the acreage, boundaries, and title to the land.

The plaintiffs further allege that it turned out upon a survey of the said land that the whole acreage thereof was 3,315 acres and that by actual survey out of that acreage 2,109 acres were held and claimed by superior titles, leaving only 1,206 acres, and the title to that was reported by the said attorney to be defective and insufficient; that said attorney reported that the whole of said acreage was defective in title, and he refused to give certificate of a good title thereto.

The plaintiffs further allege that the defendant well knew at the time he made the representations that the tract did not contain 5,000 acres, and that he did not have a good and indefeasible title thereto;
(441) that the said blue-print purporting to be a correct survey of said land was not a true copy of the survey. By these representations the plaintiffs allege that they were deceived with reference to the acreage and boundaries of the land, as well as to the title.

The plaintiff alleges repeatedly that the defendant Stephens knew that the tract did not contain the number of acres represented; that he knew that the blue-print was an incorrect presentation of the land, and that he knew he had no title to it. The plaintiffs allege that when these facts became known from the report of the attorney, they offered to execute a deed back to the defendant for the said land, and demanded that the said Roberts, with whom the money had been deposited, return the same to them, and that the notes delivered to the defendant Stephens be delivered up for cancellation.

The plaintiffs further allege that the defendant has been endeavoring to negotiate the sale of the said note, and that if he is permitted to do so, the plaintiffs would be irreparably injured. The plaintiffs pray for an injunction, enjoining the assignment of the note, that the money be repaid to them by the said Roberts, and that the notes be delivered up to them for cancellation, and for other and further relief unnecessary to mention.

These facts would seem to us amply sufficient to justify, if established, the relief prayed for. They state substantially two causes of action: First, the plaintiff bases his ground for relief upon the contract and agreement of the parties. It is immaterial that the defendant made the plaintiffs a deed for the land, for the plaintiffs offered to reconvey it. It is immaterial that the mortgage executed by Ipock upon his share of the land was recorded. That may be canceled.

The point is, Was the money deposited with Roberts and the notes delivered to the defendant Stephens upon the terms and conditions stated in the complaint? If Stephens acquired no title to the note, he acquired no title to the mortgage, for the latter is merely security for the former, and if there was no unconditional delivery of the note, the fact that the defendant had the mortgage put on record would avail him nothing.

It is said by *Mr. Justice Hoke* in *Gaylord v. Gaylord,* 150 N. C., 222: "It is a familiar principle that the question of the delivery of a deed or other written instrument is very largely dependent on the intent of the parties at the time, and is not at all conclusively established by the manual or physical passing of the deed from the grantor to the grantee."

With reference to the delivery of a policy of insurance, the same justice said: "The fact that a policy in a given case has been turned over to the insured is not conclusive on the question of delivery. This matter of delivery is very largely one of intent, and the physical act of turning over a policy is open to explanation by parol evidence." See, also, *Fortune v. Hunt,* 149 N. C., 358; *Tarlton v. Griggs,* 131 N. C., (442) 216, and other authorities cited in *Gaylord v. Gaylord, supra,* all of which show that the intent and act must concur in making a valid delivery, and that whether such existed is a question of fact to be found by the jury. *Floyd v. Taylor,* 34 N. C., 47.

The second ground upon which the plaintiffs base their claim for relief is because of the alleged fraud practiced upon the plaintiffs. It is true that the complaint fails to allege that the representations were made with intent to defraud. Such conclusion may be easily inferred, if the allegations of the complaint are established.

It is further true that fraud should be positively charged and not by implication. The representations must not only have been false and

known by the plaintiff to be so, but they must be made with the intent to deceive. Fraud cannot exist as a matter of fact where the intent to deceive does not exist, for it is emphatically the action of the mind which gives it existence. *Foy v. Haughton,* 85 N. C., 169.

It is apparent from the allegations of the complaint that the plaintiffs have alleged that the representations were false and that the defendant knew them to be false; and it is apparent that the plaintiffs intended to allege that they were made with a fraudulent intent. This is a defective statement of a cause of action, and can be cured by amendment. If the plaintiffs rely upon this ground for relief, they will be permitted to amend their complaint so as to charge the necessary purpose to deceive.

His Honor erred in sustaining the demurrer and in dissolving the injunction. The cause is remanded, with instructions to proceed in accordance with this opinion.

Reversed.

Cited: Wiggins v. Motor Co., 188 N. C., 319; *Colt v. Kimball,* 171 N. C., 171; *Whitehead v. Tel. Co.,* 190 N. C., 199; *Stone v. Milling Co.,* 192 N. C., 587; *Seawell v. Cole,* 194 N. C., 547; *Enloe v. Ragle,* 195 N. C., 39; *Tull v. Harvey,* 197 N. C., 331; *Hood, Comr., v. Love,* 203 N. C., 585.

THE HAMPTON GUANO COMPANY v. THE HILL LIVE STOCK COMPANY.

(Filed 24 March, 1915.)

1. Vendor and Purchaser—Contracts—Fertilizers—Dealers—Breach of Warranty—Damages—Express Warranty—Parol Evidence.

In the sale of personal property the law will not imply a warranty at variance with that agreed upon between the parties, or permit parol evidence to vary or contradict the warranty expressed in a written contract of sale; and a written warranty in the sale of fertilizers by a manufacturer to a dealer therein, guaranteeing the fertilizer to be in accordance with the analysis printed on the sack, but not as to results from its use; that verbal promises conflicting with the terms of the contract were unauthorized, and would not be recognized, *is held* to restrict the warranty within the stated terms and to exclude parol evidence tending to show the warranty to have been otherwise.

2. Vendor and Purchaser — Contracts — Fertilizers — Dealers — Express Warranty—Implied Warranty.

Where a seller of fertilizer to a dealer warrants the goods only to be according to a given analysis, but not as to results, the law will not imply a further warranty that the fertilizers should be good for the purposes for which they were sold.

3. Vendor and Purchaser — Contracts — Dealers — Fertilizers — Express Warranty of Analysis—Evidence—Effect on Crops—Interpretation of Statutes.

Where fertilizers sold to a dealer are warranted only to contain ingredients according to a certain analysis, but not as to results, evidence of the effect of the fertilizer upon the crop is competent in an action upon the breach of warranty of sale when properly limited to the inquiry as to whether, under relevant and proper conditions, the ingredients of the fertilizers were according to the formula guaranteed, notwithstanding our statutes, Revisal, secs. 3445, 3957, making the analysis of fertilizers certified by the Department of Agriculture *prima facie* evidence of their contents.

4. Vendor and Purchaser — Dealers — Contracts — Fertilizers — Express Warranty of Analysis—Measure of Damages.

In an action upon a warranty in the sale of fertilizer to a dealer, that the fertilizers should contain ingredients according to an agreed formula, the damages, when recoverable, are limited to the difference between the value of the article delivered and its value or market price if it had been such as it was warranted to be.

5. Vendor and Purchaser—Contracts—Dealers — Fertilizers — Effect on Crop—Substantive Evidence.

Where in an action for damages upon a breach of warranty in the sale of fertilizer it is competent to show the use of the fertilizer upon lands and its effect upon crops, the evidence is substantive and not limited merely to purposes of corroboration. *Tomlinson v. Morgan*, 166 N. C., 557, cited and approved.

6. Vendor and Purchaser—Fertilizers—Warranty as to Analysis—Dealers —Warranty as to Results.

Where a dealer purchases fertilizer under a contract containing a warranty as to the analysis only, and sells them to users thereof with further warranty as to results, express or implied, his further warranty is made upon his own responsibility, and cannot affect the warranty under which he has purchased them.

APPEAL by plaintiff from *Whedbee, J.*, at November Term, (443) 1914, of FRANKLIN.

Civil action. Plaintiff is a manufacturer of fertilizers, and defendant a merchant of Louisburg, who deals in fertilizers, selling them on credit to farmers. On 31 January, 1913, defendant purchased fertilizers from plaintiff under a written contract, the provisions thereof, material to this case, being as follows:

"And it is further understood and agreed that the fertilizer (444) named is furnished with the guarantee of analysis printed on the sack, but not of results from its use. Verbal promises that conflict with the terms of this contract are unauthorized, and will not be recognized by this company."

Under this contract, in the spring of 1913, plaintiff shipped and delivered to defendant 80 tons of 8-2-2 fertilizer. On 1 July, 1913, in payment therefor, defendant executed to plaintiff notes aggregating $1,050.75, which said notes were indorsed by K. P. and J. P. Hill, and were payable in January and February, 1914. Upon maturity of said notes, and long after the crops, under which the fertilizer was used, had been harvested, defendant wrote plaintiff several times and promised to pay the notes, as will appear from letters written from January to May, 1914, and set out in the record. In January, 1914, defendant sought to renew its contract with plaintiff, and to purchase 250 tons of the same fertilizer (being over three times as much as it had purchased in 1913) under a contract identical with the first one, but plaintiff refused to ship the goods because defendant had not paid for those purchased under the contract above referred to. At no time prior to the institution of this action did defendants ever claim or contend that the fertilizer delivered in 1913 was defective in quality, or otherwise, or that they had any defense against said notes; on the other hand, they recognized their liability upon said notes and promised to pay the same, expressing regret that a scarcity of money had prevented them from making payment at maturity. Defendants failing to comply with their promises to pay said notes, this action was instituted on 18 June, 1914, to recover the amount due thereon. Defendants answered, admitting the execution and nonpayment of the notes, but pleading as a counterclaim that it had sold the fertilizer to its customers under warranties that the goods were in every respect highly efficient, suitable, and fit for the fertilization of the crops for which they were recommended; that their customers complained to them that the goods were not fit or suitable and did not measure up to the standard and quality warranted, and that defendant had suffered damage thereby.

Upon the trial defendant, over the objection of plaintiff, offered evidence from persons who had used fertilizers purchased from defendant in 1913, tending to show that the fertilizer so purchased was in bad mechanical condition, being lumpy and off color; that it did not assimilate or was not taken up by the soil and did not fertilize the crops; that they had used it under their crops with poor results and made bad crops, and that in their opinion the fertilizer was not worth as much as they were charged for it. Plaintiff objected to all this evidence, repeating the objections, until the court ruled that all such testimony should be considered as objected to. It was objected to, first, because the

(445) effect thereof was to vary the written contract between the parties, which expressly provides that the plaintiff did not in any way guarantee the effect or results from the use of the fertilizer; second, be-

cause said testimony tended to set up a new contract guaranteeing results from its use, whereas the written contract expressly limited the warranty to the analysis appearing on the sacks; third, because said testimony in no way tended to show that the fertilizer did not contain the constituents in the quantities guaranteed by the analysis; fourth, because there was no evidence of any chemical analysis by the State chemist or other person, and that until such analysis was offered evidence as to its effect upon crops was incompetent and inadmissible; and fifth, because Revisal, secs. 3949-3951, as amended by Public Laws of 1911, ch. 92, provides that the analysis therein referred to is the best evidence of the contents of said fertilizers. There were some other specific grounds, not necessary to be stated. The contract between the parties was introduced in evidence, and shows that the fertilizer was guaranteed to contain the ingredients and in the proportion stated on the certificate of analysis printed on the sack before the sale by plaintiffs, which shows the contents to be 8 per cent of phosphoric acid, 2 per cent of ammonia, and 2 per cent of potash.

Plaintiff demurred *ore tenus* to the answer and counterclaim, upon the following grounds:

1. It failed to state or allege wherein the defendants, or either of them, had been damaged.

2. It fails to allege or state, except in general terms, that defendants, or either of them, have suffered any damage whatever, actual or special.

3. It fails to specify or allege any grounds upon which defendants base their claim for damages.

4. It fails to specify wherein defendants, or either of them, have been damaged in any manner whatsoever, even if the fertilizer was not as guaranteed in the contract.

5. It fails to allege that any chemical analysis has been made by the Agricultural Department, or any one else, and any of the ingredients found to be deficient.

6. It admits the execution of the contract containing an express warranty as to analysis as shown on the sacks, and no implied warranty as to results can be set up or considered.

The demurrer was overruled, and plaintiff excepted.

The jury returned the following verdict:

1. Are the defendants indebted to the plaintiff on account of the notes sued on, and if so, in what sum? Answer: $1,060.28, with 6 per cent interest on $525 from 15 January, 1914, until paid, and 6 per cent interest on $525.75 from 14 February, 1914, until paid, and interest on $9.53 from 4 May, 1914, until paid."

2. Did the plaintiff warrant the fertilizer to contain 8 per (446)

cent available phosphoric acid, 2 per cent ammonia, and 2 per cent potash, and suitable for use as a fertilizer of crops? Answer: "Yes."

3. If yes, was said fertilizer, when delivered to defendant, as warranted? Answer: "No."

4. What damages, if any, are defendants entitled to recover of plaintiff? Answer: "$1,061.25."

The court gave the following instructions upon the second and third issues, to which exception was taken:

"The contract itself says that it is guaranteed, and warrants the purchaser that it contains 8 per cent phosphoric acid, 2 per cent ammonia, and 2 per cent potash, and the law says, in addition, that it is suitable for the purpose for which it is sold.

"If you believe this evidence, I charge you as a matter of fact to answer this issue 'Yes,' that the plaintiff did warrant the fertilizer to contain 8 per cent phosphoric acid, 2 per cent ammonia, and 2 per cent potash, and that it was suitable for use as a fertilizer of crops.

"If the evidence satisfies you by its greater weight that it did not contain 8 per cent phosphoric acid, 2 per cent ammonia, and 2 per cent potash, or that it was unfit for use as a fertilizer, and you are satisfied of either of these facts by the greater weight of the evidence, I charge you to answer the third issue 'No.'"

Plaintiff excepted to the judgment, which was entered upon the verdict, and appealed.

A. C. & J. P. Zollicoffer and McIntyre, Lawrence & Proctor for plaintiff.

W. H. Yarborough, B. T. Holden, William H. Ruffin, and W. M. Person for defendant.

WALKER, J., after stating the case: When a person buys an article of personal property, he can require an express warranty as to its quality, or he may rely upon the warranty which the law implies in certain sales; but it has been well said that, "when he takes an express warranty, it will exclude an implied warranty on the same or a closely related subject. Thus an express warranty of quality will exclude an implied warranty of fitness for the purpose intended; but an express warranty on one subject does not exclude an implied warranty on an entirely different subject," an illustration of the latter being, that an express warranty of title will not exclude an implied warranty of soundness or merchantability. 35 Cyc., 392. It was held in the early case of *Lanier v. Auld,* 5 N. C., 138, "that the law will not imply what is not expressed, where there is a formal contract (Evans' Essay, 32; 1 Fonbl., 364; 6 Term,

606; Doug., 654), and an express warranty as to soundness and age excludes any implied warranty as to other qualities." What (447) was said by *Justice Brown* in *Piano Co. v. Kennedy,* 152 N. C., 196, is very pertinent here: "We have recognized the principle that there can be no implied warranty of quality in the sale of personal property where there is an express warranty, and that where a party sets up and relies upon a written warranty he is bound by its terms and must comply with them (30 A. and E., p. 199; *Main v. Griffin,* 141 N. C., 43), and the further principle, applied by us in that case, that a failure by the purchaser to comply with the conditions of the warranty is fatal to a recovery for breach of the warranty in an action on it, or where, as in this case, damages for the breach are pleaded as a counterclaim in an action by the seller for the purchase money." "There are numerous well considered cases that an express warranty of quality will exclude an implied warranty that the articles sold were merchantable or fit for their intended use." *DeWitt v. Berry,* 134 U. S., 306. See, also, *Main v. Griffin,* 141 N. C., 43; *Robinson v. Huffstetler,* 165 N. C., 459; *Lumber Co. v. Machine Co.,* 72 S. E., 40. It has been held that an implied warranty cannot be set up, even under a code provision, where the parties, by their contract, have expressly agreed upon a different warranty, whether it be more or less extensive or limited. *Jackson v. Langston,* 61 Ga., 392; *Farmer v. Andrews,* 69 Ala., 96, and also that if a specific kind of fertilizer, or other article of a certain description or name, is ordered, there is no implied warranty of fitness, but only one that it is the kind designated. 35 Cyc., 409; *Raisin v. Conley,* 58 Md., 59; *Ober v. Blalock,* 40 S. C., 31; *Mason v. Chappell,* 15 Gratt. (Va.), 572; *Walker v. Pou,* 57 Md., 155; *Wilcox v. Owens,* 64 Ga., 601. A party who relies upon a written contract of warranty as to quality or description of the property he has purchased is bound by the terms of the warranty. *Machine Co. v. McKay,* 161 N. C., 584. He is not only held to the terms of the contract into which he has deliberately entered, but he is not permitted to contradict or vary its terms by parol evidence, as "the written word must abide" and be considered as the only standard by which to measure the obligations of the respective parties to the agreement, in the absence of fraud or mistake, or other equitable element. 35 Cyc., 379. There are numerous cases decided by this Court illustrative of this elementary rule in the law as to written contracts. *Moffitt v. Maness,* 102 N. C., 457; *Cobb v. Clegg,* 137 N. C., 153; *Basnight v. Jobbing Co.,* 148 N. C., 350; *Walker v. Venters,* 148 N. C., 388; *Medicine Co. v. Mizell, ibid.,* 384; *Walker v. Cooper,* 150 N. C., 128; *Woodson v. Beck,* 151 N. C., 144; *Machine Co. v. McClamrock,* 152 N. C., 405, and especially *Fertilizer Works v. McLawhorn,* 158 N. C.,

274. There are authorities which hold that there is no implied warranty of quality in the sale of goods, but some of these are reviewed by this Court in the late case of *Ashford v. Shrader,* 167 N. C., 45, (448) and a warranty was said to be implied in certain excepted instances; but they all relate to contracts which do not contain any express warranty of quality. The subject is fully considered in that case, and further comment, therefore, is not required.

Let us now examine the facts of this case in the light of the foregoing principles. The main inquiry is as to the nature and scope of the special warranty and the rights and obligations of the parties springing therefrom. The warranty is made up of three elements: (1) That the fertilizer shall contain the ingredients in a specified proportion, as stated in the analysis printed on each bag. (2) That the seller should not be held responsible for results in its actual use. (3) That the whole contract is therein expressed, and all other terms are unauthorized. No language could be more explicit and no contractual obligation and right more definitely fixed. The warranty was drawn for the very purpose of preventing the recovery of such damages as are, in their nature, very speculative, if not imaginary, and out of all proportion to the amount of money or price received by the seller for the fertilizer. If fertilizer companies can be mulcted in damages for the failure of the crop of every farmer who may buy from them, they would very soon be driven into insolvency or be compelled to withdraw from the State, as the aggregate damages, if the supposed doctrine be carried to its logical conclusion, would be ruinous, and the farmers in the end would suffer incalculable harm. In view, then, of the probable results flowing from such a construction of the contract, we should hesitate very long before adopting it, with its disastrous consequences to both parties, which we cannot suppose they contemplated. The court, therefore, erred in charging the jury that if the fertilizer did not contain the ingredients, and in the quantities, as warranted, or if it was not suited to the purpose for which it was sold, they should answer the third issue in the negative, for the special warranty and the provisions against any liability for results excluded any implied warranty as to its suitableness for use in fertilizing crops. In *Allen v. Young,* 62 Ga., 617, where the contract and statute of the State were much like ours, it was said: "The notes given to the company for the price of the fertilizer having upon their face a stipulation that the fertilizer was purchased 'entirely upon the basis of the analytical standard guaranteed by the company, and that the buyer will in no event hold it responsible beyond such standard, nor in any wise for practical results,' the precise right of the purchaser was to receive an article containing the chemical and fertilizing properties

enumerated in the guaranty, and these in the proportions and up to the degree of strength held out as a standard." The same Court, in that and other cases, discusses the competency and probative force of evidence as to the effect of the particular fertilizer, when used upon land, in producing crops, and strongly intimates that such evidence is (449) not admissible where the contract contains a provision that the seller is not to be liable for results, and that if it is competent, it should be received with caution and in connection with more direct evidence that the fertilizer did not contain the ingredients guaranteed by the analysis, or as much of them as the analysis and certificate required. *Hamlin v. Rogers,* 78 Ga., 631; *Scott v. McDonald,* 83 Ga., 28; *Jones v. Cordele Guano Co.,* 94 Ga., 14. The Court said in *Hamlin v. Rogers, supra:* "All the seller is required by law to do is to guarantee that the fertilizer contains the ingredients it is represented to contain. He may or may not guarantee its effect upon crops. Parties have a right to make their own contracts. Under the limited guaranty contained in the contract and that imposed by law, the defendant could have shown that the fertilizer did not contain the ingredients indicated by the analysis made by the State chemist." Our statute, Revisal, secs. 3445 to 3957, provides for an analysis by the Department of Agriculture of all fertilizers sold in the State, and makes the certificate of the State chemist *prima facie* evidence of their contents. We are of the opinion that, notwithstanding the stipulation as to nonliability for results, evidence of the effect of any particular fertilizer upon crops is competent, under certain conditions, to prove that it did not contain the guaranteed ingredients or in the proportion specified in the label put on the bag. The Court, in *Jones v. Cordele Guano Co., supra,* referring to a contract similar to the one in question, said: "While it is true that the note sued on in the present case contained an express stipulation that the makers purchased on their own judgment and waived any guarantee as to the effects of the fertilizer on their crops, we think they were nevertheless entitled to show that their crops derived no benefit from the use of the fertilizer in question. It was competent for them to do this, not for the purpose of repudiating or varying the terms of their written contract, or of holding the guano company to a guarantee it had expressly declined to make, but to show that in point of fact the guano did not come up to the guaranteed analysis branded on the sacks, as required by law. In other words, it was the right of the defendants to show that this guano did not contain the chemical ingredients set forth in that analysis. If the guano failed to produce any beneficial effect on the crops under favorable auspices, this fact would at least tend to show it did not contain the fertilizing elements in the proportions specified in the analysis

branded on the sacks." But when there is an offer of such evidence, the kind of soil, manner of cultivation, accidents of season, and other pertinent facts should be first shown, so that a foundation may be laid for admitting testimony of actual production, with a view of disparaging the fertilizers, and the jury should be carefully instructed that they can consider the evidence only for the purpose of showing the absence (450) of the guaranteed ingredients or the represented quantities of each, and not at all for the purpose of assessing damages, either directly or indirectly, because of any loss or diminution of the crops, as the measure of damages depends upon quite a different principle.

The extent of the recovery must be restricted to the difference, not necessarily between the price and the value of the article purchased, but to the difference between the article delivered under the contract of warranty and its value or market price if it had been such as it was warranted to be. *Mfg. Co. v. Oil Co.,* 150 N. C., 150, citing *Parker v. Fenwick,* 138 N. C., 209; *Marsh v. McPherson,* 105 U. S., 709, and *Mfg. Co. v. Gray,* 129 N. C., 438. The principle is thus stated in 35 Cyc., p. 468; "The general rule as to the measure of damages on a breach of warranty is that the buyer is entitled to recover the difference between the actual value of the goods and what the value would have been if the goods had been as warranted, and in the application of the rule it is held that the fact that the goods were actually worth the price which was paid for them is immaterial. The difference between the purchase price and the actual value cannot be regarded as the measure of damages, as in such case the purchaser recovers too small a sum if he has made a bad bargain and paid more than the goods were worth, and too great a sum if he has made a good bargain, paying less than the goods were worth. It is true that in some cases the rule has been stated that the measure of damages is the difference between the purchase price and the actual value of the goods, but in nearly all of these cases the theory undoubtedly is that, in accordance with the general rule, if there is no other evidence of the actual value of the goods, the purchase price will be regarded as such value." The elementary rule as above stated is the best rule, leaving the price to be considered, when necessary, in the final adjustment between the parties to ascertain what is due by one to the other on account of the transaction, when there has been a breach of the warranty. We have mentioned this subject for the purpose of showing that no part of the recovery, under this contract, should be assessed for the failure of crops, as there is an express stipulation that plaintiff should not be held liable for any results from the use of the fertilizer, and the charge in this respect was erroneous. This Court said in *Fertilizer Works v. McLawhorn, supra:* "The deficiency in value was allowed him in abatement of

price. The claim of consequential damages resulting in the alleged shortage in his crop was properly disallowed by the court. *Carson v. Bunting,* 154 N. C., 530, where the Court holds that the measure of damages is in the abatement of the price, as is also provided by Revisal, 3949."

It must not be understood that we are dealing with a case where a farmer is suing his merchant for a breach of contract in the sale of fertilizers, alleging that they were deficient in quality and (451) thereby he has sustained a loss or diminution of his crop in the cultivation of which it was used. The sale in such a case may have been made upon an express or an implied warranty as to the quality of the fertilizer, and does not fall within the principles we have discussed. With reference to such a case, *Justice Hoke* said in *Tomlinson v. Morgan,* 166 N. C., 557: "The Court does not understand that plaintiff seriously contends that a warranty has not been established by the verdict, but it is chiefly urged for error that there is no proper evidence tending to show a breach of the warranty, *i. e.,* that the guano sold was off-grade, and, second, that under our decisions a loss claimed in diminution of the crop is too remote and uncertain to be made the basis for an award of damages. Undoubtedly, a counterclaim of this character presents such an inviting field for litigation and is so liable to abuse that it should not be entertained unless it is clearly established that there has been a definite breach of the warranty and satisfactory evidence is offered that the loss claimed is directly attributable to the breach, and the amount can be ascertained with a reasonable degree of certainty. While the court should always be careful to see that these rules are not transgressed to the injury of a litigant, when the facts in evidence clearly meet the requirements, authority in this State is to the effect that the loss suffered in diminution of a given crop, when it is clearly attributable to a definite breach of warranty as to the quality of a fertilizer, and is within the contemplation of the parties and capable of being ascertained with a reasonable degree of certainty, may be made the basis for an award of damages," citing *Herring v. Armwood,* 130 N. C., 177; *Spencer v. Hamilton,* 113 N. C., 49.

The *Tomlinson case, supra,* it has been suggested, is somewhat in conflict with our views, but we think it clearly is not, but entirely consistent therewith. In that case it appeared that there was an express warranty "that the fertilizer was suitable for tobacco," which meant, if properly construed, that if it was used in the cultivation of tobacco it would produce good results and increase the yield. Besides, there was no limited warranty, as in our case, and no restriction of liability for

results, and it appeared, that a member of the plaintiff's firm had said that he had seen as much as he had wanted to see, and he thought there must have been a mistake made in the factory by putting in acid instead of phosphate. These facts show a radical difference between the two cases. If the merchant who buys from the fertilizer company chooses to sell to the farmer with a warranty different from that which has been given to him, and broader in its scope, he may do so, but he cannot thereby increase the liability of the fertilizer company upon its warranty to him. That will remain as fixed by the terms of the contract, and will not be altered by any future conduct or action of the merchant in his dealings with others.

(452) The effect of the judge's instruction upon the third issue, which, by the way, is not in proper form, was to add a term to the contract not inserted therein by the parties, and to charge the defendant upon a warranty, for the performance of which he was not bound and for any breach of which he was, therefore, not liable.

It has been suggested that the Court, in *Jones v. Cordele Guano Co., supra,* decided that evidence as to the use of the fertilizer upon lands and its effect upon crops was admissible only as corroborative or discrediting testimony, after there had been evidence of any analysis of the fertilizer, but we think it is substantive evidence, and for the reason given by the Court in that case for admitting it as corroborative. It has been held to be substantive evidence in *Tomlinson v. Morgan, supra.* Cervantes wisely said, in his *Don Quixote,* that "the proof of the pudding is the eating," and so by analogy the proof of the fertilizer is the using of it. It is practical instead of scientific proof, but the evidence should be admitted cautiously and with proper and full safeguards, so as, by eliminating the speculative elements, to show clearly the causal connection between the fertilizer used and the loss or diminution of the crop. Unless the foundation for such proof is well laid, it lacks in probative force, as it has not been removed from the realm of speculation and is only conjectural and, of course, unreliable.

We direct that there must be a new trial because of the errors indicated.

New trial.

Cited: Bland v. Harvester Co., 169 N. C., 419; *Winn v. Finch,* 171 N. C., 276; *Carter v. McGill,* 171 N. C., 775; *Hollingsworth v. Supreme Council,* 175 N. C., 636; *Murray Co. v. Broadway,* 176 N. C., 151; *Gatlin v. R. R.,* 179 N. C., 435; *Fertilizer Co. v. Thomas,* 181 N. C., 280; *Sprout v. Ward,* 181 N. C., 375; *Fay v. Crowell,* 182 N. C., 534;

White v. Fisheries Co., 183 N. C., 231; *Brewington v. Laughran*, 183 N. C., 565; *Colt v. Springle*, 190 N. C., 230; *Swift & Co. v. Aydlett*, 192 N. C., 338; *Hyman v. Broughton*, 197 N. C., 3; *Frick Co. v. Shelton*, 197 N. C., 297.

WRIGHT KNIGHT, JR., ET AL. v. JOHN L. ROPER LUMBER COMPANY.

(Filed 24 March, 1915.)

Deeds and Conveyances—Contracts to Convey Lands—Bond for Title—Third Persons—"Color"—Adverse Possession—Limitations of Actions.

While the mere possession of the obligee under a bond for title or executory contract to convey lands, with full and sufficient description, will not ordinarily be held as adverse to the obligor, it is otherwise as to third persons who do not claim title under him; and, as to them, the continuance of the possession for the statutory period, under the contract, falls within the definition of "color," and will ripen the title in the claimant.

APPEAL by defendant from *Peebles, J.*, at November Term, 1914, of CRAVEN.

Civil action to recover damages for wrongfully cutting timber on a tract of land; involving also an issue as to title.

The action was instituted on 10 April, 1912. Title was admitted to be out of the State. As evidence tending to show title, plaintiff introduced a bond for title or contract to convey the land in fee (453) to Wright Knight, ancestor of plaintiffs, from Samuel Peel and wife, Lucinda, bearing date 7 March, 1874, describing the land by specific metes and bounds, and offered evidence tending to show that said Wright Knight entered on the land under said bond, built a shanty thereon, and continued to occupy, asserting his claim, till his death, in 1910, and plaintiffs had been in possession since that time; that, after the death of his father, Wright Knight, Jr., carried the paper writing to Samuel Peel and the execution thereof was duly acknowledged by him before a justice and was registered as such acknowledgment, 17 January, 1911.

The cutting complained of occurred in 1911. The case described that, while defendant showed a grant from the State and mesne conveyances to the company, there was no connection between such title and the claim or title of Samuel Peel, etc.

Verdict and judgment for plaintiff, and defendant excepted and appealed, assigning for error that the court held the bond for title good as color of title.

A. D. Ward, D. L. Ward, C. A. York for plaintiff.
Moore & Dunn for defendant.

HOKE, J. Color of title has been defined as a "paper writing, usually a deed, which professes and appears to pass the title, but fails to do so." *Norwood v. Totten,* 166 N. C., 648.

We were referred by counsel to decisions of other courts to the effect that the bond for title or an executory contract to convey land does not come within the definition, and this on the ground, chiefly, that the instrument in such case does not purport or profess to pass any title, and, further, that the occupation of a vendee under such a paper is not adverse. But, to our minds, and in reference to the principle involved, these courts do not correctly interpret such a contract nor the character of the claimant's occupation under it. It is true that, as against the vendor, the possession of the vendee, occupying under such a contract, does not, as a rule, become hostile or adverse until something has occurred that places one of the parties in the position of resistance to the claim of the other, and, until that time, the ordinary statute of limitations does not begin to operate. It has been so held with us in *Worth v. Wrenn,* 144 N. C., 656, and authorities cited. But, as against third persons, strangers to the title or claims of both vendor and vendee, a contract of this character should be construed as an instrument purporting to pass at least an equitable interest, considered an estate with us, and the vendee in possession under it, asserting ownership, should be properly regarded as holding adversely against all others, and, if
(454) such possession is maintained for the requisite statutory period, it should, in our opinion, have the effect of maturing the title. This position has been directly upheld elsewhere by courts of recognized authority. *McNeely v. Oil Co.,* 52 W. Va., 616; *Fair v. Gurthwright,* 5 Ga., 6; *Elliott v. Mitchell,* 47 Tex., 445, and Wood on Limitations, sec. 260, where the author says, among other things: "But where a contract is made for the sale of land upon the performance of certain conditions, and the purchaser enters into possession under the contract, the possession from that time is adverse to all except the vendor."

There have heretofore been several cases in our own Court which have gone very far in approval of the principle (*Burns v. Stewart,* 162 N. C., 360; *Greenleaf v. Bartlett,* 146 N. C., 495; *Brown v. Brown,* 106 N. C., 451; *Avent v. Arrington,* 105 N. C., 377), and it was directly so decided with us at the last term, in *Gann v. Spencer,* 167 N. C., 429, a case where a bond for title was held to be good as color.

It is said, in some of these decisions, among others, the Georgia cases, *supra,* that the contrary view seems to have the weight of authority in

its support, but we are satisfied, on further reflection, that the position as it now obtains here is in accord with the better reason and are of opinion that his Honor made correct decision in holding that the written contract to convey was good as color of title.

In connection with the question presented, we consider it desirable to call attention to the cases of *Jaspar v. Scharnikow,* 150 Fed., 571, and *Power v. Kitching,* 10 N. D., 254, as annotated in two of our standard publications, the first in L. R. A. (N. S.), 1178, and the second in 88 Am. St. Rep., 691, where the learning on the subject will be found very fully stated.

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

No error.

Cited: Kivett v. Gardner, 169 N. C., 79; *Hinson v. Kerr,* 178 N. C., 540.

BRYANT TIMBER COMPANY v. TILGHMAN LUMBER COMPANY.

(Filed 24 March, 1915.)

1. Deeds and Conveyances—Trials—Evidence—Contracts to Convey Timber—Tender of Deed.

In an action to compel a defendant to perform his contract to purchase timber on certain lands of the plaintiff it is competent for the plaintiff to introduce in evidence his deed, which he has previously tendered, purporting to convey the timber, for the purpose of showing he was ready and willing to perform his part of the contract.

2. Deeds and Conveyances—Contracts to Convey Timber—Trials—Defective Title—Parties—Evidence.

Where the title to lands of the plaintiff, in controversy, depends upon a judgment in certain former proceedings for their sale, and defendant introduces evidence that a party to that proceeding had filed in the clerk's office a petition to set aside the sale on the ground that he had been made a party thereto without his authority, which was not served and which is relied on as evidence of a defective title, it is competent to show by witnesses, who were present when the petition was prepared and knew its contents, that the petitioner had authorized his joinder as a party to the proceedings for the sale of the lands.

3. Appeal and Error—Unanswered Questions.

Unanswered questions, without anything appearing of record to show their materiality, will not be considered on appeal.

4. Appeal and Error—Trials—Damages—Evidence—Deeds and Conveyances—Tender of Deed.

Where the plaintiff has tendered his deed under his contract to convey standing timber, and demands damages in his action for the burning of

timber on the lands, the rejection of evidence upon the question of the damages, without showing that they occurred prior to the tender of the deed, is not erroneous.

(455) APPEAL by defendant from *Daniels, J.*, at October Term, 1914, of SAMPSON.

Action to recover the purchase price of certain timber on a tract of land known as the Wilson tract.

On and prior to 14 June, 1907, the plaintiff was the owner of certain timber, timber rights and easements in Sampson County, and on said date entered into a contract with the defendant to sell certain of said timber upon the terms and conditions as set out in a contract at that time entered into between plaintiff and defendant. The defendant, complying with said contract and agreement, took deeds for all the timber described, upon the terms and conditions therein contained, and paid for same, with the exception of the one tract which is in dispute. This particular tract the defendant claims it was not compelled to take on account of the fact that the said contract does not require it to take any of the said timber to which the plaintiff has not a good title, or any of said timber to which the plaintiff does not have a title which "is good and sufficient and free from all encumbrances," and a title which is "absolutely free from all conditions and encumbrances." The defendant also contends that they were not required to take said timber until the plaintiff had tendered them such title as above referred to, and that they should then have a period of ten days within which to investigate such title.

(456) The jury returned the following verdict:

1. Did the plaintiff, The Bryant Timber Company, tender to defendant, Tilghman Lumber Company, a good and sufficient deed for the timber rights and easements as set forth in the complaint, and if so, when? Answer: "Yes; 5 November, 1909."

2. Did defendant, Tilghman Lumber Company, wrongfully refuse to accept said deed? Answer: "Yes."

3. What was the price agreed to be paid for said timber rights and easements? Answer: "$7,500."

4. What amount is plaintiff entitled to recover of defendant for said timber? Answer: "$7,500, with interest from 15 November, 1909."

His Honor charged the jury: That if the jury shall believe all the evidence in the case, they should answer the first issue "Yes; 15 November, 1909," and the second issue "Yes," and the third issue "$7,500, with interest from 15 November, 1909."

The defendant excepted.

C. M. Faircloth and H. L. Stevens for plaintiff.
Fowler, Crumpler & Gavin for defendant.

ALLEN, J. It was conceded upon the argument, and properly so, that the instructions to the jury are correct if there is no error in the admission of evidence, and upon a careful consideration of the record we find none.

It is true, as contended by the defendant, that a deed only takes effect from delivery, but it was competent for the plaintiff to introduce in evidence its deed purporting to convey the timber in controversy to the defendant for the purpose of showing that it was ready and willing to perform its part of the contract.

The plaintiff claimed title in part under a proceeding for the sale of lands to which Jesse F. Wilson was a party, and on the morning of the trial of this action Jesse F. Wilson filed in the clerk's office a petition which was not served, seeking to set aside the proceeding upon the ground that he had been made a party thereto without authority, and this was relied on by the defendant as evidence of a defect in the title of the plaintiff.

It then became competent for the plaintiff to introduce Messrs. Grady and Faison and to prove by them that Jesse F. Wilson authorized his joinder as a party to the proceeding; that he was present when the petition was prepared and knew its contents.

The exceptions of the defendant to the refusal of the court to permit a witness to answer certain questions as to damage to the timber by fire and otherwise since the execution of the contract are without merit.

In the first place, there is nothing in the record to indicate what would have been the answers to the questions. (*Lumber* (457) *Co. v. Childerhose,* 167 N. C., 34), and again, it does not appear that if there was a depreciation in value, it occurred prior to the time the plaintiff tendered its deed to the defendant.

There was ample evidence to support the findings of the jury, and the motion for judgment of nonsuit was properly denied.

No error.

G. W. WARREN AND WIFE v. B. L. SUSMAN, THE WASHINGTON HORSE EXCHANGE COMPANY, AND FELIX LEE.

(Filed 24 March, 1915.)

1. Mortgages—Power of Sale—Conversion—Damages.

Where a mortgage of real and personal property contains no power of sale as to the latter, a seizure and sale thereof by the mortgagee amounts to a conversion, making him liable for their actual value, and also for the value of his use of the chattels.

2. Mortgages—Trusts and Trustees—Sales—Mortgagee a Purchaser—Equity—Election.

The mortgagee with relation to the mortgaged premises is regarded as a trustee for the mortgagor, and at the sale of foreclosure, under a power contained in the instrument, is not permitted to speculate upon his trust or make an unfair profit out of it; and when he has become the purchaser at his own sale, it is optional with the mortgagor to have the transaction set aside and the property returned to the trust fund; and if the trustee insists upon the validity of the sale and has conveyed the property to a third person, who, as he insists, is an innocent purchaser for value and has acquired an absolute title the mortgagor may recover the value of the land thus conveyed or a fair compensation for the breach of the trust.

3. Same—Principal and Agent.

Where one acting as an agent for the mortgagee has purchased the mortgaged property at a foreclosure sale on behalf of his principal the same equities apply as where the mortgagee himself has become the purchaser.

4. Same—Appeal and Error.

Where a mortgagee has bid in the mortgaged property at his foreclosure sale, and in the mortgagor's action against him for the breach of his trust in so doing, the trial proceeds only upon the theory that a fair compensation or the value of the property can be recovered, with allegation and proof sufficient to sustain it, instead of the restoration of the property itself to the mortgagor, the Supreme Court, on appeal by the mortgagee from an adverse judgment, will pass upon the case as it was tried in the lower court.

5. Mortgages—Trusts and Trustees—Sales—Mortgagee a Purchaser—Equities.

While in exceptional cases a mortgagee may be permitted to bid in mortgaged property at his own foreclosure sale to avoid loss to himself and the mortgagor, it must be done in good faith and in recognition of the mortgagor's right to avoid the sale, if he elects to do so; and where the mortgaged property consists of land and mules, the inadequate price, brought by the latter, to pay the debt, will not alone justify the mortgagee in bidding in the land at his own foreclosure sale, and deny to the mortgagor his right to declare the sale void.

6. Same—Election.

Where a mortgagor in his original complaint seeks to set aside a sale of foreclosure wherein the mortgagee became the purchaser, and to restore the property to the trust fund, and the mortgagee, in his answer, alleges that the sale was valid, and also that he had conveyed the property to an innocent purchaser for value, who had acquired thereby a good title, and upon amendment allowed by the court the trial proceeds, without objection, upon the issues then raised, which are confined to a recovery of compensation for the breach of trust alleged, the doctrine of election between inconsistent causes of action has no application, and a judgment in plaintiff's favor will not be set aside on appeal on that ground.

7. Same—Pleadings—Amendments—Inconsistent Causes—Estoppel.

In an action brought by a mortgagor to set aside a foreclosure sale whereat the mortgagee became the purchaser, the plaintiff prayed for his relief that the property thus sold be restored to the trust fund, and the defendant resisted the equity sought, alleging that the sale was valid, and, further, that title to the property had since been acquired by an innocent purchaser for value. The court, without objection, allowed plaintiff to amend and set up his equitable right to compensation for the breach of trust by the mortgagee. *Held*, the plaintiff was not concluded by the relief prayed for in the original complaint from setting up his equity in his amendment thereto, under the doctrine of election between inconsistent causes of action; and the defendant, by its answer and not objecting to the issues raised or to the proceedings at the trial under the amendment, is estopped to rely upon that equitable principle on appeal. The Court *further held* that the mortgagor was not required to take chances on the result of the issue as to the third party being an innocent purchaser for value, and the doctrine of election, therefore, did not apply.

8. Appeal and Error—Exclusion of Evidence.

Exception to the exclusion of evidence in the court below will not be considered on appeal unless its nature is made properly to appear, so that the appellate court can decide upon its competency.

BROWN, J., dissenting.

APPEAL by defendant from *Peebles, J.*, at October Term, 1914, (458) of PAMLICO.

This action was brought to recover the value of certain mules and land sold by defendant, the Washington Horse Exchange Company, under a mortgage given by the defendant to it. There is a power of sale in the mortgage, but it is restricted to the land. It was (459) executed to secure $500, the price of the two mules, for which two notes of $250 each were given on 9 March, 1910, one payable 1 November, 1910, and the other on 1 November, 1911. The transaction took place in Pamlico County where the land is situated and where the mortgage was registered. Plaintiff changed his residence to Carteret County and carried the mules with him. They were seized by the defendant, the mortgagee, carried to Washington, Beaufort County, N. C., and

there sold at public outcry for $225. The land was afterwards sold in Pamlico in like manner and bought by the defendant, the mortgagee, through an agent, for $325.

The jury returned the following verdict:

1. What was the value of the mules described in the complaint at the time the said mules were taken into the possession of the defendant Susman and the Washington Horse Exchange Company? Answer: "$500."

2. What is the highest fair hiring or rental value of said mules? Answer: "$50 per year."

3. What was the value of the lands described in the complaint at the time the same was taken into the possession of the defendants? Answer: "$800."

4. What is the highest rental value of said lands since the defendants took the same into their possession? Answer: "$25 per year."

5. Did E. L. Stewart buy in said lands for the Washington Horse Exchange Company? Answer: "Yes."

6. Did said Stewart pay any money for said lands? Answer: "No."

Judgment was entered on the verdict, and defendant appealed.

Abernethy & Davis for plaintiff.

Z. V. Rawls and Small, MacLean, Bragaw & Rodman for defendant.

WALKER, J., after stating the case: The mortgagee had no power of sale as to the mules, and when the defendant seized and sold them to a third party, it amounted to a conversion and rendered them liable to the plaintiff for their real value. Otherwise if the defendant had sold them regularly under a decree of court or under some authority given to that end. *Bird v. Davis,* 14 N. J. Eq., 467. The jury have found that the mules did not bring a fair price at the sale made by the defendant, but, on the contrary, were worth more than twice the amount they brought at the sale. The defendant is also liable for the value of any use of the mules by it.

As to the land, defendant bought it for itself, though it acted indirectly by an agent. It is the same in equity as if it had bought in its own name. *Whitehead v. Hellen,* 76 N. C., 99. The plaintiff (460) could elect to have the sale set aside and the property returned to the trust fund, or recover of the defendant, who had sold and bought at the same time, in breach of his trust, the value of the land where the trustee insists on the validity of the sale and his right to retain the property, and has conveyed it to a third person, whose title he also insists is unassailable; otherwise the trustee would be allowed to speculate upon his trust and make an unfair profit out of it, which will

not be tolerated by a court of equity. This is held to be the rule in *Froneberger v. Lewis,* 79 N. C., 426, where the subject is fully discussed. *Huston v. Cassidy,* 1 McCarter (N. J. Eq.), 320; *Smith v. Drake,* 23 N. J. Eq. (2 Beasley), 302. The *cestui que trust,* in making his election, is not required, in such circumstances, to take the property upon his trustee's terms, or at a price fixed by him; but equity requires that if the trustee elects to stand upon his right as purchaser, instead of surrendering the property to the beneficiary, he must pay the reasonable value of the land or a fair compensation for the breach of his trust; and this, with greater reason, is true where the trustee has himself subsequently conveyed the land to a *bona fide* purchaser for value and without notice. *Sprinkle v. Wellborn,* 140 N. C., 163; *Froneberger v. Lewis, supra.* When *Froneberger v. Lewis* was before this Court the first time, 70 N. C., 456, the Court said: "It is against the policy of the law to allow an administrator to buy at his own sale; and when he does so, those interested have their election to treat the sale as a nullity—in this case, to have the sale set aside and a new sale ordered—or to let the sale stand and demand a full price," citing *Ryden v. Jones,* 8 N. C., 497; and the trustee was charged accordingly in that case, even though the *cestui que trust* was present at the sale and assented to it.

This suit was heard in the court below upon the theory that the plaintiff had elected to take the value of the land as compensation for the breach of trust by the trustee in buying the land for himself at the sale, and afterwards disposing of it, and it was so submitted to the jury without apparent objection to the issues. The trustee, according to the record, is now insisting that the sale was valid and that he has conveyed to an innocent purchaser, Felix Lee, as he excepted to the court's intimation that he was not such, and also moved to nonsuit the plaintiff. The court expressly states that the plaintiff has elected to take the value of the land. Although Felix Lee was made a party, he filed no answer and no issue was submitted concerning his rights as a *bona fide* purchaser for value and without notice. His Honor told the jury, it is true, that he would submit an issue and to answer it "No," but it was not, in fact, submitted and answered. Besides, as plaintiff takes the value of the land in the place of the land itself, Felix Lee cannot be prejudiced by the judgment, as he has a deed for the land from the defendant, who purchased it at the sale.

We observe that no issue was tendered and no request for in- (461)
structions made upon the theory that defendants were entitled to have the same set aside and return the land to the plaintiff. Their whole defense proceeds upon quite a contrary basis, namely, that they have a right to hold the land against the plaintiff, having acquired it

under a valid sale, and for this reason they moved for a nonsuit, which could not be based upon any other notion.

Another exception taken by defendant was that the proceeds from the sale of the mules were not sufficient to pay the mortgage debt, and therefore it had the right to sell the land and to purchase at the sale. This proved not to be true; but even if it had been, it did not justify the defendant in buying the land at its own sale and afterwards resisting the claim of the plaintiff by denying that he had any right in or to the land, or any equity to have the sale set aside. The case of *Tayloe v. Tayloe,* 108 N. C., 69, where the trustee bought property at his own sale, seems to be directly in point. The court there said that the trustee had dealt with the property unlawfully and sold it for a sum of money greatly less than its value, to appellee's injury, and having failed to dispose of it as the law directed, he was clearly liable for its value.

We do not mean to intimate that a mortgagee may not, sometimes, buy in property at his own sale to prevent a sacrifice of it by a sale to a third party below its value, as such a course may be necessary in order to prevent a loss to himself and the mortgagor. But he must do so in good faith, and in recognition of the mortgagor's right to avoid the sale if he elects so to do. Instead of pursuing this course, defendant company, at the very outset, denied plaintiffs' right to anything, out and out, and prayed for judgment that they take nothing by their action, but be taxed with the costs. They seized and sold the mules unlawfully, and after becoming responsible, by reason of the conversion, for their full value, which was sufficient to pay the debt, they nevertheless sold the land under the power contained in the mortgage, bought it in for themselves, asserted their right to hold it free from any interest or claim of plaintiffs, and conveyed it to a third party, and, as they alleged and maintained in the trial below, for value and without notice, if there was any defect in its title, which was denied. There is nothing in the record by way of prayers for instructions, exceptions to issues, instructions of the court, or assignment of errors, that raises the question properly as to the defendant's nonliability for the value of the land. The issue as to the value of the land was submitted without objection, and it was raised by the pleadings, as plaintiffs, by their amendment to the complaint, asked that the value of the land be determined and that they have judgment for it, and the injury was confined to this phase of the case without any objection. The effect of an amendment of a complaint,

(462) as superseding the original pleadings, was stated at the last term in *Zagier v. Zagier,* 167 N. C., 616, and in *Warren v. R. R.*, 156 N. C., 591. It is sufficient to say, though, that the case was tried below on the issues as to the value of the property with defendant's full

acquiescence, and we hear the case here according to the theory upon which it was tried in the court below. *Allen v. R. R.*, 119 N. C., 710; *Hendon v. R. R.*, 127 N. C., 110; *Graves v. Barrett*, 126 N. C., 267; *S. v. McWhirter*, 141 N. C., 809. The whole theory of the defense below is wholly inconsistent with the present contention that plaintiffs should be required to take the land. It is too late to set up this claim, and it does not meet with the favor of the Court, and especially since defendant has complicated the matter by other conveyances.

It is suggested, though, with much confidence, that plaintiff made a binding and irrevocable election in the original complaint, and, therefore, the amendment, which is inconsistent with and repugnant to it, cannot be considered; but no such objection was taken to the pleading by motion to strike out, demurrer, or in any other regular way, which is necessary to raise such a question; and, too, defendant, by not objecting, consented to the amendment and agreed to the submission of the issue as to the value of the land. In *Scott v. Turley*, 9 Lea (Tenn.), 631, where a conclusive election or ratification was relied on at first, and an amended or supplemental bill afterwards filed, which was repugnant to it, and presented "the anomaly of antagonistic rights being prosecuted in the same suit," the Court held (as the headnote of the case shows) that when the plaintiff "brought the agent before the court, repudiating his act and seeking to hold him individually liable for the debt, while insisting at the same time upon the relief sought in the original bill, and the agent answered to the merits, without objecting to the form of suit or setting up the defense of ratification by reason of the course pursued, the principal will be entitled to relief under the bill repudiating the act of the agent. The amended and supplemental bill filed under such circumstances is, in substance, an original bill upon a different cause of action, and if the defendant, without objection, goes to trial on the merits, must be treated as such." That defendant has waived the benefit of the election by not availing itself of it by proper pleading, is also held in *Davis v. Terry*, 114 N. C., 29; *Hawkins v. Hughes*, 87 N. C., 115. A party cannot take advantage of a defense, which he has ignored or foregone during the entire course of the trial, including the judgment. It is too late, after an adverse verdict and judgment, to take a position which is foreclosed by them, because not presented at an earlier stage of the case in the orderly course of pleading. The authorities clearly show that the objection may be waived by answering to the merits or taking issue thereon.

If there is one rule settled by the courts, it is that a party will (463) not be permitted to have two chances, one on a favorable verdict and another on some supposed defect or irregularity, or even a defense,

preceding it. Defendant could not take a chance on a low assessment of value, and, when disappointed by the verdict, fall back upon an inconsistent position. It was also required to elect, and must abide by its choice, freely and intelligently made. Besides, the doctrine of election does not apply. It is only enforced when the facts are ascertained and known; but here, by its answer, defendant raised an issue as to the validity of the sale, asserting strenuously that it acquired an unassailable title, and that it had conveyed a valid title to the land by its deed to a purchaser for value and without notice. How could the plaintiff be made to elect, unless he was required to take the risk of an adverse verdict as to the latter defense? If he had chosen to take the land, and his choice was irrevocable, the jury might have found that Felix Lee was a purchaser for value and without notice, which would have deprived plaintiff of the land. The law will not subject him to this quandary and eventual loss by the happening of some event which could not be foreseen. The rule must operate fairly and equitably or not at all. The very authority relied on to fasten the election upon plaintiff so says: "If, in attempting and designing to make an election, one puts forth an act or commences an action in ignorance of substantial facts which proffer an alternate remedy, and the knowledge of which is essential to an intelligent choice of procedure, his act or action is not binding. He may, when informed, adopt a different remedy." Enc. of Pl. and Pr., p. 366. The plaintiff made his election as to the value when he discovered the true situation, and the defense, from the answer. It may also be said that the authorities are about evenly divided in number as to whether the mere bringing of a suit is to be considered as a conclusive election, the weight of reason being against it, when no one is prejudiced by the change in the form of relief afterwards prayed, the doctrine of election being founded on the idea of an estoppel. In *Trimble v. Bank,* 71 Mo. App., 467, it was held that "an election is in the nature of an estoppel, and unless it is shown by the record of a final judgment or contains the elements of an estoppel *in pais,* owing to intervening rights, it will not conclude the party against whom it is invoked," citing *Johnson v. R. R.,* 120 Mo., 344, and other cases, among them: *Wiggins Ferry Co. v. R. R.,* 142 U. S., 396; *Balton Mines Co. v. Stokes,* 82 Ind., 50. See, also, *H. B. L. R. Co. v. Corpening,* 97 Ala., 681; *McCoy v. Stockman,* 146 Ind., 668; *J. B. Com. Co. v. K. C. Cont. Bank,* 116 Mo., 558; *Spurr v. C. U. Assur. Co.,* 40 Minn., 428; *Spurr v. Home Ins. Co., ibid.,* 424; *Norcross v. Cambridge,* 166 Mass., 508; *Moore v. Sanford,* 151 Mass., 285; *R. U. P. R. Co. v. N. Y., etc., R. Co.,* 95 Va., 386; *N. Y. Bank v. Tyndale,* 179 Mass., 390; *Hagadine,* (464) *etc., Co. v. Warden,* 150 Mo., 578; *Matter of McLaughlin,* 76

N. Y. App. Div., 75. In *Kehoe v. Patton,* 21 R. I., 223, the Court said: "We do not think, however, that the mere bringing of the suit in equity, it not having proceeded to final decree, amounts to an election (*Jenks v. Smith,* 14 R. I., 634; *Quidnick Co. v. Chafee,* 13 R. I., 367, 369), and therefore we are of opinion that the plea is not sufficient. The defendant's remedy is by motion to require the plaintiff to elect whether he will proceed in the suit in equity or by the present action." Referring to an amendment inconsistent with the original bill, the Court, in *McDougald v. Williford,* 14 Ga., 665, said: "In courts of justice, equity, and common law, the time will come, and now is, when mispleading will never be allowed to prejudice any party, but every case will be ultimately tried upon its real and substantial merits." The Court added that it does not follow, because the original and amended bills are contradictory, that the amendment will be rejected, but amendments will be liberally allowed to change the nature of the bill and rectify mistakes. Our present Code system was adopted for the very purpose here indicated, and is liberal in its allowance of amendments. Rev., secs. 507, 508, and 509. It is said to modify the doctrine of election of remedies (7 Enc. of Pl. and Pr., p. 368), and to require the trial of cases to proceed according to right and justice, rejecting antiquated and refined technicalities. In a case similar to the one at bar, this Court held that the proper course was to amend and substitute the last allegation for the first, the two remedies sought being inconsistent. *Milton v. Hogue,* 39 N. C., 416.

The question asked the witness, as to the controversy about the title, was not answered, and counsel did not indicate what they expected to prove or that the answer would probably be favorable to them. It, therefore, comes within the rule so often announced by this and other courts, that unless we can know certainly what is the nature of the evidence proposed to be elicited, we cannot decide as to its competency, and especially as to its relevancy. *S. v. Leak,* 156 N. C., 643; *S. v. Lane,* 166 N. C., 333, and cases cited at p. 377; *In re Smith's Will,* 163 N. C., 464; *Dickerson v. Dail,* 159 N. C., 541; *Lumber Co. v. Childerhose,* 167 N. C., 34; *A. L. W. Co. v. C. B. and T. Corporation,* 138 Ga., 618; *Wadley v. Southern Railway,* 137 Ga., 497; *Manning v. Webb,* 72 S. E., 401; *Cutchin v. City of Roanoke,* 74 S. E. (Va.), 403. In *Leak's case, supra, Justice Allen* says: "The exception to the refusal to permit the witness to say whether or not the defendant was considered bright or had the reputation of not having a strong mind, are without merit. There is nothing to indicate what was expected to be proved, or what answer would have been given to the question, and so far as we can see, the witness would have answered both questions in the negative." As

(465) far as we can see from the record, if there was any error, it was harmless. The witness, if permitted to answer the question, might have stated that there was no such controversy, or that he knew nothing about it, and it is very probable that he would have so answered.

The other exceptions are without any merit.

No error.

BROWN, J., dissenting: I agree with the majority of the Court that the defendants are liable to the plaintiff for the value of the mules, as the power of sale contained in the mortgage is confined in express terms to the land, and does not extend to the mules. Therefore, having seized and sold the mules without any power of sale, the defendants are undoubtedly liable to the plaintiff for their actual value.

But I do not think the defendants are liable for the actual value of the land. Under the well settled principles of law, the plaintiff must elect as to whether he will set aside the sale and claim the land, itself, and its rents and profits, or whether he will affirm the sale of the land and demand its actual value.

The original complaint plainly elects to recover the land, itself, with its rents and profits, and demands judgment that the sale be declared null and void and that the deed executed by the defendant Horse Exchange, under the power of sale, be set aside.

It is true that, after the defendants had joined issue by filing an answer to that complaint, the plaintiff at October Term, 1914, the term when the case was tried, filed, by leave of court, an amended complaint in which they seek to affirm the sale of the land and to recover its value.

While the court may allow amendments to pleadings, the amendment cannot be permitted to have the effect of reversing and revoking the election already made in December, 1913, when the original complaint was filed.

It is well settled that an election, once made, with knowledge of the facts, between coexisting remedial rights, which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit, or proceeding, upon a remedial right, inconsistent with that asserted by the election. 15 Cyc., 262, citing an array of cases.

Speaking of the finality of an election, it is said in the Encyclopedia of Pleading and Practice, vol. 7, p. 364: "It may, therefore, be stated as approximately if not substantially true, that, subject to the exceptions hereafter stated, the first pronounced act of election is final and imperative. It is certainly the established law in every State that has spoken on the subject, that the definite adoption of one of two or more in-

consistent remedies, by a party cognizant of the material facts, (466) is a conclusive and irrevocable bar to his resort to the alternative remedy."

The exceptions to the rule are want of jurisdiction, premature action, mistaken remedy, ignorance of material facts, none of which apply to the facts in this case. When the plaintiff filed his original complaint, he had full knowledge of the facts therein stated, and more particularly of the value of the land, as he was its owner and had been for some time.

It does not appear in this record that the defendant consented to the amendment by which the plaintiff was permitted to revoke his election. For these reasons, I am of opinion that the Court should set aside the sale and order a resale, instead of giving judgment against the defendant for the value of the land.

Cited: Coble v. Barringer, 171 N. C., 447; *Webb v. Roseman,* 172 N. C., 850; *Bailey v. Justice,* 174 N. C., 755; *Burnett v. Supply Co.,* 180 N. C., 119; *Hooper v. Trust Co.,* 190 N. C., 428; *Shipp v. Stage Lines,* 192 N. C., 478; *Greene v. Becktel,* 193 N. C., 99; *Booth v. Hairston,* 193 N. C., 281; *In re Will of Efird,* 195 N. C., 84; *Moses v. Morganton,* 195 N. C., 99; *McCall v. Lumber Co.,* 196 N. C., 601; *Lykes v. Grove,* 201 N. C., 257; *Bailey v. Stokes,* 208 N. C., 116.

C. M. JORDAN AND WIFE v. I. FRANK FAULKNER.

(Filed 24 March, 1915.)

1. Tenants in Common—Judicial Sales—Sale for Division—Commissioner's Deed.

The deed of a commissioner to lands owned by tenants in common, given for a division, conveys to the purchaser the same title and estate as owned by the tenants in common, and operates as the deed from each and all of them.

2. Tenants in Common—Partition—Judgment Creditors—Parties.

A partition sale, in the absence of statute laws, does not free the lands from preëxisting liens, and judgment creditors of one of the tenants are not necessary parties to the proceedings.

3. Same—Proceeds of Sale—Payment of Liens.

Prior encumbrancers or judgment creditors, whose liens on the interest of an insolvent tenant in common in lands has been docketed before proceedings for partition, may not as interpleaders in the proceedings compel

the commissioner, who has sold the lands for division among the tenants, to pay over the share of the proceeds of their judgment debtor to them, to be applied to the satisfaction of their liens.

APPEAL by defendant from *Daniels, J.*, at December Term, 1914, of LENOIR.

Petition in the cause. From the order made by his Honor, continuing the restraining order to the hearing and refusing to order the payment to the defendant Faulkner of certain money in the hands of a commissioner, the defendant appealed.

Certain interpleaders, W. C. Fields, John G. Cox, and others named in their interplea, asked that the funds in the hands of the commissioner be applied to the payment of certain judgments against the defendant.

(467) *McLean, Varser & McLean, G. G. Moore for interpleaders, appellees.*

W. D. Pollock, G. V. Cowper, and R. H. Lewis, Jr., for defendant, appellant.

BROWN, J. In this proceeding a decree was entered directing the sale of certain lands for partition among the plaintiffs and the defendant. Before the commencement of this proceeding certain of the interpleaders had obtained judgments against the defendant Faulkner, which were duly docketed in the Superior Court of Lenoir County.

A decree of sale was entered and the commissioner appointed to sell the land. At the sale the two Mitchells, interpleaders, were the purchasers of the land, the other interpleaders being the judgment creditors.

The sale was duly confirmed and the deed made to the purchasers by the commissioners. The purchasers sold the land to one Clyde Cunningham for $7,500, $1,500 over their bid.

Prior to the institution of this proceeding the homestead of the defendant Faulkner had been legally allotted to him in lands other than those sold in this proceeding. It is admitted that the defendant is insolvent. The interpleaders asked that that part of the proceeds of the sale belonging to the defendant Faulkner be applied to the payment of the said judgments, or as much as may be necessary. It is admitted that the purchasers of the property had full knowledge of the docketed judgments before the confirmation of the sale.

We are of opinion that his Honor erred in continuing the restraining order and refusing to direct the payment of the share of the funds belonging to the defendant to him. Under our statute, Revisal, sec. 2512, the deed of the commissioner conveyed to the purchaser "such title and estate in the property as the tenants in common had."

The deed of the commissioner, by virtue of the partition proceedings, is in law the conveyance of all the parties, and vests in the grantee the same title and rights as would other conveyance equally comprehensive in terms. 30 Cyc., 287 (B).

In many States the statutes provide that a partition sale frees the lands from all preëxisting liens, and deprives the lien holder of all remedies save that of seeking payment out of the proceeds of sale. 30 Cyc., 210.

Such is not the statute law of this State, and in the absence of such statutes, requiring this to be done, it cannot be affirmed that encumbrancers or judgment creditors of an individual parcener are necessary parties to the partition proceeding.

It was early held in this State that "Where slaves, on the petition of owners, have been ordered to be sold for a division, one who was no party to the petition, but claimed by a lien, under an execution against one of the petitioners before the sale, has no right to (468) apply to the court to have the share of such petitioner in the proceeds paid over to him." *In re Harding,* 25 N. C., 320; *Harding v. Spivey,* 30 N. C., 63.

It seems to be generally held, in the absence of such statutes, that lien holders are not necessary parties in partition proceedings, and have no right to intervene after final judgment. 30 Cyc., 229.

It is said in 24 Cyc., p. 62: "The purchaser at a judicial sale takes the property subject to whatever liens and encumbrances exist thereon at the time of the attaching of the lien under which the property is sold, and cannot have the proceeds of sale applied to discharge such liens.

In *Roberts v. Hughes,* 25 Am. Rep., 270, it is held by the Supreme Court of Illinois that, "In the absence of fraud, or misrepresentation, the purchaser at a judicial sale takes, subject to prior judgment and encumbrances, and must bear the loss, if any ensues."

In *Vaughan v. Clark,* 5 Neb., 238, it is held that "A purchaser at a judicial sale, under a decree of foreclosure, takes the property subject to whatever liens may exist thereon at that time."

In *Zeigler v. His Creditors,* the Supreme Court of Louisiana holds: "Where a tutor holding an undivided interest in real estate purchases the entire property at a judicial sale in partition proceedings, a tutorship mortgage affecting at the time of the sale the tutor's undivided interest in the property, remains unaffected by the sale." 49 La. Ann., 144.

We might cite other authorities, but it is unnecessary. The cause is remanded to the Superior Court of Lenoir County with directions to enter a decree that the commissioner pay over to the defendant Faulk-

ner his share of the proceeds of sale. The costs of this Court will be taxed against the interpleaders.

Reversed.

Cited: Holley v. White, 172 N. C., 78.

ORRIN WEEKS v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY.

(Filed 24 March, 1915.)

Cities and Towns—Streets—Moving Houses—Wire Companies—Overhead Obstructions—Damages.

The plaintiff attempted to move a house he had purchased, along the streets of an incorporated town, from one location to another, under the provisions of an ordinance of the town and by permission of the proper authorities, and also under promises of the local manager of a telephone company, operating its overhead wires and cables on the street, that the company would arrange for the passage of the house where the wires of the company would otherwise prevent. The failure of the company to fulfill its promise except at a heavy expense to the plaintiff prevented him from passing the cables and wires of the company and forced him to sell the house, to be used in a different place, at a loss. *Held:* The telephone company was answerable in damages. Discussion of advisability of requiring telephone and telegraph companies to place their wires underground.

BROWN, J., did not sit; HOKE, J., concurred in result; ALLEN, J., dissenting.

(469) APPEAL by plaintiff from *Rountree, J.,* at November Term, 1914, of LENOIR.

C. V. Cowper, Loftin & Dawson, and Rouse & Land for plaintiff.

Y. T. Ormond and G. M. T. Fountain & Son for defendant.

CLARK, C. J. This is an action by a resident and taxpayer of Kinston who had obtained a permit from the city authorities to move a house along the street from one point to another in that town. The city had passed an ordinance regulating the moving of houses which required a permit from the city and that the mover should bear all expenses of removing the electric light wires for the passage of such house, with a penalty for allowing any building to remain in the same place more than six hours in the day, Sundays excepted.

The city had granted the defendant a franchise to erect the telephone system by an ordinance under one section of which the defendant obligated itself to observe the ordinances of the city, then in force or thereafter to be enacted, which was its duty anyway. The poles were erected under the supervision of the board of aldermen. After the completion of the defendant's system it appeared before the city council and asked to be permitted to raise the rates of phone rentals, as provided in the franchise, which the board permitted, and fixed the rates. It was admitted that at the time of the franchise, and since, it has been usual to move buildings under the permit of the city.

The plaintiff testified that he was negotiating the purchase of a one-story building and offered to pay $375 for the building, provided the city would grant the permit to move and that the telephone company would remove its wires to permit the building to be carried from its then location to a vacant lot on which the plaintiff wished to place it. He said that he received from the authorities permit to remove the building and then applied to the defendant's manager, who told him to go ahead and he would remove the wires when necessary, and that in consequence he purchased the house.

Under these conditions the plaintiff testified he began to remove the building. The small wires were actually cut and the house was moved into the street and reached the first crossing, where the defendant's wires, poles, and cables interfered. At this point the defendant's manager refused to remove the obstructions unless the plaintiff would (470) pay all expenses, which the defendant's manager estimated at a large sum. The defendant offered evidence tending to show that cables would have to be cut at a great expense, while the plaintiff offered evidence tending to show that the building could have proceeded by merely lowering or raising the cable. After expending $500, the plaintiff was compelled to sell the building at the highest market price, $100, and claims that he sustained a loss of $400, not including the loss of all benefit and profit from the proposed transaction.

The court erred in granting a nonsuit. The town of Kinston was vested with full authority to regulate the use of its streets, and by ordinance had assumed to control the moving of buildings along said street, and had granted this plaintiff a permit to thus move the building. Besides, there was evidence tending to show that the defendant, through its local manager, who was in control of its plant and operations in that town, contracted with the plaintiff to remove the obstructions in the way of his removal of this building.

The full authority of a municipality over its streets and the wide discretion reposed in them is fully recognized in *Tate v. Greensboro,* 114

N. C., 392, and in the cases cited thereto in the Anno. Ed. These hold that such authority will not be reviewed by the courts unless it has been exercised negligently, willfully, or maliciously.

While we have no direct case in our State as to moving buildings along the streets with the permission of the town authorities, the law is thus summed up 28 Cyc., 909 (c), with citations: "A citizen has a common-law right to the reasonable use of streets for the purpose of moving buildings, subject to reasonable restrictions which the municipality may impose." A case in point is *R. R. v. Calvert,* 11 Anno. Cases, 635, with a valuable note containing a summary of the authorities. In *Day v. Greene,* 4 Cush. (Mass.), 423, *Chief Justice Shaw* says: "That it is often useful and convenient that buildings should be so removed is found by experience . . . And therefore it seems highly proper that the power to authorize and regulate it should exist somewhere." This is cited as a correct statement of the law, 1 Dillon Mun. Corp. (4 Ed.), sec. 395. In *R. R. v. Calvert,* 11 A. and E. Anno., 639, it is said: "The mere fact that appellant enjoys contract rights in the streets is not controlling. The regulations operate on the property, and it must always be understood that those who enter into such contract relations with the public as render their property reasonably subject to control do so with a knowledge that the police power is an inalienable and continuing authority." In the note referring to this case it is said: "It was held that for the purpose of moving a building the plaintiff had the right, upon compliance with the terms of the ordinance, to cut the wires of the electric light company."

(471) A reasonable use of the streets for the purpose of moving buildings is proper and necessary. Even if it were conceded that the city could barter away this right which it held in trust for its citizens, it has not done so in this case. Its ordinances recognize such right by requiring a permit, and the franchise granted to the defendant required it to observe the city ordinances. In *Moore v. Power Co.,* 163 N. C., 300, it was held, in reference to the city's power over its streets, that "A municipal corporation cannot transfer to a *quasi*-public corporation for its convenience and profit the superior right which the city authorities can exercise only for the public benefit."

The defendant, like all other public service corporations, exercises its rights and powers in subordination to those of the public. The poles and wires of the defendant are unsightly, and the wires, being above ground, expose the defendant to interruption of the service from storms and electrical disturbances. It is strange that such companies do not avoid this by placing their wires underground. But if they prefer to keep them above ground, to save the expense of their proper installation

in pipes underground, they must not interfere with the superior rights and privileges in the streets of the citizens or with those rights held by the authorities in trust for the people. *R. R. v. Morehead City,* 167 N. C., 118.

Besides, there was evidence of an express agreement and contract between the plaintiff and the defendant's manager upon which he could base an action for the defendant's subsequent interference with the removal of the house after agreeing that the wires should be removed for it. The defendant contends on its evidence that its manager agreed only to remove the "wires," but said nothing about removing "cables." The defendant also contends that its manager at Kinston in charge of its plant and operations was the "local manager," and did not have authority to make such contract. This matter should have been submitted to the jury under proper instructions, and should not have been decided by the court itself by granting a nonsuit.

Reversed.

BROWN, J., did not sit; HOKE, J., concurred in result; ALLEN, J., dissented.

Cited: Weeks v. Tel. Co., 172 N. C., 869.

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(472)

C. V. SWAN, ADMINISTRATOR OF DAVID K. O'NEAL, v. V. V. CARAWAN ET AL.

(Filed 24 March, 1915.)

1. Bills and Notes—Execution—Payment—Trials—Burden of Proof.

Where the plaintiff proves the execution by the defendant of a note, the subject of the action, he is entitled to recover thereon unless payment is shown by the defendant, the burden of showing payment resting on the latter.

2. Courts—Expression of Opinion—Interest of Witness—Trials.

In proceedings by an administrator to sell lands of deceased to make assets to pay debts, the execution of the note was testified to by the plaintiff, and a witness for the defendant testified that the note had been paid and that he had a mortgage on the land in question. *Held:* It was error for the court to charge the jury that the defendant's witness was not interested in the result of the action, such being an expression of his opinion upon the weight of the evidence prohibited by statute, which was exclusively for the determination of the jury.

APPEAL by plaintiff from *Peebles, J.,* at October Term, 1914, of PAMLICO.

SWAN *v.* CARAWAN.

Proceeding to sell land for assets, heard in the Superior Court upon appeal from the clerk.

The only issue submitted to the jury was as to the indebtedness of the intestate.

The plaintiff introduced a note and a witness who testified that he saw the deceased execute it.

The defendant relied upon the plea of payment, and introduced a witness, Mr. Watson, who testified that he saw the deceased pay the indebtedness. On cross-examination this witness, Watson, testified that he did not consider that he owned the land yet which the plaintiff was seeking to sell, but that he held a mortgage deed on the land.

His Honor charged the jury as follows: "The plaintiff swears that Mr. O'Neal signed the note. There was no objection to his testimony. If there was, I would have ruled it out, as he was interested in the result of the suit. There was no objection; therefore, it is your duty to consider it; but when you consider it, remember that he is interested in the result of this suit, and ascertain the best you can what effect his interest would have upon the truthfulness of his testimony; then give to his testimony that weight and effect under all the circumstances you think it is entitled to. It does not appear that Watson is an interested witness, and the whole matter depends upon whether or not you believe Watson, who says that the note was paid, or the plaintiff, who says that it has never been paid. The burden is upon the plaintiff to satisfy you by the greater weight of the evidence that the note was never paid, and that something is due, and what amount is due."

(473) The plaintiff excepted to that part of the charge stating that it did not appear that Watson was an interested witness, and to that part that the burden was upon the plaintiff to satisfy the jury that the note was never paid.

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

Z. V. Rawls for plaintiff.
No counsel for defendant.

ALLEN, J. When the plaintiff proved the execution of the note by the intestate, he was entitled to have the issue of indebtedness answered in his favor unless the defendant established his plea of payment, and the burden of proof upon this plea was on the defendant. *Guano Co. v. Marks,* 135 N. C., 59.

It was therefore error to charge the jury that the burden was on the plaintiff to prove that the note had not been paid.

The witness, Watson, upon whom the defendant relied in support of his plea, admitted on cross-examination that he held a mortgage on the land which the plaintiff was seeking to sell, and it was for the jury and not for the judge to say whether this fact would affect his testimony, and the statement of his Honor that it did not appear that this witness was interested was an expression of opinion upon the weight of evidence which the law does not permit.

There must be a

New trial.

Cited: Lassiter v. R. R., 171 N. C., 287; *Collins v. Vandiford*, 196 N. C., 239; *Davis v. Dockery*, 209 N. C., 274.

FRANKLIN NATIONAL BANK v. ROBERTS BROTHERS COMPANY.

(Filed 24 March, 1915.)

1. Bills and Notes—Blank Spaces—Interest—Legal Rate—Presumption.

Where no stipulated rate of interest is named in a promissory note, the legal rate will apply, and where the note reads "at.....per cent per annum" it will be regarded as reading at 6 per cent per annum, the law thus filling, at the legal rate, the space left blank, and the negotiability of the instrument is not affected thereby.

2. Bills and Notes—Exchange on Notes—Consideration.

In the exchange by two parties of their promissory notes, the giving of each note affords a sufficient consideration for the other.

3. Trials—Issues Sufficient—Appeal and Error.

The refusal of the court to submit the issues tendered by the appellant will not be held as erroneous when the issues passed upon by the jury have afforded the parties opportunity to introduce all pertinent evidence to the matter in controversy arising under the pleadings.

4. Bills and Notes—Banks and Banking—Holder in Due Course—Deposits—Trials—Instructions—Verdict, Directing.

Where all the evidence in an action brought on a note by a bank claiming to be a holder in due course of an instrument regular upon its face tends only to show that the note was indorsed to the bank by the payee, the money placed to his credit and drawn out by him before maturity; that there was no arrangement between the depositor and the bank by which this or other unpaid notes were charged back to him in event of nonpayment, it is proper for the trial judge to charge the jury that if they should find the facts to be as testified they should answer the issue in the plaintiff's favor.

(474) APPEAL by defendant from *Whedbee, J.*, at October Term, 1914, of WAKE.

Civil action tried on these issues:

1. What amount is the plaintiff entitled to recover on the first note sued on? Answer: "$2,500, with interest at 6 per cent from 16 November, 1912."

2. What amount is the plaintiff entitled to recover on the second note sued on? Answer: "$1,000, with interest at 6 per cent from 23 November, 1912."

From the judgment rendered, the defendant appealed.

John W. Hinsdale for plaintiff.

J. C. Little, Winston & Biggs for defendant.

BROWN, J. This action is brought to recover on two promissory notes:

$2,500. WENDELL, N. C., Aug. 15, 1912.

November 16, 1912, after date we promise to pay to the order of Harding-Finley Lumber Company, twenty-five hundred dollars at the Bank of Wendell, N. C. Value received, with interest at ..... per cent per annum. (Signed) ROBERT BROS., INC.,
J. L. ROBERTS, *Prest.*

Indorsed:

HARDING-FINLEY LUMBER CO.,
By W. H. HARDING, *Prest.*

The other is similar in form to the above, except it is in the sum of $1,000, and is due 25 November, 1912.

It is admitted that these notes were given in exchange for two other notes of similar amounts, executed by the Harding-Finley Lumber Company to the defendant. The defendant discounted the notes received from the said lumber company, and as they were not paid at maturity, the defendant paid the banks at which those notes were discounted, and refused to pay the notes sued on. This is set up as a defense against the recovery by the plaintiff upon the notes executed by the defendant to the said lumber company.

(475) The plaintiff alleges that the notes sued on were indorsed by the Harding-Finley Lumber Company to the plaintiff before the maturity for value, and without notice of any infirmity.

(1) It is contended that the notes sued on are nonnegotiable because there is a blank space for the rate of interest, which is not filled in. It

seems to have been decided in a great many cases that stipulating for interest without the rate, *i. e.*, leaving blank the rate of interest, does not affect the negotiability of a promissory note by rendering uncertain the amount, because a blank for interest cannot be filled above the legal rate, and *in the absence of a stipulated rate, the legal rate applies. Hoopes v. Collingswood,* 10 Col., 107; *Patton v. Shanklin,* 14 Mon. (Ky.), 15; *Holmes v. Trumper,* 22 Mich., 472.

The legal effect of not filling in the blank is the same as if there had been nothing written or printed after the word "interest," and the reading of the note would be to pay "interest until paid." This causes the debt to draw the rate of interest fixed by law where no rate is expressed. *Hornstein v. Cifuno,* 125 N. W., 136; *Salazar v. Taylor,* 33 Pac., 369; *Jewett v. McGillicudy,* 55 Neb., 588; Ogden Neg. Instr., 42; Second Daniel Neg. Instr. (5 Ed.), 1385, 1458; Parley Law of Interest, 8.

(2) The defendant excepted to the issues and tendered others. These issues offered opportunity to the parties to introduce all pertinent evidence to the matter in controversy as set out in the pleadings, and that is said to be the proper test. *Black v. Black,* 110 N. C., 398; *Pretzfelder v. Ins. Co.,* 123 N. C., 164.

(3) It is contended that there is no consideration for the notes sued on, and that the plaintiff is not a holder in due course, and is, therefore, affected with notice of such infirmity. It is well settled that one promissory note is a good consideration for another promissory note given in exchange. *Higginson v. Gray,* 47 Mass., 212; *Savage v. Ball,* 17 N. J. Eq., 142.

In *Williams v. Banks,* 11 Md., 198, it is said: "A mutual exchange of notes will furnish a good consideration for both, if such affirmatively appears to have been the intention of the parties, and that will depend on the particular circumstances of each case."

(4) His Honor charged the jury: "If you believe the evidence, you will answer the first issue '$2,500, with interest at 6 per cent from 16 November, 1912,' and the second issue, '$1,000, with interest at 6 per cent from 23 November, 1912.'"

To this charge the defendant excepted.

We think the evidence in this case fully warranted the instructions given. We do not gainsay the general proposition that a negotiable instrument, deposited in a bank, indorsed for collection, remains the property of the depositor, nor that the fact that a bank has given a depositor credit for the amount of a negotiable instrument, (476) regularly indorsed, is not conclusive evidence that the bank had purchased the paper. The evidence in this case does not bring it within the principles laid down in *Packing Co. v. Davis,* 118 N. C., 548; *Bank*

v. Exum, 163 N. C., 199; *Latham v. Spragins,* 162 N. C., 404.

The case comes within the principle laid down in *Trust Co. v. Bank,* 166 N. C., 113, where it appeared that the plaintiff bank had an arrangement with its depositor that it would receive for deposit, and as cash items, checks payable to himself, and permit him to draw against them, and that the depositor had drawn out the full amount of the check in question, in which case it was held that the bank was the owner of the check so deposited and entitled to maintain the action thereon.

The uncontradicted evidence in this case shows that the plaintiff is in the possession of the notes sued on and that their execution is admitted in the pleadings. The testimony shows that the notes were indorsed by the payee and discounted to the bank for value and without notice of any infirmity before maturity.

The witness Harding, the president of the defendant company, testifies that he discounted the notes to the plaintiff before maturity, and that the money was placed to the credit of the defendant and drawn out by it, and that the bank became the absolute owner.

The uncontradicted evidence proves that in the course of dealing with the Harding-Finley Lumber Company the plaintiff bank discounted notes, but they were never charged back when not paid, but were taken up by the Harding-Finley Lumber Company by its check.

The uncontradicted testimony of the witness Gehmann proves that the notes were actually discounted and paid for that the money was drawn out by the Harding-Finley Lumber Company before the notes matured; the full statement of account between the bank and the Harding-Finley Lumber Company, which is made a part of the record, shows no item therein of the charging back of these notes by the bank.

This statement shows that the credit balance at the time these notes fell due of the Harding-Finley Lumber Company was reduced to $34.54 and remained so until 9 December, 1912, when it was reduced to $2.62, and on 11 December it was reduced to 56 cents, and remained at that figure until 23 December, when the Harding-Finley Lumber Company went into the hands of the receiver.

The testimony of Gehmann further negatives completely the proposition that the proceeds of these notes were credited to the account of the Harding-Finley Lumber Company and never drawn out by it. On the contrary, it shows that on 20 August, the day when the $2,500 note was discounted, the Harding-Finley Lumber Company drew out the full amount; and on 23 September, when the $1,000 note was discounted, the said company drew the full amount of the discount.

(477) A perusal of the entire evidence shows, if it is to be believed,

that in any view of it the plaintiff bank discounted the notes sued on for value, and became the absolute owner of them, without any notice of any infirmity attached thereto.

No error.

Cited: Moon v. Simpson, 170 N. C., 336; *Worth Co. v. Feed Co.,* 172 N. C., 342; *Bank v. Rochamora,* 193 N. C., 5.

W. L. NEVINS v. A. C. HUGHES.

(Filed 24 March, 1915.)

1. Trials—Instructions—Statement of Contentions—Objections and Exceptions—Appeal and Error.

Objection to the statement by the trial judge of the contentions of the parties, in his charge to the jury, must be called to his attention at the time, so that it can be corrected and conformed to the evidence, and exception thereto taken after judgment will not be considered on appeal.

2. Trials—Conflicting Evidence—Questions for Jury—Instructions.

In this case *it is held* that the evidence is conflicting and the issues were properly submitted to the jury under proper and approved instructions from the court.

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

Action for the recovery of $750, plaintiff's part of the commissions for selling certain "timber and timber rights" belonging to the Deep River Lumber Corporation. Plaintiff alleged that the defendant, who is a real estate broker, had been appointed to make the sale, and stated that his commissions would be 5 per cent on the purchase price, which had been fixed at $30,000, and that he would pay to plaintiff one-half of the commissions if he would make the sale; that the sale was made accordingly by him at the stipulated price, and that the contract on his part was fully performed, whereby he became entitled to his part of the commissions, or $750. Defendant denied all of this and, on the contrary, alleged that, if he offered one-half of 5 per cent, he made a mistake as to the amount of the commissions he was to receive; that there was an original contract, the terms of which were altered afterwards, and that when the contract was thus amended it was understood and agreed between all the parties, the timber company, plaintiff, and defendant, that no commissions would be paid for the sale, either to the defendant or by him to the plaintiff, and that this was fully understood

and assented to by all the parties. There was evidence to sustain the contentions of the respective parties. The jury rendered a verdict for the plaintiff for $750, and from the judgment thereon defendant appealed.

(478) *Cox & Cox for plaintiff.*
P. J. Olive and H. E. Norris for defendant.

WALKER, J., after stating the case: The only question in the case, as we view it, is one of fact. There are two exceptions, both to the charge of the court. The first is addressed to the statement by the judge of the contention of the plaintiff, and the ground of objection is that there was no evidence to support it; but upon a careful perusal of the testimony, we think otherwise. If the defendant thought that the statement was erroneous or calculated to mislead the jury, he should have called the court's attention to it at the time, so that it could be corrected and conformed to the evidence. *Jeffress v. R. R.,* 158 N. C., 215; *S. v. Cox,* 153 N. C., 638; *S. v. Blackwell,* 162 N. C., 672; *S. v. Wade,* 169 N. C., 306. But we discover no such fault in the charge.

The second exception was taken to an instruction to the jury, in substance as follows: If you are satisfied, by the greater weight of the evidence, that the contract was made as alleged by the plaintiff, and that he performed it, "in accordance with its terms," in making the sale, the burden being on the plaintiff to so satisfy you, then you will answer the issue, "Yes; $750"; but if not so satisfied, you will answer it "No; nothing," and the ground of the exception is not to the form of the instruction, for it could not well be, but that there was no evidence to warrant it; but we think that there was some evidence to support the entire charge, which was fair, full, and impartial, and presented the issues to the jury with clearness and precision.

Apart from these exceptions, the defendant testified that there was an agreement, after the original contract was changed at Norfolk, that there would be no commissions; but the plaintiff in his testimony contradicted this, and stated that it was understood and agreed that the same amount, as his share of the commissions, would be paid to him, notwithstanding the alteration in the terms of the sale. This presented an issue of fact purely.

Upon full consideration of the case, no error has been found. The jury have simply found the facts against the defendant.

No error.

Cited: McMillan v. R. R., 172 N. C., 855; *S. v. Love,* 187 N. C., 39; *S. v. Steele,* 190 N. C., 510.

LEA & ADCOCK v. ATLANTIC INSURANCE COMPANY.

(Filed 31 March, 1915.)

1. Insurance, Fire—Parol Contract—"Binder"—Written Evidence.

In the absence of statutory regulation, a parol contract of fire insurance is valid, and a written memorandum thereof, called a binder, is also competent evidence of the agreement entered into between the parties.

2. Same—Validity of Contract.

Our statute, by establishing a standard form of fire insurance, does not prevent the binding effect of a parol agreement of insurance, looking to the delivery of the policy according to the form prescribed and evidenced by a written memorandum thereof, called a binder; and when such is shown to have been made in a manner to bind the company, it is in force from that time, and thereafter the insured is responsible for the loss in accordance with the terms of the statutory form of policy.

3. Insurance, Fire—Parol Agreement—"Binder"—Contracts—Evidence—Trials.

Evidence that the insured requested fire insurance in a certain sum on tobacco he had in a certain warehouse from the local agent of the insurer, who agreed thereto, gave a written memorandum or "binder" to that effect, contemplating, according to the custom between the parties, the subsequent delivery of the statutory form of policy, and payment of the premium, is sufficient upon the question of whether a valid contract of insurance had been entered into, under the circumstances of this case.

4. Insurance, Fire—Parol Agreement—Principal and Agent—Agent's Authority—Evidence—Trials.

Where the evidence tends to show that an insurance company customarily sends to its local agents batches of its policies, properly signed by its officials and wanting only the signatures of the local agents to give them validity; that these agents were accustomed to bind the company by parol agreement to insure, giving the insured a written memorandum or "binder" thereof, followed by the delivery of the statutory forms of policies, which were received by the home office without question, it is sufficient upon whether the acts of the agents therein were authorized by the company and binding upon it.

5. Insurance, Fire—Principal and Agent—Insured—Private Advantage—Banks and Banking.

Where the cashier of a bank also acts as agent of a fire insurance company, and charges the premiums for policies against the insured's account at the bank, and then remits them to the insurer, it does not come within the condemnation of *Folb v. Insurance Co.*, 133 N. C., 180, which holds that the insured cannot pay his premiums by satisfying a private debt due him by the agent of the company.

BROWN, J., took no part in the decision of this case.

(479) APPEAL by defendant from *Whedbee, J.*, at October Term, 1914, of WAKE.

Action to recover upon two contracts of insurance.

The record discloses that the plaintiffs, Lea & Adcock, were in December, 1913, and January, 1914, doing a leaf tobacco business at Fuquay Springs, N. C.; that they owned a large quantity of leaf and scrap tobacco then in the Banner Warehouse; that on 17 December, 1913, they applied to Howard & Aiken, agents of the defendants, for $3,000 of insurance on said stock of tobacco, and that on 9 January, 1914,
(480) plaintiffs likewise applied to said agents for $2,500 additional insurance on said stock of tobacco in the Banner Warehouse. That when application was made to the said agents for the said insurance the said agents agreed with the plaintiff that they would insure said stock of tobacco, and that they did execute the two paper writings, spoken of as "binders," in words and figures as follows, to wit:

$3,000 on stock of tob. Lea & Adcock. Atlantic, Raleigh, 12 mos. 12/17/13. HOWARD & AIKEN, *Agts.*

$2,500 on Lea & Adcock stock tob. 12 mos. Atlantic, Raleigh, 1/9/14. HOWARD & AIKEN, *Agts.*

On 26 January, 1914, and before policies of insurance had been issued and delivered to the plaintiffs, a fire broke out in a neighboring warehouse, called the Farmers Warehouse, which fire spread to the Banner Warehouse and consumed it, together with the stock of tobacco therein. The next day after the fire the plaintiffs notified the defendants of the fire and of their loss, and demanded payment for the same. The defendants declined and refused to make payment.

The premiums upon the policies referred to in the binders had not been actually paid by the plaintiffs at the time of the fire, but credit had been extended to the plaintiffs, the amounts due thereon had been charged up by the defendants' agents, Howard & Aiken, against the plaintiffs, Lea & Adcock. Mr. Howard, of Howard & Aiken, was cashier of the Fuquay Bank, and all premiums of Lea & Adcock, by a previous agreement, were charged. "A debit slip was returned the same as checks and were cashed and returned and charged to Lea & Adcock's account." This arrangement had been in force between the parties for several years. In September, 1913, the plaintiffs had taken out other insurance in the defendant company and the premium amounted to $33. The slip which was charged up by Howard, the cashier, against Lea & Adcock on the September policy was offered in evidence as tending to show the said arrangement. It was for $33. Mr. Chamberlain, who was in

charge of the plaintiffs' business, testified that all of the plaintiffs' insurance was under that arrangement, which arrangement had been in force for many years.

Both Howard and Aiken, agents of the defendant, were examined as witnesses. Mr. Howard, who is cashier of the bank, confirms the statement that the binders were issued by him as agent for the defendant, and "that a slip in each case would be placed in the bank against Lea & Adcock for the premium and that this would be a debit ticket and would be returned and canceled as a voucher." He says that this agreement was effective when the binders were issued, and that when credit was extended to Lea & Adcock, Howard & Aiken became respon- (481) sible to the company with respect to remitting to them; that he looked after the financial end of the matter, but that Mr. Aiken, his partner, usually filled out the policies for tobacco. It appears, in December, that Mr. Aiken, who usually did this work, was absent, and that Howard did not have the time to fill out the policy until the fire occurred. Mr. Howard explains about the blank policies. About fifty of these blank policies were in his possession as agent of the defendant, all signed up by the president and secretary of the defendant. He states that they were in the usual form, signed by G. H. Dortch, secretary, and by Charles E. Johnson, president, and that they were sent to his firm from the Raleigh office; that he had them in his possession when he gave both binders; *that his firm delivered the policies to the insured and did not have to send to Raleigh for the policies.* He states that that is the only way that Howard & Aiken ever did business for the defendant, and that it was the usual and customary way of issuing policies; that they would report to the company that they had issued a policy, but would never report that they had given a binder, because the policy was to follow soon afterwards. That during the life of their agency Howard & Aiken issued *one hundred and six* policies for the defendants in this way, and that the premiums during their five months agency amounted to over $1,000 net to the defendant. That it was not customary to notify the company of the issuing of any memorandum slip, and that they did not make a daily report of any binding slips. He further states that the policy issued by the defendant in September, 1913, was deposited in the Bank of Fuquay for safe keeping.

Mr. Aiken, the partner of Mr. Howard, says that the memorandum slip for the policy dated 18 September was not reported to the defendant; "we never reported a binder; we reported only the policy." He says that the tobacco companies had printed forms of binders, which were a kind of preliminary insurance to take effect before the policy could be written, and that binders issued upon the tobacco of these com-

panies were never reported to their general agents. This witness further states that on one occasion he asked Mr. Busbee, the general agent of the defendant, for a printed form of binder, as it was not always convenient to write out the policy immediately. Mr. Busbee stated that he would send one, but never did. The defendant required us to make daily reports when we issued a policy, but not as to binders. Blank forms of policies duly signed up by an officer of the defendant, identified by this witness, being fifty in number, and a large lot of stationery, which was furnished to the agents, including books, etc., were identified by this witness and offered in evidence.

(482) A jury trial was waived, and by consent his Honor found the facts in the form of answers to issues as follows:

1. Did the defendant through its duly authorized agents, Howard & Aiken, on 17 December, 1913, insure the plaintiffs' stock of tobacco in the Banner Warehouse at Fuquay Springs in the sum of $3,000 for a period of twelve months? Answer: "Yes."

2. Did the defendant through its duly authorized agents, Howard & Aiken, on 9 January, 1914, insure the plaintiffs' stock of tobacco in the Banner Warehouse at Fuquay Springs in the sum of $2,500 for a period of twelve months? Answer: "Yes."

3. If so, was said insurance of $5,500 in force on 26 January, 1914? Answer: "Yes."

4. Was said stock of tobacco totally destroyed by fire on 26 January, 1914? Answer: "Yes."

5. In what sum is defendant indebted to plaintiffs on account of said insurance? Answer: "$5,500, with 6 per cent interest from 21 May, 1914 (sixty days after proof of loss)."

6. What was the value of the tobacco of the plaintiffs destroyed by fire at date of fire, 26 January, 1914? Answer: "$11,184.54."

Judgment was entered in favor of the plaintiffs, and the defendant excepted and appealed.

Winston & Biggs for plaintiffs.

A. B. Andrews, Jr., and James H. Pou for defendant.

ALLEN, J. There are several exceptions to the admission of evidence, but all of them were taken to preserve and present the contentions of the defendant, (1) that a standard form of policy of insurance having been adopted by statute, neither a parol contract of insurance nor a written memorandum of the contract, known as a binder, is valid; (2) that there is no evidence of a parol contract and no evidence of a delivery of the binder; (3) that there is no evidence that Howard &

Aiken, agents of the defendant, had authority to make a contract of insurance; and if we are against the defendant on these positions, the evidence offered to prove these facts was competent.

(1) Is a parol contract of insurance or a memorandum of the contract, called a binder, valid, although a standard form of policy has been adopted by statute?

In the absence of a statutory prohibition, the great weight of authority is in favor of the validity of a parol contract of insurance. 19 Cyc., 600; Vance on Insurance, 155 Com.; *Marine Ins. Co. v. The Union Fire Ins. Co.,* 19 How., 318; *Ins. Co. v. Coit,* 85 U. S., 567; *Phœnix Ins. Co. v. Ryland,* 1 L. R. A., 549 (Md.); *Horne Ins. Co. v. Adler,* 71 Ala., 524; *Fire Ins. Co. v. Wilcox,* 57 Ill., 182; *Campbell v. Ins.* (483) *Co.,* 73 Wis., 108; *Walker v. Ins. Co.,* 56 Me., 378; *Floars v. Ins. Co.,* 144 N. C., 232.

In the last case this Court said: "It seems to be well established that in the absence of some statutory inhibition, an oral contract of insurance, or to insure, will be upheld if otherwise binding, except, as suggested by one author, in the case of guaranty insurance," and this position is fully sustained by the other authorities cited.

The memorandum of the agreement or binder is also well recognized and established as a valid contract of insurance. Vance on Insurance, 160; 19 Cyc., 395; *Lipman v. Ins. Co.,* 121 N. Y., 457; *Kerr v. Ins. Co.,* 124 F., 835; 1 Cooley Ins. Briefs, 535; 16 A. and E. Enc., 851; *Karelson v. Ins. Co.,* 122 N. Y., 545; *Putman v. Ins. Co.,* 123 Mass., 324; *Gardner v. Ins. Co.,* 163 N. C., 367.

In Vance on Insurance, 160, the author says: "The binding slip is merely a written memorandum of the most important terms of a preliminary contract of insurance, intended to give temporary protection pending the investigation of the risk by the insurer, or until the issuance of a formal policy," and this was cited with approval in *Gardner v. Ins. Co., supra,* as was also *Lipman v. Ins. Co.,* 121 N. Y., 454, which holds a binder to be a valid contract of insurance.

In 19 Cyc., 595, the custom of issuing binders is referred to and their legal effect is stated as follows: "It is usual, however, to issue to the person contracting for insurance some sort of a receipt or memorandum, which is sometimes called a binding slip, evidencing the making of the contract, although not specifying its terms and conditions. Such binding slip or memorandum is evidence of a present contract of insurance between the parties, and the insurance takes effect and is in force from the time the binding receipt or memorandum is delivered to the person contracting for the insurance."

Also, *Chief Justice Parker* says in *Hicks v. Ins. Co.*, 162 N. Y., 284: "It is usual for the company to issue a policy of insurance evidencing the contract between the parties, but the policy accomplishes nothing more than that; for when the contract is entered into between the agent and the owner, whether the binder be verbal or in writing, it includes within it the standard form of policies, and the contract is a completed one. So that all the plaintiff had to do in order to recover, aside from showing a loss by fire and compliance on her part with the condition of the contract, was to prove the making of the contract. This was accomplished by proving the conversation between her assignor and the agent, for the conversation disclosed the sum for which the property was to be insured, the amount of the premium, and the period of the insurance, and the statute provided for all of the other conditions of the contract of insurance."

(484) If, therefore, a parol contract, or one evidenced by a binder, would be legal and enforcible in the absence of statutory regulation, does the fact that a standard form of policy has been adopted render them invalid?

We think not. As we said in *Blount v. Fraternal Assn.*, 163 N. C., 167: "The statute does not purport to deal with the validity of the contract of insurance, but with the insurance company," and it was never intended to furnish the opportunity or temptation to a company to change the form of the contract and thereby escape liability.

In *Armstrong v. Ins. Co.*, 95 Mich., 139, which is approved in *Gazzam v. Ins. Co.*, 155 N. C., 330, the Court having under consideration a statutory form of policy, said of the effect of deviating from its terms: "In construing this statute, we must consider the purpose which the Legislature had in view. It was not to subserve any public policy. Contracts of insurance, so far as the public are concerned, stand upon no different basis than other contracts. The object was to protect policyholders and to provide a policy fair to the insured and the insurer, and avoid litigation. It was undoubtedly well known to the Legislature that policyholders do not usually examine and scrutinize their policies with the same care that they do other contracts which they make, involving their ordinary business transactions. The statute imposes a penalty upon an insurance company for issuing such a policy, but imposes none upon the insured. In using the word 'void' the Legislature certainly did not contemplate that an insurance company might insert a clause not provided for in the standard policy, receive premiums year after year upon it, and, when loss occurs, say to the insured, 'Your policy is void, because we inserted a clause in it contrary to the law of Michigan.' Such a result would be a reproach upon the Legislature

and the law. The law, so construed, instead of operating to protect the insured, would afford the surest means to oppress and defraud them, and thus defeat the very object the Legislature had in view. In 16 A. and E., 851, the author says: 'This preliminary contract is of the greatest importance, for if the applicant could not be made secure until all the formal documents were executed and delivered, the beneficial effect of the insurance system would be greatly impaired; and a clause in the State insurance law or in the charter of an insurance company providing that policies shall be executed in a certain manner does not affect the power of the insurer to make these preliminary arrangements. Such a contract remains in force until it is superseded by the issuance of a regular policy, or until the risk is rejected by the insurer, and the insurer is liable for any loss in the meanwhile."

Also, in *Floars v. Ins. Co., supra,* Vance on Insurance and *Hicks v. Ins. Co., supra,* are cited in support of the proposition "that the enactment of a statute which establishes a standard form for (485) a policy, the statute being only affirmative in its terms, will not invalidate an oral contract," and further, that "the law will read into the contract the standard policy as fixed by the statute."

(2) We are also of opinion that there is evidence of a parol contract to insure and of a delivery of the binder.

Mr. E. H. Howard, one of the agents of the defendant, says with reference to the parol contract: "I agreed to insure that tobacco for them," and with reference to the binders, "That agreement was effective when the binders were issued."

S. W. Chamberlain, who was a bookkeeper of the plaintiffs and had charge of taking out insurance for them, testified: "I saw Mr. Howard and asked him about $3,000 insurance. I told him that I wanted it on leaf tobacco in the Banner Warehouse. It was then known as the Banner Warehouse, Lea & Adcock stock of tobacco. He agreed to issue the insurance for me. He gave me a binder at that time. On 9 January I applied to Mr. Howard and told him I wanted $2,500 additional insurance on leaf tobacco or tobacco of Lea & Adcock in the Banner Warehouse. He said all right, and gave me the binder."

If this evidence is believed, there was an oral agreement to insure and a delivery of the binder to Mr. Chamberlain, the bookkeeper and agent of the plaintiffs.

This seems to be recognized in the brief of appellant, in which, referring to the last binder, it is said: "This slip, like the other, was delivered to the witness Chamberlain, who retained possession of the same."

(3) The evidence as to the authority of Howard & Aiken, agents of the defendant, to issue the policies of insurance is ample.

It was in evidence that it was the custom of the defendant to send its policies of insurance in blank to the agents, and that they were filled up and signed by them; that these policies were ready for delivery without being sent back to the principal office, and that about one hundred policies had been issued by these agents in that way which were accepted by the defendant, and that about fifty of them were in the hands of the agent at the time of the trial.

The witness Howard, one of the agents, testified: "I see the blank forms of policies now shown me, purporting to be the Atlantic Fire Insurance Company of Raleigh, N. C., in the usual form, signed by G. H. Dortch, secretary, and Charles E. Johnson, president, countersigned by blank. Those policies were sent to us from—those blanks, I mean—were sent us from the Raleigh office. I had those in my possession, and had them in my possession at the time I gave those binders. There are fifty of them here; fifty in a batch; these run from fifty-one to seventy-five. When we gave a binder and followed it by issuing a policy,
(486) we delivered some of the policies. A good many of them told us to keep them in the bank. I delivered the policy to the insured; did not have to send it to Raleigh. It was already signed by the president and the secretary and was countersigned by Howard & Aiken, giving it effect, and I at once turned it loose. As to whether that was the usual and customary way in the course of business of Howard & Aiken, agents of the Atlantic Fire Insurance Company, will say that's the only way, the only way we did it. They sent us the policy signed by the president and the secretary before getting any application, and all we did was to countersign it. After we countersigned one of those policies, we reported to the company that we had issued a policy. I do not know exactly how many policies for the Atlantic Fire Insurance Company we issued as agents for that company during the life of our agency; one hundred or more; one hundred and six, I think. The premiums we remitted during the five months amounted to little over $1,000. That was all the net premium to them."

It is well settled that such circumstances are evidence of authority in the agent to issue the policy, and that the company is affected with notice of the making of the contract. *Grabbs v. Ins. Co.*, 125 N. C., 389.

The plan adopted for the payment of premiums by charging them against the plaintiff in his account with the bank of which the agent of the plaintiff was cashier, and then having them remitted to the defendant by its agent, does not come under the condemnation of *Folb v. Ins. Co.*, 133 N. C., 179, which holds that the insured cannot pay his pre-

miums by satisfying a private debt due him by the agent of the company.

Upon a review of the whole record, we find

No error.

BROWN, J., took no part in the decision of this case.

Cited: Wooten v. Order of Odd Fellows, 176 N. C., 61; *Clark v. Ins. Co.,* 193 N. C., 170; *Davenport v. Ins. Co.,* 207 N. C., 862.

RANSOM HAM ET AL. v. MARY J. HAM ET AL.

(Filed 31 March, 1915.)

1. Wills—Intent—Interpretation.

In construing a will, the word "or" will be given the meaning of the word "and" when from the language employed in the paper writing it appears that such was the testator's intent.

2. Same—"Or" as "And"—Estates—Contingent Remainders.

In a devise of lands to the testator's four sons, "but should either of them die before arriving at the age of 21, or without children surviving him," the word "or" should be read as "and," so as to require both contingencies to occur before the limitation over should take effect, and thus save the inheritance to the child or children of any of the sons who should die under age.

3. Same—Vested Interests.

A devise of lands to the testator's four sons, with provision, "but should either of them die before arriving at the age of 21, or without children surviving him," vests in each of the sons the title to his interest in the lands upon his becoming 21 years of age, without regard to his having or not having children.

4. Same—Survivorship.

A devise to the testator's four sons, with provision that the lands be partitioned when they attain the age of 21 years, and upon the death of each of the sons his share "shall go to the others that are living, but not to any of my other children," it appearing that the testator had other living children for whom he had also made provision, does not include within the intent and meaning of the limitation over the surviving child or children of a deceased son, the words "shall go to the others that are living" referring only to the testator's four sons who are named in the devise.

5. Same—Ultimate Survivor.

It appearing from a devise of lands to the testator's four sons that he intended successive survivorships, by directing that at the death of each under age, or without leaving children to survive him, then his or their

share "shall go to the others that are living," the question whether the last surviving son, or the last two of the surviving sons, would take the estate, is, under the facts of this case, immaterial, one of the last two having acquired the share of the other by purchase.

6. Wills—Separate Clauses—Interpretation—Intent—Phraseology—Substance.

A testator in separate items of his will devised different tracts of land to certain of his sons, with words having substantially the same meaning, but with slightly different phraseology, the first clause providing, by interpretation, a succession of interests in the sons, contingent upon their living longer than the others. Construing the will to ascertain the intent of the testator, *it is held*, under the facts of this case, that the difference in the phraseology used in the subsequent clause is immaterial.

7. Same—Contingent Limitations—Rule in Shelley's Case.

A devise of lands to the four sons of the testator upon contingency that "should either of the sons die before arriving at the age of 21, or leaving children surviving him, then and in that case his or their share shall be taken and equally divided between those who are living" is construed, under the circumstances of this case and in connection with another and relevant clause of the will, as if it had read "before" or "without leaving children surviving him," and the children of a deceased devisee may only inherit from his own father, and not take as purchaser under the will of the testator.

(488) APPEAL by plaintiff from *Connor, J.*, at August Term, 1914, of WAYNE.

This case, for the recovery of land, involves the construction of the will of Haywood D. Ham, Sr., who died on 31 May, 1859. He devised his home place, containing 175 acres, to his wife, Penny Ham, for life, and all the rest of the land of which he died seized and possessed to his four sons, Matthew J. Ham, George D. Ham, Erastus Ham, and Haywood D. Ham, Jr., "to be equally divided between them, but should either the said Matthew, George, Erastus, or Haywood die before arriving at the age of 21, or without children surviving him, then his or their share shall go to the others that are living, but not to any of my other children." The other tract of 175 acres he then devised to his said four sons, subject to the life estate of his wife, upon substantially the same limitations, though there is a slight difference in phraseology, the last devise being in these words: "Should either of my sons, Matthew, George, Erastus, or Haywood, die before arriving at the age of 21, or leaving children surviving him, then and in that case his or their share shall be taken and divided equally between those that are living"; the words, "but not to my other children," being omitted from this clause of the will. It is alleged in the complaint that, by other clauses of the will, "the testator made ample and equitable provision for all of his other children, and his widow, Penny Ham, is dead."

The said four sons attained to the age of 21 years and all died without leaving a child, except Matthew J. Ham, who left children. When the four sons were of age, the lands devised to them in their father's will was partitioned equally among them, and each of them took possession of the share allotted to him. The partition was made under the following clause of the will of Haywood D. Ham, Sr.: "Whenever the said Matthew, George, Erastus, or Haywood D., shall arrive at the age of 21, the one so attaining age may by petition have a division of the land that I have given them, have his share set apart in severalty, and the balance to be cast back and remain and continue to be held by the others as tenants in common, and as each one arrives at the age of 21 he may file a petition and have his share allotted to him, and so may each one as he attains the age of 21 continue to do."

George D. Ham died on 30 June, 1887, and his share was divided among the other three surviving brothers, Matthew J. Ham, Erastus Ham, and Haywood D. Ham, Jr. Matthew J. Ham died on 13 April, 1893, leaving children, who are the plaintiffs. Erastus Ham died 6 November, 1893, leaving a will, in which he devised his interest in the said lands, both his original and accrued shares, to his brothers and sisters of the whole blood, who sold and conveyed it to Haywood D. Ham, Jr., who died on 26 May, 1914, leaving a will in which he devised to certain of the defendants his original share in the lands of his (489) father, which was devised to him, and as allotted to him in the division among the four sons, and that part of said lands which was allotted to Erastus Ham in the original partition, and also in the division of the share of George D. Ham, he claiming to have purchased the same from the devisees of Erastus Ham, the said Haywood D. Ham, Jr., having conveyed the part allotted to him in the division of the share of George D. Ham to the children and heirs of Matthew J. Ham, who conveyed to Haywood D. Ham, Jr., the part allotted to them in the division of the share of Erastus Ham, which seems to have been an exchange of the said interests.

Plaintiffs further allege in their complaint that they are the owners and entitled to the possession of the land described in the complaint, being a part of that willed by Haywood D. Ham, Sr., to his four sons, and which were devised by Haywood D. Ham, Jr., in his will to certain of the defendants. The defendant Mary J. Ham is the widow of Haywood D. Ham, Jr., deceased, and is in possession of all the said lands; defendants Nancy Hill and Mary A. Casey are sisters of the four sons, Matthew, George, Erastus, and Haywood, who are the devisees under the will of Haywood D. Ham, Sr.; the defendants Carrie Harrell, Bertha Casey, Will Casey, Lou Pearl Edwards, Eva Casey, and S. J.

Casey are the children of Ellen Casey, deceased, another sister of the said devisees, the said sisters being the children of Haywood D. Ham, Sr.; and Curtis Howell and Rachel Howell are grantees of Haywood D. Ham, Jr., as to 3 acres of said land. The prayer of the complaint is that plaintiffs be declared to be the owners of the land therein described, and entitled to the immediate possession thereof, and for costs.

Defendants demurred to the complaint upon the ground that under the will of his father and the deeds executed to him, Haywood D. Ham, Jr., was seized and possessed of the said lands at his death, and by his will they were devised to certain of the defendants, who thereby became and are now the owners thereof.

The court held that upon the death of Matthew J. Ham, leaving surviving him the plaintiffs as his children and heirs at law, the share of the said Matthew J. Ham in the division of the lands of Haywood Ham, Sr., descended to the plaintiffs as the heirs at law of said Matthew J. Ham, together with an undivided one-third interest in the share of George D. Ham in the said division of the lands of Haywood Ham, Sr.; that upon the death of Erastus Ham, his share in the division of the said lands of Haywood Ham, Sr., passed by the will of Erastus Ham and subsequent deeds to Haywood D. Ham, Jr., in fee, together with the one-third interest of Erastus Ham in George D. Ham's share in said division of the lands of Haywood D. Ham, Sr.; that upon the
(490) death of Haywood D. Ham, Jr., there being no survivors of the brothers, the share of Haywood D. Ham, Jr., in the division of the lands of Haywood Ham, Sr., together with the share which passed to him from Erastus Ham and the one-third interest in George D. Ham's share in said division, passed under the will of Haywood D. Ham, Jr., to the defendants, and thereupon sustained the demurrer.

Plaintiffs appealed from the judgment.

Robinson & Robinson, W. A. Thompson, and Langston, Allen & Taylor for plaintiffs.

Dortch & Barham, W. W. Peirce, and M. T. Dickinson for defendants.

WALKER, J., after stating the facts: The plaintiffs are the children and heirs at law of Matthew J. Ham, and claim to be the owners of the land in dispute under the will of their grandfather, Haywood D. Ham, Sr., upon the ground that they are the last survivors of the four sons mentioned in said will, within the meaning and intent of the testator, as expressed therein or as clearly to be implied from the language used by him.

It has been settled by several cases decided by this Court, and many in other jurisdictions, that the word "or" last used in the sentence, "but

should either of the said Matthew, George, Erastus, or Haywood die before arriving at the age of 21, *or* without children surviving him," should be read as "and," so as to require both contingencies to occur before the limitation over should take effect, and to occur during minority, this construction being necessary to save the inheritance to the child or children of any son who should die under age, according to the undoubted intention of the testator. There are two cases decided by this Court which are typical of all those upon the subject. The first is *Dickenson v. Jordan,* 5 N. C., 380, in which it appeared that the testator devised certain land to his grandson, William S. Stewart, in fee, with the limitation that if he died before he arrived at lawful age or without leaving issue, the land should go to his other grandson, John Spier, in fee. *Judge Taylor* said: "According to a literal construction of the will, the occurrence of either event would vest the estate in John Spier; but it is evident that such was not the testator's intention, and this intention ought always to be effectuated when it does not contravene the rules of law. He could not have intended that the issue of William Spier Stewart should be deprived of the estate if their father died under age; for that would operate to take all from those who appear to have been the principal objects of his bounty; yet such would be the effect of a literal interpretation of his will. His intention seems to have been that the fee should remain absolute in William S. Stewart on the happening of either event, either his leaving issue or attaining to lawful age; or, in other words, that both contingencies, to wit, (491) his dying under age and without leaving issue, should happen before the estate vested in John Spier. To give effect to this intention, it is necessary to construe the disjunctive *or* copulatively; and there are various, clear, and direct authorities which place the power of the court to do this beyond all doubt." And in *Turner v. Whitted,* 9 N. C., 613, construing a similar devise and approving *Dickenson v. Jordan, supra,* the Court said: "Many cases have established the propriety of so construing it ('or') in wills of this kind, otherwise the property would be carried over if the first devisee died under the age of 21, though he had left issue, when the intent of the devisor was that both events should happen, the dying under 21 *and* without issue, before the estate should go over. So that at the age of 21 it was intended that the daughter should have the power of disposing of the estate absolutely, and of making what provision she pleased for her issue, if she should have any; but in the event of her dying before 21, that her issue should not be deprived of the inheritance." So in *Hilliard v. Kearney,* 45 N. C., 221, *Judge Pearson* puts this case: "A gift to A., if he arrives at the age of 21, but if he dies without a child, the property is to go to B.; the inter-

mediate period is adopted, and the gift is absolute at his age of 21," citing *Horne v. Pillars,* 2 M. and K., 22. He says, in another part of the opinion: "It should be borne in mind that this is not a limitation to several children, with a condition that if one or more should die under the age of 21, and unmarried, their shares should go to the survivors or survivor, which is a very usual limitation in wills, and a very reasonable one, for the ownership is restrained only until the child has discretion, or marries, and should be settled in the world. The restraint being a reasonable one, it is probable the testator intended to apply it to all of the children under like circumstances, and the Court incline, in the absence of express words, to imply a succession of survivorships, from the fact that the same reason was applicable to all." The rule is well expressed in *Parker v. Parker,* 5 Metcalf (Mass.), 154: "We think this is one of the cases in which the word 'or' will be construed to mean 'and' in order to carry the testator's intention into effect. The manifest object of the testator was, we think, that if the son who was the first object of his bounty should die without leaving children to take after him, and whilst he was under age, so that he could not make any disposition of the property on account of the incapacity of nonage, then the testator intended to make disposition of it himself. But if the son should leave no children, but still if he should arrive at an age at which the law would allow him to dispose of real estate by his own act by deed or will, then it was intended that the gift to him should be absolute, and the devise over would fail." The Court, in *Doebler's Appeal,* 64 Pa. St., 1, after stating and commenting on the rule, added, that (492) "this construction has been so conclusively settled as to have become one of the landmarks of the law not now to be shaken." See, also, *Soulle v. Gerard,* Cro. Eliz., 525; *Janney v. Sprigg,* 48 Am. Dec., 557, 566, and note; 19 A. and E. Anno. Cases, pp. 924-5; 30 A. and E. Enc. (2 Ed.), 692; *Alston v. Branch,* 5 N. C., 356; *Lindsey v. Burfoot, ibid.,* 494; *Arrington v. Alston,* 6 N. C., 322; *Gregory v. Beasley,* 36 N. C., 26; *Hilliard v. Kearney, supra; Cheek v. Walker,* 138 N. C., 447; *China v. White,* 5 Rich. Eq., 426; 25 L. R. A. (N. S.), 1160, and note; 1 Underhill on Wills, pp. 447, 504; *Phelps v. Bates,* 1 Am. St. Rep., 92; 2 Fearne on Rem., sec. 235. *Chancellor Kent* said in *Jackson v. Blansham,* 5 Am. Dec., 188, a case like this one: "It is now to be hoped that the question on the construction of those words in a will may never hereafter be revived," so sure was he that it had been settled and closed by the courts for many years. We, therefore, conclude, on this branch of the case, that the share of each of the sons would have vested absolutely and unconditionally in him when he arrived at the age of 21 years, whether he had children or not, and the same would have

been the result if he had children during his minority. Matthew D. Ham was the only son who had children, but his share became absolute when he attained to full age, and the same was the result as to all of the brothers, for they had arrived at full age and died without children, and the share of each vested absolutely on his coming to full age.

The next question is whether the plaintiffs acquired any interest in the land by reason of the fact that they survived the other brothers of their father, who died without children, upon the theory that they fall within the class intended to take under these words of the will, "then his, or their, share shall go to the others that are living, but not to any of my other children." But we are unable to agree with this view. Both authority and reason are against it. We would be perverting the language of the will should we so construe it, and it would be necessary to write words into the instrument which are not there. It is clear that the testator used the words, "shall go to the *others that are living,*" in the passage above quoted, in the sense of the survivors of the brothers, which would not include the children of a deceased brother, because the word "others" plainly refers to them, the brothers, when read with what precedes it, and it is immediately followed by the expression, "but not to any of my *other* children" (italics ours), which demonstrates that the word "other" meant only children, and they could only be the sons, as it referred to the children before mentioned in the will. That this is the plain, natural, and grammatical construction is hardly arguable. This brings the case directly within the following authorities. It appeared in *Threadgill v. Ingram,* 23 N. C., 577, that a testator had bequeathed all his personal property to his four children, to be equally divided between them when his son A. arrived at the age (493) of 21 years; and if one or two or three should die under age, or *without issue,* all the property to go to the surviving ones forever. A daughter died before her arrival at full age, leaving no children, but after A. had attained 21 years. It was held that her share went over to the survivors then living, and that a child of a sister, who had died after attaining full age, was not entitled to any part of it. *Judge Daniels* added: "Must not the representative deduce his title by averring that his principal was the survivor? Could the representative have any pretense of claim without such averment? We think he could not. How could a person claim as heir to a survivor, if the ancestor was not *in esse* at the death of the first taker, so as to acquire the character of survivor? The thing appears absurd. It seems to us that no other presumption can arise in this case but that the testator intended a personal benefit to the survivors, and that the superadded words which he has made use of do not repel the presumption." And the language of

Judge Pearson, in *Hilliard v. Kearney, supra,* is equally emphatic: "The argument fails, because there are no words showing an intention to give a preference to such of the daughters as died leaving children, except to the extent of making the shares absolute at their deaths. . . . There is this further objection: If the words 'other sisters' do not refer to the death of one, so as to be confined to the survivors, and is allowed to take in the others also, there is nothing to exclude such as had died without a child, which is absurd." To the same effect are *Threadgill v. Ingram, supra; Zollicoffer v. Zollicoffer,* 20 N. C., 574; *Lowry v. O'Bryan,* 57 Am. Dec., 727. In *Spruill v. Moore,* 40 N. C., 284, the testator gave property to his daughters, naming them, as the sons are named in this will, and annexed this condition to the gift: "If either of my daughters should die without lawful issue, then and in that case the survivors or survivor of my said daughters shall have all the said negroes and their increase forever." The Court, through *Chief Justice Ruffin,* said: "There is no doubt that each of the daughters took a vested interest in the slaves, subject to be divested upon her death without leaving issue, and to go over as long as there was one or more of them who could take by survivorship." One of the daughters died leaving a child, and, holding that a child could not represent the parent as a survivor, the Court said: "Although one may regret the exclusion of Mrs. Moore's child, yet the Court cannot help it. It is clear that the testator contemplated and intended to provide for the happening of the death of more than one of his daughters without issue, from the fact that the limitation over is, first, to the survivors, and then to the survivor in the singular. It is conclusive that the survivorship as to the original parts at least was to continue on until a sole survivorship (494) should happen, after which, of course, there was to be an end of the matter, as there could be no one else to take." That case is almost identical with the case at bar in its facts, as the wording of the limitations in the two wills is practically the same, and one of the four daughters died leaving a child to survive her, while here Matthew J. Ham left several children; but the plurality of issue can make no difference in the construction of the two wills. *Holcombe v. Lake,* 24 N. J. (4 Zabriskie), 686, is a very instructive case upon the subject and a strong authority in favor of our construction. The Court there said: "It is suggested that this is an *unreasonable* construction, because when the testator made his will, both his daughters were married and had children, and that he could not have intended that if one should die before John, the other should take the whole estate, to the exclusion of her deceased sister's children, which would be the effect, in such a case, of this construction. But the answer to this is, the word 'surviving' is

here in the will, put here by the testator; he meant something by it, and that something was that such of his children who survived *somebody* should take, and such as did not survive should not take." And it was further said, referring to *Lessee of Westbrook v. Romeyn,* Baldwin's R., 196: "There Abraham Van Campen conveyed lands to his son Moses, and to the heirs of his body lawfully begotten or to be begotten, and in default of such issue, *then* to the *surviving sons* and daughters of Abraham, in certain shares. And the Court said: 'The word *then* denotes the time when the interest vests in them to be at his (Moses') death, as well as the person to take, that is, those who shall then be the survivors of Moses.' That, 'as a general rule, words of survivorship relate to the time or event when the thing devised is to be distributed or enjoyed, and not to the time when the will took effect by the testator's death.' " The case of *Milsom v. Audrey,* 5 Vesey, 465, is, if possible, even more analogous, and the words "survivors" and "survivor" were there construed according to their strict literal meaning, although such construction led to intestacy. It has been held that the shares of the third of the four nephews, who had died without issue, belonged exclusively to the survivor of them all, excluding the children of one who had previously died. *Lee v. Stone,* 1 Mees. and Wels. (Exch.), 673; *Leeming v. Sherratt,* 24 Eng. Ch. Rep. (2 Hare), 14; *Prendergast v. Walsh,* 58 N. J. Eq., 149. We find the following clear statement of the doctrine in 1 Underhill on Wills. sec. 351: "The question arises in disposing of the shares of those who die *without issue,* whether the children of deceased legatees shall participate or whether it is to go only to the actual *survivors of the original class.* The plain and strict signification of the word 'survivor' is one who outlives others, and in the above devise the word should receive its strict meaning, *excluding the children, and also the next of kin of those who have died before distribution.* This natural meaning will be given to the words, and those only will (495) take as survivors who are living at the death of the others without issue, in the absence of anything in the will clearly showing that the testator has employed the word with any other intention. This rule of construction is applied to a limitation to survivors, though the testator has in fact expressly provided that the children of a deceased legatee shall take, by representation, the share which *their* parent had enjoyed. Though they may take *this,* they cannot take the share of one who has died without issue, for *that* goes to those only who survive the legatee so dying."

It appears from the will that the testator intended that there should be successive survivorships as between his four sons mentioned in the devises, for he directs that, at the death of each under age, or without

leaving children to survive him, "then his *or their* share shall go to the others that are living," and it may be that, in the event named, his will was that the last survivor should take the interests of those who had thus died, though it is not material to decide whether it would go only to the last two survivors instead of the last survivor, as Erastus, who was one of the last two survivors, devised his share to certain persons, who conveyed to the last survivor, Haywood D. Ham, Jr.; but we are sure that there are no words in the will under which these plaintiffs, as children of Matthew J. Ham, can take as survivors, and this is sufficient to dispose of the case, without regard to the manner in which the last survivor of the four sons acquired the sole interest in the property that did not, under the terms of the will, go to the other brothers.

We attach no importance to the difference of phraseology in the two devises. The word "without" was clearly omitted before the words "leaving children surviving him," in the second devise, or the word "before" is implied, so that it should be, "before arriving at the age of 21," or "before," or "without leaving children surviving him," for if the son left children, the testator manifestly intended that they should take by *descent* from their father, though they could not take, as purchasers, under the will. *Whitfield v. Garris,* 134 N. C., 24.

The plaintiffs rely on the use by the testator of the words, "but not to any of my other children," which are annexed to the first gift to the four sons; but it is evident that these words were intended merely to free his meaning of any doubt and to express more clearly his desire that none of his other children, for whom he had amply provided, should further participate in his bounty *under the will,* and thereby prevent the *surviving* sons from taking, however much they, "the other children," might get by will or descent from a brother whose interest had become indefeasibly vested in him.

We may regret that we are forced to the conclusion that plaintiffs can take nothing under the will, as survivors of the four sons, but the (496) meaning of the testator is so obvious that we could not decide otherwise. There is no rule of higher obligation in the construction of wills than this, that the language of the testator must govern, unless there are clear indications of a contrary meaning to be found in the instrument, considering it altogether. We must take care how we indulge in speculations as to the intention of testators, our province being not to make wills for them as we may think they ought to be, but to interpret fairly and according to established rules of law such as they have made for themselves. A testator must be his own interpreter when he expresses himself in language free from obscurity and which, as he employed it, conveys a certain and definite meaning, to the exclusion of

any other. It may be that if the testator could have anticipated what has actually happened, he would have provided for such a contingency, but he does not appear to have done so, and it is not our duty, or our privilege, to supply the omission by reading into his will something that he did not see fit to put there. *Holcombe v. Lake, supra; Bartholomew's Estate,* 155 Pa. St., 314; *Bender v. Bender,* 226 Pa., 602.

We are unable to see any clear indication in this will that the testator did not intend to do just what he, in fact, did, according to the plain meaning of the language he has used, viz., confine his bounty to his surviving son or sons, irrespective of the issue of any deceased child. Mrs. Penny Ham, the widow of the testator, died in 1884, as admitted in this Court; but this cannot affect the result, and only makes the case stronger, if possible, against the plaintiffs. See *Holcombe v. Lake,* 4 Zab., 690.

It is unfortunate that a case of this kind should be tried on demurrer, but we can now see no facts, not stated in the record, which could possibly change the views we have expressed.

Affirmed.

Cited: Bell v. Keesler, 175 N. C., 528; *Dicks v. Young,* 181 N. C., 453; *Williams v. Hicks,* 182 N. C., 113; *Pilley v. Sullivan,* 182 N. C., 496; *Christopher v. Wilson,* 188 N. C., 760; *Robertson v. Robertson,* 190 N. C., 562.

J. F. BENNETT v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 31 March, 1915.)

1. Telegraphs—Written Demand—"Sixty Days"—Valid Stipulations.

The stipulation printed on the back of a telegraph blank requiring that any claim for damages must be presented to the company in writing within sixty days after filing the message, is a reasonable and valid one.

2. Same—Sufficient Compliance.

It is a sufficient compliance with the stipulation printed on the back of a telegram requiring that a claim for damages must be presented to the company in writing within sixty days, when the plaintiff, the sendee of the message, promptly notifies the agent at the terminal point that he would bring suit for the delay, and afterwards writes the agent at the receiving point that he "would make demand on the company for $5,000 for nondelivery of the telegram sent to him at R. on 29 April, 1912," it further appearing that this had been the only message sent to him, and that all of the communications occurred within the sixty days stipulated for by the company.

3. Same—Parol Evidence—Notice to Produce Original.

In an action to recover damages of a telegraph company for its negligent failure to deliver a message relating to sickness, the court permitted

the plaintiff to testify as to the contents of a letter written to defendant's agent within the sixty days (after notification to the defendant and its failure to produce the original letter) that he "would make demand on it for $5,000 for nondelivery of the telegram sent to him at R. on 29 April, 1912," but rejected testimony as to what the message was about, or its nature. *Held:* The ruling of the court excluding this evidence was erroneous.

4. Damages—Written Demand—Telegraphs—Mailing Letter — Presumptions.

The mailing of a letter properly addressed is presumptive evidence that it was received by the addressee within a reasonable time, which applies, in this case, to a letter making demand upon a telegraph company for damages arising from its negligent delay in delivering a telegram to the sendee.

(497) APPEAL by plaintiff from *Cooke, J.*, at October Term, 1914, of CUMBERLAND.

Shaw & MacLean for plaintiff.
Rose & Rose and George H. Fearons for defendant.

CLARK, C. J. This is an appeal from a nonsuit in an action to recover damages for mental anguish caused by failure to deliver a telegram. The plaintiff left the bedside of his brother, who was quite ill at his home near Bennettsville, S. C., on Sunday afternoon, 28 April, 1912. The physicians told him that he might safely leave, but he enjoined the family to wire him if his brother grew worse. Next morning the brother-in-law of the brother phoned to Hamlet and caused the following telegram to be sent, addressed to the plaintiff at Raeford, N. C.: "Come back to see your brother at once. W. H. Pearson." This telegram was filed at 9 a. m., according to the evidence for the plaintiff, which must be taken as true on this appeal.

The plaintiff testified that he called that day at the defendant's office in Raeford three times, *i. e.*, at 12 o'clock, at 1 p. m., and again at 3 p. m., and asked for a telegram, but was told there was none for him; he left at 3 p. m., and asked the defendant's agent to forward the telegram, if any came for him, to Aberdeen. This was not done, and he did not receive the telegram till he got back to Hamlet Tuesday night and had learned that his brother had died at 2:30 p. m. that day.

(498) The defendant company then presented a bill for 25 cents for the telegram, which the plaintiff says he paid under protest, saying that he would bring suit for damages.

The plaintiff further testified that at Raeford he was 35 miles from his brother's home, and if the telegram had been delivered, he would at

once have gone to his brother's bedside either by train, which made connection, or through the country by automobile or with horses. He testified to the close and affectionate relations that existed between him and his brother, and the mental anguish he suffered by reason of being deprived of an opportunity of seeing him again by reason of the nondelivery of the telegram.

On the back of the telegraph blank was the usual requirement that any claim for damages must be presented to the company in writing within sixty days after filing the message. This regulation has been held reasonable and valid in *Sherrill v. Tel. Co.,* 109 N. C., 527, and has been often approved since; see citations in Anno. Ed.

The plaintiff further testified that on 29 May, 1912, he wrote a letter addressed to the defendant's agent at Hamlet, which he posted himself in the post office at Georgetown, S. C. The court would not permit him to testify as to the contents of this letter. He thereupon served notice on the defendant's counsel to produce the letter, and this not being done, the court permitted him to testify that in said letter he stated to the company that he "would make demands on it for $5,000 for nondelivery of the telegram sent to him at Raeford on 29 April, 1912." He was then asked: "Did you tell him (the addressee of the letter) what the telegram was, or what the nature of it was?" On objection by the defendant, this was ruled out, and the plaintiff excepted, as he also did to the nonsuit, which was granted on motion of the defendant.

It was error to exclude the question, which was asked to show more fully the contents of the letter, and it was also error to grant the nonsuit. The court seems to have been of opinion that the letter was not sufficient to identify the telegram. But there was no evidence of any other telegram sent from Hamlet to the plaintiff on 29 April, or on any other day. There was also evidence, which must be taken as true, that the defendant had been already put on notice by the plaintiff of his dissatisfaction, at the time payment was collected from him for the telegram.

The object of the sixty days notice, as stated in *Sherrill v. Tel. Co., supra,* is to give the telegraph company notice within sixty days, before its records may be sent off or the memory of its agents becomes indistinct. This letter was sufficient to recall the matter to the attention of the agent at Hamlet, and was mailed within the sixty days. *Lytle v. Tel. Co.,* 165 N. C., 504. Such mailing raised the "pre- (499) sumption that the letter was received, and therefore was duly served." *Cogdell v. R. R.,* 132 N. C., 852, citing *Bragaw v. Supreme Lodge,* 124 N. C., 154.

The judgment of nonsuit is

Reversed.

Cited: Lynch v. Johnson, 171 N. C., 624; *Parks v. Comrs. of Lenoir,* 186 N. C., 500; *Waters v. Tel. Co.,* 194 N. C., 196; *Newbern v. Tel. Co.,* 195 N. C., 261.

W. D. CLIFTON, ADMINISTRATOR OF PAUL H. KORNEGAY, v. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

(Filed 31 March, 1915.)

1. Insurance, Life—Premiums—Payment—Waiver—Evidence.

The payment of a premium on a life insurance policy, according to its terms, is necessary to keep the insurance in force; and this requisite is not waived when the insurer receives the money for the premium when it is past due, in ignorance of the sickness of the insured, resulting in his death, without issuing a receipt, requests a statement of good health from the insured, and returns the money after his death, shortly thereafter occurring.

2. Evidence—Letters—Originals—Notice to Produce—Carbon Copies.

When the opposing party has been notified to produce the original letters, in his possession, at the trial, carbon copies thereof are admissible as evidence when the original ones would be, and when duly proven by the person who wrote them.

APPEAL by plaintiff from *Daniels, J.,* at August Term, 1914, of DUPLIN.

Civil action to recover on a policy of insurance issued on the life of the plaintiff's intestate by the defendant. The following issues were submitted to the jury without objection:

1. Did defendant waive the forfeiture of the policy of insurance sued on? Answer: "No."

2. If so, what amount is due the plaintiff on said policy? Answer: .....

The court charged the jury, if they found the facts to be as testified to by all the witnesses, to answer the first issue "No." The plaintiffs appealed.

Langston, Allen & Taylor, Gavin & Wallace, and J. F. Thompson for plaintiff.

J. O. Carr, James H. Pou for defendant.

BROWN, J. It is elemental law that the payment of the premium is requisite to keep the policy of insurance in force. If the premium is not paid in the manner prescribed in the policy, the policy is (500) forfeited. Partial payment, even when accepted as a partial pay-

ment, will not keep the policy alive even for such fractional part of the year as the part payment bears to the whole payment. 19 A. and E. Enc., 48.

The insurer may waive such conditions, and the unqualified, unconditional receipt of a past-due premium is a waiver. Where the facts upon which a waiver is based are undisputed, a question of law is presented for the decision of the court. Where the facts are in dispute and admit of different inferences, the matter of waiver should be submitted to the jury with proper instructions. All the evidence in this case tends to prove these facts:

The insured took out a policy of insurance for the sum of $2,000 on his life, and paid the first premium. He neglected to pay the second premium, and undertook, ten days after it became due, to arrange for the premium to be distributed quarterly, which was agreed to by the defendant. At this time the insured was in South Carolina. Nothing was then said about sickness.

Shortly after his request for a quarterly distribution of the premium, insured went home sick and grew steadily worse; and although he had received two premium notices, one thirty days before the premium fell due and the second a day or two after it fell due, calling his attention to the necessity of paying the premium, neglected to send the money.

After he grew desperately sick, his father, or some one, found the premium notice and saw that the time had passed, and asked his cousin, L. D. Dail, to send the premium to the company. Dail sent a money order and inclosed with it the premium notice, without any letter of explanation.

Defendant received this notice and money order, and immediately advised the insured that it could not accept the money as payment of the premium until he furnished a certificate of good health, blank for which defendant sent insured, as the time for the payment of the premium (including the days of grace) had expired.

Insured continued to grow worse and never furnished a health certificate. Defendant held the money so deposited in suspense and gave no receipt for the second premium. The money for the second premium was advanced by Dail, not at the request of Paul H. Kornegay, but at the request of Peter H. Kornegay, his father.

After the death of Paul H. Kornegay, Peter H. Kornegay wrote to the defendant and requested a return of the money. It was offered to him first in a check, which could not, under the circumstances, be cashed; and afterwards, on 1 August, it was paid over to him by Mr. Barker, defendant's district manager, who took a receipt for the same; and shortly thereafter Mr. Peter H. Kornegay repaid Mr. Dail.

We agree with his Honor that there is no evidence of a waiver of the conditions of the policy. The defendant had a right to receive
(501) the premium and hold it, awaiting the return of the health certificate. That not being forthcoming, the defendant properly returned the premium after the death of the insured. Receiving the premium under such circumstances is no evidence of a waiver. *Melvin v. Ins. Co.*, 150 N. C., 398; *Sexton v. Ins. Co.*, 157 N. C., 142; *Wilkie v. National Council*, 151 N. C., 527; *Page v. Junior Order*, 153 N. C., 404.

In *Hay v. Asso.*, 143 N. C., 257, the *Chief Justice* very pertinently says: "It is always sad when one who has made payments on his policy deprives his family of expected protection by failure to pay at a critical time. But insurance is a business proposition, and no company could survive if the insured could default while in good health, but retain a right to pay up when impaired health gives warning. It is a warning of which the company also has the right to take notice when asked to waive a forfeiture. It is the insured's own fault when he does not make a payment as he contracted."

The doctrine laid down in the textbooks and by the decisions of other States is in line with the decisions of this State, as are also the decisions of the Supreme Court of the United States. *Klein v. Ins. Co.*, 104 U. S., 88; *Ins. Co. v. Statham*, 93 U. S., 24.

The plaintiff excepted to the introduction of carbon copies of certain letters. The defendant had given plaintiff due notice to produce the originals. The letters were written to the insured by the defendant's agent, McIntosh. The plaintiff had failed to produce the originals, consequently the carbon copies, which were duly proven by the person who wrote the letters, were competent.

We have examined the other exceptions in the record, and think they are without merit.

No error.

Cited: Moore v. Accident Assurance Corp., 173 N. C., 536; *Paul v. Ins. Co.*, 183 N. C., 161; *Arrington v. Ins. Co.*, 193 N. C., 345; *Mewborn v. Assurance Corp.*, 198 N. C., 160; *Hill v. Lexington Council*, 202 N. C., 699.

BARBER-PASCHAL LUMBER COMPANY v. J. D. BOUSHALL.

(Filed 31 March, 1915.)

1. Contracts, Written—Ambiguity—Misapprehension of Parties.

While ordinarily a written contract clearly expressing an agreement made between the parties will not be set aside, in the absence of fraud, for a mistaken impression of its terms resting solely in the mind of one of the parties, this rule of construction has no application where the essential terms of the agreement are ambiguously expressed, reasonably susceptible of different interpretations, and it is clearly made to appear that these terms have been used and intended by one of the parties in one sense and by the other in a different sense; for therein the minds of the parties not coming to an agreement, there can have been no contract made.

2. Same—Equity—In Statu Quo.

Where, in permissible instances, it is shown that the parties to an alleged contract had supposed they had agreed upon its terms, when in point of fact they had not done so with reference to its material parts, the law will place them *in statu quo.*

3. Contracts to Convey—Ambiguity—Mistake—Deeds and Conveyances—Timber—Damages.

Where it appears that the parties to a contract to convey a certain tract of land, known and designated as the M. tract, each in good faith, thought a large body of timber was situated thereon, when it was upon an adjoining tract, and the vendor stated to the vendee at the time that he was unfamiliar with the land; and it appears that he contracted to sell only the M. tract and the title he had thereto or was authorized by other owners thereof to convey, *it is held* that the minds of the parties had not come together into a valid or enforcible contract for the sale of the land whereon the timber was situate, and the transaction afforded no right of action for the purchaser to recover any damages he may have received by reason of the inability of the vendor to convey it.

4. Same—Negligence.

Where both parties to a contract to convey lands honestly supposed that a large body of timber was growing thereon, when in fact it was on an adjoining tract of land, and the supposed purchaser brings his action to recover the damages he has sustained for the inability of the vendor to make the deed contemplated by the contract, and it appears that the vendor had informed the purchaser, at the time, that he was personally unacquainted with the boundaries, and that his title had come to him by devise or descent, and the title deeds were in the possession of others, *it is held* that, under the facts stated, the principle of culpable negligence will not apply to the vendor so as to deny him the defense that no agreement had been made, and to avoid the payment of the damages sought in the action.

5. Contracts—Mistake—Trials—Wrong Theory—Appeal and Error.

In this action to recover damages for the breach of a contract to convey certain lands, known as the M. tract, the plaintiff asserted that the contract was one way, and the defendant another way, and prayed for specific performance; and the allegations and evidence being sufficiently broad for the Supreme Court on appeal to determine the matter upon the correct ground that no contract had in fact been made, the respective prayers for relief are not of the substance, and the decision is put upon the correct view of the case.

6. Contracts to Convey—"Bond for Title"—Penalty—Liquidated Damages—Election—Measure of Damages.

Where, in a contract to convey lands, written in the ordinary form, it appears that a certain sum is fixed upon as a penalty for the failure of the vendor to convey a perfect title in accordance with its terms, and that the sum so fixed is in disproportion to the magnitude of the transaction, the complaining party is not confined to a recovery of the stated sum as a stipulation fixing the extent of liquidated damages, but at his election may sue for the damages he has actually sustained.

7. Contracts—Failure to Agree—Deeds and Conveyances—Timber—Part Payment—Damages—Offsets—Pleadings—Appeal and Error—Costs.

Where it appears that the parties to the action have mistakenly supposed that they had entered into a valid contract to convey lands, the plaintiff claiming damages for the inability of the defendant to convey the title he was supposed to have contracted to convey and the defendant demanding specific performance; that the plaintiffs have paid a certain sum of money and had cut timber upon the lands. *Held:* The plaintiff is entitled to recover the sum he has paid, with interest, and on repleader by defendant the latter is entitled, as an offset, to the value of the timber cut as it stood on the ground; and in this case cost is taxed against defendant in the lower court, and cost on appeal is divided.

(503) APPEAL by defendant from *Connor, J.*, at October Term, 1914, of LEE.

Civil action to recover damages for breach of a written contract to convey land.

The contract, dated 10 October, 1913, was in the form of a bond for $500, to be void on condition that defendant conveyed to plaintiff by good and sufficient deed a tract of land in Chatham County, N. C., described as follows: "A certain parcel of real estate situated in Chatham County, State of North Carolina, and bounded by the Foushee lands and Deep River, and commonly known as the McIntosh tract, containing 371 acres, more or less, belonging to American Iron and Steel Company, the estate of J. M. Heck, deceased, Lobdell Car Wheel Company, and J. D. Boushall, trustee; the same to be conveyed by a good and sufficient warranty deed, conveying a good clear title to the same, free from all encumbrances," at the contract price of $5,565, $565 being paid down

and the remainder evidenced by the promissory notes of plaintiff, in different amounts and payable at specified dates to 1 November, 1914.

Plaintiff contended and offered evidence tending to show that the tract of land, as sold and described in the written instrument and known as the McIntosh tract, contained from 2½ to 3 million feet of merchantable lumber, which was the main inducement to the purchase; that, acting under the terms of the contract and on representations of defendant, plaintiff moved its mill on the tract and commenced cutting the timber, when he was stopped by the agent of the American Iron and Steel Company, who claimed that the timber belonged to that company and was not included in plaintiff's contract of purchase; that defendant had failed and refused to comply with his written contract or to make a deed conveying the land described therein and the deed tendered by defendant was not in accord with the written agreement and contained but a small portion of the timber referred to, about 97,000 feet, and defendant had no title to that portion of the land on which the remainder of the timber was situated, and plaintiff was thereby greatly damaged.

Defendant contended that he sold and intended to convey only (504) that portion of the McIntosh land which was owned by the three parties mentioned, to wit, The Steel Company, The Lobdell Company, and the Heck estate, this being all that defendant owned; that the contract, in terms, so specified and that the deed tendered by him, although it included no reference to the McIntosh place in its description, contained all the McIntosh place owned by the three parties specified, described by metes and bounds, and was in all respects a compliance with his written contract, and demanded judgment for specific performance of the contract as written or damages for breach, etc.

It was admitted that the $565 had been paid defendant on the contract price; that plaintiff company, before being stopped, had cut the timber situate on the land contained in the deed which defendant tendered, amounting to about 95,000 to 100,000 feet; that defendant Boushall had acted in good faith, and no fraud was intended or practiced by him in the transaction.

There was verdict for plaintiff, assessing plaintiff's damages at $2,290, and judgment having been entered for this sum, and also the $565 paid by plaintiff on the contract, defendant excepted and appealed.

A. A. F. Seawell and Siler & Millikin for plaintiff.
Pace & Boushall and Williams & Williams for defendant.

HOKE, J. The facts in evidence tended to show that The American Iron and Steel Company owned two adjoining tracts of land in the

county of Chatham, known as the Foushee tract and the McIntosh tract, the divisional line between them originally running from Deep River north to a pond on the public road and, for a part of the distance, along an "old hedgerow," and that on the McIntosh place, near this line, was a large body of timber, 2½ or 3 million feet; that some time after acquiring the land, the precise date not given, the company ran a new line dividing the property and by which the timber was thrown on the Foushee tract, and thereafter the timber and the portion of land on which it was situated was treated as part of the Foushee tract, and so termed on the company's books. Thereafter, The American Iron and Steel Company mortgaged the land, known as the Foushee land as now termed by them, to the Lobdell Car Company, a corporation of the State of Delaware and having its principal place of business in said State, and the remainder of the property, to wit, the McIntosh place, as constituted under the new division, was mortgaged by the Iron and Steel Company to the Lobdell Car Company and J. M. Heck, now deceased, of the city of Raleigh; that plaintiff, desiring to purchase the body of timber heretofore mentioned, and having learned that same was owned by defendant J. D. Boushall, in 1913 approached said Boushall
(505) for the purpose of acquiring the timber and purchasing the land on which the same was situate, and said Boushall, having come into possession and control of the Heck interest, and having assurance that, as to the part of the land mortgaged to Mr. Heck, now deceased, his negotiations would be approved by the iron and steel and the car companies, contracted to convey the McIntosh place to plaintiff company under the terms and provisions of the written contract above set forth. It further appeared that during the negotiations defendant, acting honestly in such belief, represented that the timber in question was on the property owned by him, and that his agent, a man living out there, pointed out the "old hedgerow" as the dividing line; that plaintiff contracted for the timber under the impression that defendant owned it, and that procuring the timber was a principal inducement to the deal, and the value thereof called for the larger portion of the purchase price agreed upon, and that the descriptive terms used in the bond, as understood by plaintiff, covered and was intended to cover the land on which the same was situated. On the other hand, it was admitted that defendant was guilty of no fraud in the transaction, and it also appeared that he acted throughout in the honest belief that his boundaries covered the timber; that he told plaintiff's representatives in the trade that he had no personal knowledge of the lines or boundaries; that the title deeds were in possession and control of the car company, in the State of Delaware, and that, while plaintiff was under the impression that his bound-

aries covered the timber and made the trade in reference to that, he only intended to sell the land that was mortgaged to him, and, in using the descriptive terms of the contract, he understood and intended that they only referred to such land.

Upon these the facts chiefly relevant, and about which there is no substantial conflict in the testimony, we are of opinion that there has been no valid contract between these parties, and that the verdict establishing a breach and assessing damages on that theory must be set aside.

It is recognized as a fundamental principle in the law of contract that there must be a meeting of the minds of the parties on the same thing at one and the same time. It is true that when the parties have expressed their agreement, either oral or written, in terms that are explicit and plain of meaning—that is, when their minds have met on the terms of the contract—it may not be revoked or altered by reason of the mistake of "one of the parties alone, resting wholly in his own mind," there being no fraud or misrepresentation by the other; but where essential terms of an agreement are ambiguous, so much so as to be fairly and reasonably susceptible of different interpretations, and it is clearly made to appear that these terms have been used and intended by one of the parties in one sense and by the other in a different sense, in such case there has been no meeting of the minds on the (506) terms of the contract, and unless some facts have arisen creating an estoppel or rendering such course altogether inequitable, the agreement or attempted agreement should be set aside and the parties placed *in statu quo*. This was held in substantially these terms in *Strong v. Lane*, 66 Minn., 94, a case not unlike the one before us, and the principle will be found very generally approved in the decided cases and textbooks of approved excellence. *Machine Co. v. Chalkley*, 143 N. C., 181; *Lumber Co. v. Wilson*, 51 W. Va., 30; *Silliman v. Gillespie*, 48 W. Va., 374; *Contan v. Sullivan*, 110 Cal., 624; *Chamberlain v. Martin*, 20 Va., 283; *Werner v. Rawson*, 89 Ga., 619; *Kyle v. Kavenagh*, 103 Mass., 356; *Rice v. Dwight Mfg. Co.*, 56 Mass., 80; *Fink v. Smith*, 170 Pa. St., 124; *Bingham v. Bingham*, 27 Eng. Rep. Repr. Chan., 7, 934; *Cooper v. Phipps*, 29 L. R. Eng. and Ir. App. Cases, 49; Pomeroy Eq. Jurisprudence, sec. 856; Pomeroy on Contracts, secs. 250-251; 29 A. and E. (2 Ed.), pp. 664-665; 9 Cyc., 398.

This being the established position, the case before us, as heretofore stated, is one which, in our opinion, clearly calls for its application, the facts showing that the description in the contract is ambiguous and that both parties designing, the one to sell and the other to buy the timber, and honestly believing that the defendant owned it, entered into a contract for the land on which it was supposed to be situate, and, in the

written instrument, the plaintiff used and intended to use the descriptive terms as covering the McIntosh place as it formerly was, "the land commonly known as the McIntosh tract," and the defendant intended to confine the contract to that part of the McIntosh place which he controlled and which was then owned by the three parties mentioned, the Iron and Steel Company, The Lobdell Car Company, and the Heck estate.

It has been said that culpable negligence of the complaining party will sometimes prevent the operation of the principle, but, as stated in one of these citations, Pomeroy Eq. Jur., sec. 856: "It is not every negligence that will stay the hand of the court, but the best authorities are to the effect that the neglect must amount to the violation of a positive legal duty," and the qualification, if it applies at all to the case presented, should not prevail in this instance, the evidence showing further that defendant informed plaintiff that he was personally unacquainted with the boundaries, and also that the interest had come to him by devise or descent and the title deeds were in the keeping of others.

It is true that neither party is asking relief on any such ground, but plaintiff, in his pleadings, asserting the contract to be one way and demanding damages for its breach, and the defendant asserting that it is another way and praying for specific performance, the allegations are sufficiently broad to present the question, and the evidence clearly showing the mistake, the respective prayers for relief are not of the
(507) substance, and the decree must be entered that the contract be set aside, or rather that there has never been a contract between them. *Alston v. Connell,* 140 N. C., 485.

It is insisted for defendant that plaintiff is restricted in the bond to the sum of $500; that this should be regarded as an agreement for liquidated damages, and that no recovery by plaintiff can exceed this amount, and no greater sum can be considered as a basis for adjustment; but, on the facts presented, the authorities are against this position. The bond is in the old form in which the sum of $500 is evidently stated as a penalty, and was never intended, in a contract of this character and value, to restrict the plaintiff's recovery, in case of breach, to such an amount. The decisions are that where a contract of this kind is established the plaintiff, at his election, may sue for the damages actually sustained. *Rhyne v. Rhyne,* 160 N. C., 559; *Noyes v. Phillips,* 60 N. Y., 408; *Lowe v. Peers,* 4 Burr, 2228; 11 Cyc., p. 1026.

On the record, it must be adjudged that there has been no contract between the parties; that the verdict, establishing a breach of same and assessing damages for such breach, be set aside; and it appearing from the pleadings that the plaintiff has paid on the contract the sum of $565, he is entitled to recover this sum and interest thereon from time of pay-

ment and, on repleader by defendant, he is entitled, as an offset to this sum, to the value of the timber as it stood on the ground and which was cut by plaintiff from the part of the McIntosh place owned by the defendant while he was acting under the agreement as he understood it to be.

The plaintiff is entitled to costs in the lower court, thus far accrued, and the costs of appeal will be divided.

Error.

Cited: Strickland v. Shearon, 191 N. C., 566; *Potter v. Miller,* 191 N. C., 817; *Sweet v. Spinning Co.,* 205 N. C., 141.

J. W. CARTER v. W. E. McGILL.

(Filed 31 March, 1915.)

1. Vendor and Purchaser—Fertilizers—Breach of Warranty—Effect Upon Crop—Trials—Evidence.

A breach of warranty in the sale of fertilizers to be used by the purchaser in the cultivation of his crop may be shown by evidence that the crop was not beneficially affected by its use, provided a proper foundation for its admission is first laid by evidence tending to show that the land was adapted to the growth of the contemplated product, had been properly cultivated and tilled, with propitious weather or seasons, so as to exclude any element which would render the evidence uncertain as to the cause of the loss or the diminution of the crop, and rid it of its speculative character.

2. Same—Chemical Analysis—Appeal and Error.

In an action on breach of warranty of grade in the sale of fertilizer to a consumer, a chemical analysis of the fertilizer is not the indispensable, though, perhaps, the better test, and it is reversible error for the trial judge to exclude an answer to a question, when it is stated by the attorney for the appellant that he would show by this and other witnesses that the fertilizer was worthless; and his further statement, "that it had no beneficial effect on the crop," was merely a logical deduction to be made from its worthless character.

3. Vendor and Purchaser—Fertilizer—Breach of Warranty—Damages—Penalty of Statutes.

A user of fertilizer is not deprived of his right to recover general damages for a breach of warranty of its grade by Revisal, sec. 3945, which penalizes the violation of its provisions.

4. Vendor and Purchaser—Breach of Warranty—Counterclaim—Issues.

On a trial to recover the purchase price of fertilizer sold to a user thereof, where a counterclaim is set up seeking damages for a breach of warranty, separate issues should be submitted, and the issue of damages should exclusively relate to that subject.

(508) APPEAL by defendant from *Cooke, J.*, at September Term, 1914, of CUMBERLAND.

This action was brought to recover the amount due upon a note and agricultural lien given for advances in supplies and so forth, to be made to defendant by the plaintiff in 1912, and to be used in the cultivation of his farm of 172 acres in said county. Plaintiff alleged, and there was testimony to show, that the balance due for supplies furnished by him, after proper deduction for payments, was $1,388.62. Defendant set up a counterclaim, alleging therein that he had paid for all supplies except certain ferilizers, which were furnished by plaintiff with a special representation, upon which he relied and which induced him to purchase the same, that they would be of standard grade, containing certain chemical ingredients, and that this contract of warranty was broken by plaintiff, entailing damage to the defendant in the loss or diminution of his crop and injury to his land in the sum of $6,000.

The defendant tendered an issue in these words: "Did the fertilizer furnished by the plaintiff to the defendant come up to the standard grade?"

The court submitted these issues:

1. In what amount, if anything, is the defendant indebted to the plaintiff for wares, goods, and merchandise sold by the plaintiff to the defendant under the lien and mortgage described in the complaint?

2. What was the value of the property seized by the sheriff in the claim and delivery herein, at the time of the seizure?

3. In what amount, if anything, is the plaintiff indebted to the defendant on account of the counterclaim set up in the defendant's answer?

(509) The court charged the jury to answer the first "$1,388.62," the second issue as they might find the value of the property to be, seized by the sheriff, and the third "Nothing," and the jury rendered their verdict accordingly, answering the second issue "$663.12."

The plaintiff's witness, P. S. Stead, who was salesman for the plaintiff, testified to an additional representation in the sale of the fertilizer, as follows: "I told him that the fertilizer was all right; that it was good guano for cotton or for anything. I do not remember that he asked me if it was good for corn. I am certain that I told him it was good for cotton. I do not know whether he bought it on my recommendation or not, but he did buy it." But no notice is taken of this fact, if it be a fact, in the complaint.

Defendant's witness, John Campbell, testified: "I used some of the 8-3-3 fertilizer in 1912, which I obtained from Mr. McGill. I used it on some corn. It had no effect on my corn. I used about 600 pounds,

three sacks to the acre. The crop was properly cultivated. The land was good for either cotton or corn. I got the fertilizer from Mr. McGill."

Defendant also proved by other witnesses that they used the fertilizers on their lands in the same neighborhood, and then proposed to prove what were the results, but was stopped by plaintiff's objections. The questions were ruled out. He also proved that some of the fertilizer was "dumped into a field," and proposed to show what effect it had upon the land, but this question was also excluded. He finally proposed to show by several witnesses (naming them) that they used the same fertilizer, "and that it was *worthless* and had no beneficial results upon the crops where it was used." This was excluded upon objection by plaintiff.

There was certain evidence as to the rules and practice of the Department of Agriculture in making analyses of fertilizers, which appears to be incompetent, but is not material, in the view taken of the case by the Court. There was judgment upon the verdict, and the defendant appealed and assigned errors.

McIntyre, Lawrence & Proctor for plaintiff.
Rose & Rose for defendant.

WALKER, J., after stating the case: This case is not exactly like any other one we have had before us upon this and kindred subjects. The only question we will discuss in this appeal is whether the defendant offered any competent evidence of a breach of the warranty that the fertilizer should be of "the standard grade," and we think he did. It may not have been very full or explicit, but we cannot say that there was no evidence. It is not necessary, in order to prove this fact, that there should be a chemical analysis of the fertilizer. This is, perhaps, the best way of establishing the fact, but not the only (510) one. The purchaser of the fertilizer may show a breach by the effect of the use of it upon his crops, provided he first lays the foundation for such proof by showing that it was used under conditions favorable to a correct test of its value, such as land adapted to the growth of the cotton, proper cultivation and tillage, propitious weather or seasons, the general purpose being to exclude any element which would render the evidence uncertain as to the cause of the loss or diminution of the crop or rid it of its speculative character. It may be somewhat difficult in practice to apply the rule, but it can be done by proper attention to the limitations on this kind of evidence, and we have so held in *Guano Co. v. Live Stock Co., ante,* 442. We have allowed somewhat similar

evidence to be considered in the case of flooding lands. *Spencer v. Hamilton,* 113 N. C., 49; and this Court, in *Herring v. Armwood,* 130 N. C., 177, recognized that such evidence might be stripped of its conjectural features and made available as legal proof of the fact that the loss or diminution of crops, in such circumstances, was directly, certainly, and solely traceable to the lack of a fertilizer, and, for the same reason, to its worthlessness. It is not unlike the opinion of an expert, which, if not founded upon a knowledge or finding of the facts to which it relates, is of no value, and those facts must be such as are material to the inquiry, and not uncertain or conjectural. We know by experience that a fertilizer of standard quality will produce good results by stimulating the growth of the plant under favorable conditions, but that in order to determine whether a failure in results is attributable to its bad quality, or to its being below such grade, the purely speculative elements or quantities in the calculation must be excluded, so as to bring the test to the standard of reasonable certainty. There must be some evidence by which the jury can reason from cause to effect, disregarding those matters which necessarily involve the matter in doubt, and prevent a reliable conclusion. If the fertilizer, therefore, is used under conditions and circumstances favoring an increased yield in the crop, provided it is of the warranted grade, and yet the results are not such as should have been expected, there is some evidence that it was of a defective quality and not up to grade. *Herring v. Armwood, supra.*

In this case defendant offered to prove that the fertilizer was "worthless," and should have been permitted to do so, if he could. The tender of the proof was a broad one, that the fertilizer was worthless, and the addition, "that it had no beneficial results upon the crops," was merely a logical deduction to be made from its worthless character. If it was worthless, this was certainly some evidence that it was "off grade." *Tomlinson v. Morgan,* 166 N. C., 557; *Guano Co. v. Live Stock Co., supra.* The seller and the buyer of fertilizers can protect themselves by proper warranties, at the time of the purchase, if they see fit to do so. The seller may restrict it, while the buyer may require that it be enlarged, according as their interests may dictate. Unless they do so, they must abide by the contract as made by them. We need not consider the question as to the measure of defendant's damages, if he is entitled to any, as that matter is not before us. There was a warranty here and evidence as to its breach, which should have been submitted to the jury, under proper instructions.

(511)

If the question of damages comes before us, the cases of *Spencer v. Hamilton, supra,* and *Herring v. Armwood, supra,* may have an important bearing. The Revisal, sec. 3945 *et seq.,* which penalizes the

violation of its provisions, does not deprive the buyer of his right to general damages for a breach of warranty. *Tomlinson v. Morgan, supra.*

The question here, as to the competency of the evidence, was not presented in *Fertilizer Works v. McLawhorn,* 158 N. C., 274; *Ober v. Katzenstein,* 160 N. C., 439, or *Carson v. Bunting,* 154 N. C., 530. The first two cases were between the manufacturer and the dealer, and the last was an action for the penalty for not branding, and in other respects involved a different question. In the *McLawhorn case, supra,* so far as the question may have been mentioned, the evidence was clearly speculative.

The defendant was entitled to have an issue submitted upon his counterclaim, so that the jury might find specifically whether or not there was a warranty and a breach thereof. A cause of action or defense should not be tried upon the issue as to damages merely, where objection is made, but a separate issue should be submitted and the issue as to damages left to embrace that subject alone. *Denmark v. R. R.,* 107 N. C., 185; *Davis v. R. R.,* 147 N. C., 68.

New trial.

Cited: Carter v. McGill, 171 N. C., 775; *Gatlin v. R. R.,* 179 N. C., 435; *Fertilizing Co. v. Thomas,* 181 N. C., 280; *Fertilizer Works v. Simpson,* 183 N. C., 252; *Pearsall v. Eakins,* 184 N. C., 294; *Gulley v. Raynor,* 185 N. C., 98; *Brown v. Ruffin,* 189 N. C., 266; *Swift v. Etheridge,* 190 N. C., 168; *Swift & Co. v. Aydlett,* 192 N. C., 338; *Gaskins v. Mitchell,* 194 N. C., 276.

LAWTON OUTLAW, ADMINISTRATOR, v. E. J. TAYLOR ET AL.

(Filed 31 March, 1915.)

Deeds and Conveyances—Chattels—Limitations in Remainder.

A reservation by the grantor of chattels, in a deed attempting to convey them in remainder, reserves the whole estate, and the limitation in remainder is void.

APPEAL by defendant from *Daniels, J.,* at September Term, 1914, of DUPLIN.

Civil action to recover possession of certain personal property, described in a deed from Calvin H. Herring, the plaintiff's intestate, to the defendants, dated 27 November, 1912.

(512) His Honor directed a verdict, and rendered judgment for the plaintiff. The defendants appealed.

George R. Ward, Thad Jones, Gavin & Wallace for plaintiff.
H. D. Williams, Stephens & Beasley for defendant.

BROWN, J. It is admitted that the property in dispute belonged to Calvin H. Herring. The defendants claim it under a conveyance from him, the material parts of which are as follows: "That the said parties of the first part, for and *in consideration of valuable services rendered to the said parties of the first part by the parties of the second part during the sickness of the said parties of the first part,* we give, grant, and convey to the said parties of the second part all the personal property of every description that we may own at our death, consisting of horses, mules, cows, hogs, wagons, carts, buggies, farming implements, household and kitchen furniture, and all other personal property not mentioned in this instrument of writing. We hereby reserve to ourselves our lifetime right to the said property hereinbefore mentioned."

His Honor correctly held the conveyance void. It is well settled in this State, by numerous and uniform adjudications, that a reservation of a life estate by the grantor of chattels, in a deed attempting to convey them in remainder, reserves the whole estate, and the limitation in remainder is void. *Dail v. Jones,* 85 N. C., 222.

"The law prescribed no formula for such reservation," says *Justice Ashe* in that case, "any expression in a deed that indicates the intention of the donor to reserve a life estate is sufficient." *Graham v. Graham,* 9 N. C., 322; *Morrow v. Williams,* 14 N. C., 263.

No error.

Cited: Speight v. Speight, 208 N. C., 133.

ELIZA BARNES, ADMINISTRATRIX, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 31 March, 1915.)

1. Railroads—Negligence—Pedestrians — Helpless Condition — Trials — Evidence—Questions of Jury.

In an action against a railroad company to recover for the wrongful death of plaintiff's intestate (Revisal, sec. 59), there was evidence that the intestate was last seen, intoxicated, going towards his home on the

defendant's railroad track, on a bright moonlight night, and that the defendant's train thereafter passed going the same direction, with its engine equipped with an old-fashioned headlight and without ringing the bell or giving other warning of its approach, though its track at that place was through a populous portion of a town and customarily used by pedestrians; that from the injuries to the body of the deceased, etc., and from flesh and blood along the track, the body had been rolled along under the train across a 40-foot trestle, the severed head being at one end of the trestle and the body at the other end, and articles he had been carrying home being strewn along the side of the track; that the engine was equipped with a V-shaped cowcatcher, the bottom of which was about 8 inches from the ground. *Held:* Evidence sufficient to be submitted to the jury upon the question of whether the intestate at the time he was killed was down and helpless upon the track, and the actionable negligence of the defendant's engineer in not seeing him in time to have avoided killing him in the exercise of proper care.

2. Railroads—Electric Headlights—Negligence—Pleadings—Trials—Burden of Proof—Interpretation of Statutes.

It is negligence for a railroad company not to equip its locomotives with electric headlights (Pell's Revisal, sec. 2617, a), with the burden on the company to plead and prove that it had one in use at the time complained of or that its use was excepted by the statute, when relevant to the inquiry.

APPEAL by defendant from *Allen, J.*, at November Term, 1914, (513) of COLUMBUS.

Irvin B. Tucker and H. L. Lyon for plaintiff.
Davis & Davis and Schulken, Toon & Schulken for defendant.

CLARK, C. J. The defendant introduced no evidence, and the only grounds of appeal are for refusal of the motion to nonsuit and in refusing to set aside the verdict. The action is for the wrongful death of plaintiff's intestate. Revisal, sec. 59.

The testimony was that the plaintiff's intestate was taking home to his family some potatoes and candy; that he was walking on the railroad at a place where the track is customarily used by the public, and was killed between Fair Bluff and his home, 16 February, 1910; when last seen he was drunk and staggering along the track; he was killed by the train going east, which was the direction in which he was going, near a trestle inside the limits of Fair Bluff. The mayor of the town testified that he did not hear the train blow after it left Fair Bluff; that he did not hear any crossing blow given by the train after it left Fair Bluff until it reached Barnes' Crossing, 3 miles from the station. Another witness testified that it was a very bright moonlight night; that when the body of the deceased was found his head was between the rail and the guard-

rail on the north side of track, near the west end of the trestle, while his body was lying on the east end of the trestle. The train was equipped with the old-fashioned oil headlight. The position of the body tended to show that the intestate must have been down on the track when struck. One of his hands was cut off and was found under the trestle. One foot was mashed off, his clothing torn to pieces, and his whole body (514) indicated that it had been rolled along under the train. The little bag of candy he was carrying his children was found where his head was found and the bag with one or two potatoes in it was found near the body and the other potatoes scattered along the trestle, which was 40 feet across, and further along in an easterly direction along the track for 85 yards. Flesh and blood were on the ties of the trestle as if he had been rolled from where the head was found. There was a V-shaped cowcatcher, the bottom of which was about 8 inches from the rail. The witness testified that he examined the track together with defendant's section master, and found no evidence of the intestate having been struck west of the point where his head was found.

The plaintiff contends that the evidence shows that the intestate was very drunk about three-quarters of an hour before he was killed, going along the track in the direction of his home. The plaintiff also contends that the condition of the body and the circumstances above narrated were sufficient to satisfy the jury that the deceased was not walking along the track, but he must have been down on it in a helpless condition; that the track was straight for a long distance at that point, and that the engineer in the exercise of ordinary care could have seen the deceased in time to stop the train and avoid the killing. The train was running about 20 miles an hour.

There was evidence also that the train was running through a populous section of the town of Fair Bluff, over a track which had been used by the public as a walkway for many years, where people were constantly passing and across four road crossings, the engineer gave no alarm, did not sound the signal for crossings, and ran over the intestate on the trestle in the nighttime without stopping the train, and without knowing, so far as appears, that the intestate was on the track. The plaintiff contends that this evidence was sufficient to show that a proper lookout was not kept; that the intestate was killed as a direct result of the negligence of the defendant, and that the jury should infer from the condition of the body and the attendant circumstances that the intestate was drunk on the track, and that the engineer should have seen him in time to have avoided killing him.

The facts in this case are very similar to those in *Henderson v. R. R.*, 159 N. C., 581, in which the Court set aside the nonsuit, holding (*Allen,*

J.) that the plaintiff was entitled to have the evidence considered by the jury. The facts in this case are also very similar to those in *Powell v. R. R.*, 125 N. C., 370, in which the Court sustained a verdict and judgment for the plaintiff. See citations to the latter case in the Anno. Ed. See, also, *Shepherd v. R. R.*, 163 N. C., 518, and cases therein cited, and *Powers v. R. R.*, 166 N. C., 599; *Dallago v. R. R.*, 165 N. C., 269; *Holman v. R. R.*, 159 N. C., 44; *Norris v. R. R.*, 152 N. C., 505.

Furthermore, it was held in *Powers v. R. R., supra,* that the (515) defendant was negligent in not having its engine equipped with an electric headlight, as required by Pell's Revisal, 2617 (a), and that the burden of pleading and proving that it had an electric headlight in use at the time, or that it was excepted from the statute, was upon the defendant. That statute was enacted in 1909, ch. 446, and the death of the defendant's intestate occurred 16 February, 1910.

The case was properly submitted to the jury as the triers of the facts. No error.

Cited: Hill v. R. R., 169 N. C., 743; *Brown v. R. R.*, 172 N. C., 607; *Smith v. Electric R. R.*, 173 N. C., 492; *Nowell v. Basnight,* 185 N. C., 148.

GEORGE W. SMITH v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 31 March, 1915.)

1. Telegraphs—Delivery Limits—Service Message—Extra Charge—Refusal of Sender to Pay or Guarantee—Sender's Instructions.

Where the sendee of a telegram announcing the death and time of burial of a deceased person is beyond the reasonable free delivery limits of the telegraph company, at the terminal office, in this case 3 miles, it is the duty of the agent of the company, upon ascertaining the fact, to wire the information back to the sending office, where the sender should be so notified, with request for guarantee or payment of the special charges required for the extra service in delivering the message; and when the sender refuses to do so, but instructs that the message be mailed from the terminal office to the addressee, which is accordingly done, and this alone causes the addressee to arrive too late for the funeral, the latter may not recover actual or compensatory damages, in his action against the company, for his inability to have been then present.

2. Same—Conflicting Evidence — Sender's Statement — Impeaching Evidence.

Where the agent of the sender of a message has been notified that the sendee was beyond the free delivery limits of the telegraph company's terminal office, in accordance with information given in a service message

sent from that place, and the evidence is conflicting as to whether he guaranteed the extra charge required for its delivery or instructed that the telegram be mailed to the addressee from the terminal office; and he has testified that he had sent two messages to different people, and that he had given these instructions about the other message, it is competent, as tending to contradict his testimony, to introduce as evidence his written statement previously given, that he had been notified that the message in question had not been delivered for the reasons stated; that the addressee was not expected to come; and that the company was not to blame, as it had followed his instructions in mailing the telegram.

APPEAL by defendant from *Cooke, J.*, at September Term, 1914, of CUMBERLAND.

This action was brought to recover damages for failure to deliver a message, addressed to plaintiff at Fayetteville, N. C., by his (516) sister, Mrs. H. C. Freeman, at Lumberton, N. C., at 11:30 a. m. on 8 May, 1913, in the following words: "Mother died yesterday. Buried this afternoon." It is admitted by the defendant in its brief that there was some evidence of negligence, sufficient to carry the case to the jury. Plaintiff did not reside in Fayetteville, but 3 miles from there, in the country. The operator received the message, copied it, and delivered it to the messenger at that office, who searched for G. W. Smith and could not find him, but was told that he lived at Victory Mills, 3 miles away, whereupon he attempted to call him over the phone, but failed to reach him. He returned the message to the operator, who sent a service message to the operator at Lumberton, informing him of the facts, and asking for a guarantee of 75 cents for special delivery charges beyond the free-delivery limits. The operator at Lumberton, S. H. Hamilton, carried the service message to the sender's husband and agent, H. C. Freeman, who originally delivered the message for transmission, and asked him if he would guarantee payment of the extra charge for the special service in delivering outside of Fayetteville, which he refused to do, but directed Hamilton to request the operator at Fayetteville to mail the telegram to G. W. Smith, which was done, and the latter received the message by mail the next day, but after the funeral, which took place at 5 o'clock p. m. on the day the first message was sent. H. C. Freeman, witness for the plaintiff, admitted the conversation with Hamilton about the telegram, but afterwards stated that he did not know what was said by them, though he denied having refused to pay the charge for extra service in making a special delivery of the message beyond Fayetteville, and stated that he would have paid it if he had been asked to do so. In order to contradict him, defendant offered as evidence the following written statement made by Freeman on the day of its date:

"LUMBERTON, N. C., 15 May, 1913.

"This is to certify that I (H. C. Freeman), on 8 May, 1913, about 11:30 a. m., filed a telegram at the Western Union Telegraph office at Lumberton, N. C., for my wife (Mrs. H. C. Freeman), addressed to G. W. Smith, Fayetteville, N. C., reading as follows:

" 'Mother died yesterday. Burial this afternoon.'

"Manager Hamilton, who wrote the message for me, asked me if I could give some address at Fayetteville, and I told him that I knew no other or better address. Mr. Hamilton notified me in person, about 1:50 p. m., that the message was undelivered; that Mr. Smith lived 3 miles in the country, and that it would cost 75 cents to have it delivered. I told Mr. Hamilton to have them mail a copy; that we did not expect him to attend the funeral anyway. (We lay no blame on the part of the telegraph company at all, as they did as instructed by us. We sent the message to Mr. G. W. Smith as a matter of respect, (517) and we did not expect him to attend the burial, as interment was made before the arrival of any of the afternoon trains. We regret very much that Mr. Smith has taken such action against the telegraph company, and if he is suing for mental anguish, we feel sure that he is going to have a very difficult job proving it.)"

Plaintiff objected to the part in parentheses, which was excluded by the court, and defendant excepted. There were other exceptions to rulings of the court and the charge, but it is not necessary to state them. The jury found for the plaintiff, and defendant appealed from the judgment upon the verdict.

Robinson & Lyon for plaintiff.
Rose & Rose and George H. Fearons for defendant.

WALKER, J., after stating the case: If the defendant's witnesses testified truthfully in this case, the defendant performed its duty and is not liable to the plaintiff for anything. It transmitted the message promptly from Lumberton to Fayetteville, caused search to be made for the sendee at that place, and, failing to find him, used the telephone unsuccessfully for the purpose of communicating with him. It then wired back to the sender for payment or a guarantee of the charge of 75 cents for the extra service in delivering beyond the place to which the message was addressed. So far, it was within its rights, and there was full compliance with a correct performance of its duty, and the case turns, at this point, upon the question whether H. C. Freeman did or did not refuse to pay the charges. His testimony as to the conversation with

Hamilton was not very consistent, and it became important to the defendant that every piece of evidence fairly tending to impair his credit should be considered by the jury. The portion of his written statement, which he had before deliberately made, was excluded by the court, for what reason we are not advised. It clearly tended to contradict him in respect to this vital matter. Surely this admission, in the excluded part of the statement, had that tendency, viz., "We lay no blame on the part of the telegraph company at all, as they did as instructed by us," and we also think that the whole letter should have gone to the jury. 1 Elliott on Evidence, sec. 241; *Spencer v. Fortescue,* 112 N. C., 268. The part which was excluded was very material as tending directly to show that the company had acted solely under Freeman's directions in regard to handling the message, and was therefore not guilty of any negligence in failing to deliver it on the day it was sent, and, besides, it had an important bearing upon another phase of the case, in that it tended to show that the conversation between Freeman and Hamilton, near
(518) the post office, related to this particular message and not to the one sent to a Miss Smith in Georgia, as Freeman testified that he thought Hamilton was referring to the latter one. When recalled, he testified: "I do not really know under what circumstances I authorized the telegraph company to mail the telegram. I had a death in my family at the time. I was at the post office, and, really, there were two telegrams sent. I did not know it at the time, and really did not think about it—whether it was going to Miss Smith in Georgia, and when Mr. Hamilton asked me the question, and I guess I got it right, and he asked me what he should do, and I told him to 'mail it,' thinking it was to the one in Georgia." It was material for defendant to show that he did know which telegram Hamilton meant when he asked about the extra charge, and the excluded part of the statement further tended to show not only that he refused to pay the charge, but why he refused to pay it, because "he sent the message to Smith as a matter of respect and did not expect him to attend the funeral," and, therefore, thought that mailing the telegram would answer as well as a quicker delivery. The evidence excluded really showed the contradiction in an intensive form.

It was the duty of the defendant, when it learned that the sendee lived "out of town," to inform the sender of the fact and demand payment, or a satisfactory guarantee, of the charge for the extra service, as it elected. The *Chief Justice* said, in *Bryan v. Tel. Co.,* 133 N. C., 604: "The defendant could have sent the message on to the plaintiff, collecting the charge for the special delivery from her, or, if not willing to risk it, it was negligence not to wire back to Mooresville and demand payment or

a guarantee of the cost of delivery beyond the free-delivery limits." And again: "If guarantee of payment of the special delivery (charge) had been asked and refused, there was no compulsion on the defendant to deliver beyond the free-delivery limits." We fully recognized, in the following cases, the right of the company, when it discovers that the sendee lives beyond its free-delivery limits, to collect in advance the charge for the extra service required in making a special delivery. *Bryan v. Tel. Co., supra; Hood v. Tel. Co.,* 135 N. C., 622; *Bright v. Tel. Co.,* 132 N. C., 317. In *Gainey v. Telegraph Co.,* 136 N. C., 261, we quoted with approval what was said by the *Chief Justice* in *Bryan v. Tel. Co., supra:* "The officer at the receiving point could not have given the sender any information which he did not already have. It was his own negligence not to have paid the special delivery charges, if such a delivery was required," citing *Tel. Co. v. Henderson,* 89 Ala., 510; *Tel. Co. v. Matthews,* 107 Ky., 663; *Tel. Co. v. Taylor,* 3 Texas Civ. App., 310; *Tel. Co. v. Swearingen,* 95 Texas, 420.

The case of *Tel. Co. v. Taylor, supra,* which has been generally (519) followed by the courts, and which has been approved by this Court, held that where the rules of the company restrict its free-delivery limits to the radius of a given distance, in that case one-half mile of its office, it is not legally bound (the special delivery charge not having been paid or arranged) to deliver a message to the addressee at his residence in the country, 3 miles from the said office. The rule as to delivery limits is a reasonable one, and we have held that it must be complied with, when brought to the attention of the sender, by the prepayment of or some agreement in regard to the special delivery charges.

Some courts have held, in well considered opinions, notably *Tel. Co. v. Henderson, supra,* that the sender, if the blank on which he writes his message informs him that there are free-delivery limits, must take notice of the fact, and is presumed to have sent the message with the understanding that the sendee resides within them, unless he has provided, in some way satisfactory to the company and in advance, for the payment of the extra toll for a special delivery, if the sendee lives beyond the free-delivery limits. But we have not gone so far, and deem our rule the more reasonable one, viz., that the company should notify the sender by a service message, if the message cannot be delivered within the limits prescribed for the place to which it is addressed, so that he may furnish a better address, or, if the addressee lives beyond the said limits, provide for the payment of the charge for the extra service required. *Hendricks v. Tel. Co.,* 126 N. C., 304. We so held in *Gainey v. Tel. Co., supra,* where it was said: "We have held that when a message is received at a terminal office to which it has been transmitted for de-

livery to the person addressed, it is the duty of the company to make diligent search to find him, and, if he cannot be found, to wire back to the office from which the message came for a better address; and likewise it is the duty of the company, when it has discovered that the person for whom the message is intended lives beyond its free-delivery limits, either to deliver it by a special messenger or to wire back and demand payment, or a satisfactory guarantee of payment, as it may choose to do, of the charge for the special delivery, and if it fails to deliver without demanding and being refused payment of the charge, it will be liable for its default. It is not liable, though, if the sender of the message, when proper demand is made, refuses to pay the extra charge for a special delivery beyond the limits established for free delivery by the company, provided those limits are reasonable," citing *Hendricks v. Tel. Co., supra,* and 78 Am. St. Rep., 658; *Bryan v. Tel. Co., supra,* and *Tel. Co. v. Moore,* 12 Ind. App., 136 (54 Am. St. Rep., 515). This rule is fair to the sender, who may not take special notice of the free-delivery regulation at the time, as a very few read (520) what is printed on the back of the blanks, or who may not know where the addressee resides; and it is also fair to the company, as it is thus enabled to perform its full duty with proper compensation. It seems to us that it would be exceedingly inconvenient, if not unfair, to the public should we take any other view of the matter.

But this only shows how important it was that all the facts regarding the guarantee of the charge for the extra service should have been laid before the jury, and it would appear, in this case, that the denial of the right to have this done greatly prejudiced the defendant, as the written statement squarely contradicted Freeman's testimony in every material respect, so far as it concerned this question, which was the paramount one in the case.

Mental anguish affords a proper basis for the assessment of damages in telegraph cases, irrespective of physical injury, as this Court held as far back as *Young v. Tel. Co.,* 107 N. C., 370, and *Thompson v. Tel. Co.,* 107 N. C., 449; but that means genuine and not unreal anguish, and juries should be careful, if not astute, to distinguish between the two. It is necessary, therefore, that they should have all the light possible in order that they may detect that which is spurious, and compensate only that which is real, as it is so easy to be simulated.

For the error indicated, another trial is ordered.

New trial.

Cited: Johnson v. Tel. Co., 171 N. C., 132; *Moore v. Ins. Co.,* 192 N. C., 584.

LILA HUGHES AND HUSBAND, T. C. HUGHES, v. ROSCOE FIELDS.

(Filed 31 March, 1915.)

Deeds and Conveyances—Mortgages—Foreclosure Sales—Purchasers for Value—Trials—Evidence—Verdict, Directing—Burden of Proof.

The plaintiff claims a one-half interest in the lands in dispute from the ancestor of both parties to the action, who acquired title by deed given at a foreclosure sale which was not registered, the mortgage appearing of record to have been canceled, but the time not stated; and the defendant claims by a subsequent deed from the mortgagor, as a purchaser for value; and *it is held* for error that the trial judge charged the jury upon the evidence to answer the issue in defendant's favor, the burden of proof being on the defendant to show he was such purchaser by the preponderance of the evidence, and the character of his testimony being inconsistent and improbable under the circumstances narrated by him; and *it is further held* that the registration of the deed obtained at the foreclosure sale was not necessary to the title to the lands, as between the parties.

APPEAL by plaintiff from *Daniels, J.*, at June Term, 1914, of (521) GREENE.

Civil action tried upon these issues:

1. Did R. L. Davis execute and deliver the deed to Mrs. Elizabeth Anne Fields, as alleged in the complaint? Answer: "Yes."

2. Did the defendant Roscoe A. Fields purchase the land described in the deed of Jeremiah Fields, dated 2 April, 1906, for value? Answer: "Yes."

3. Did the defendant Roscoe A. Fields purchase the land described in the deed of Jeremiah Fields, dated 10 February, 1911, for value? Answer: "Yes."

His Honor rendered judgment in favor of the defendant, and the plaintiffs appealed.

G. V. Cowper and J. Paul Frizzelle for plaintiffs.

L. I. Moore and J. A. Albritton for defendants.

BROWN, J. This is an action by the plaintiff to recover a one-half interest in two tracts of land, described in the complaint. It is admitted that the land originally belonged to Jeremiah Fields. He conveyed it by mortgage to R. L. Davis on 15 August, 1893, who foreclosed the mortgage, at which sale it was bid off for Elizabeth Anne Fields, to whom, according to the findings of the jury on the first issue, R. L. Davis conveyed it under the power of sale contained in the mortgage.

On the margin of the mortgage record appears the following entry: "Received of Jeremiah Fields full satisfaction for the within mortgage, and the same is hereby canceled. R. L. Davis. Witness: C. A. Lassiter, Register of Deeds."

It is admitted that on the death of Elizabeth Anne Fields her lands descended in equal shares to the plaintiff Lila and the defendant Roscoe Fields.

On 2 April, 1906, Jeremiah Fields executed a deed to Roscoe Fields for the recited consideration of $4,000 for one of the tracts of land, and on 11 February, 1911, Jeremiah Fields executed a deed to Roscoe Fields for the other tract of land for the recited consideration of $2,500. As the jury have found that the deed by R. L. Davis was executed and delivered to Mrs. Elizabeth Anne Fields, the grantee therein, and as the defendant did not appeal, the judgment being in his favor, that fact may be taken as settled by the finding of the jury.

His Honor instructed the jury: "If you find the facts to be as testified by the witnesses, you will answer the second issue 'Yes,' that the land was purchased for value; and if you find the facts to be as testified on the third issue, you will answer that issue 'Yes.'" To the foregoing charge, the plaintiff duly excepted.

(522) It is established by the verdict that Elizabeth Anne Fields was upon her death the owner in fee of the lands in controversy, and although the deed to her was not registered, her title is good except as against a *bona fide* purchaser for value. *Hinton v. Moore,* 139 N. C., 44; *Norcum v. Savage,* 140 N. C., 472.

We think his Honor erred in instructing the jury upon the second and third issues substantially that in any view of the evidence the defendant was a purchaser for value. He should have submitted the matter to the jury under proper instructions as an open question for the jury to determine, the burden of proof being upon the defendant to satisfy them by a preponderance of evidence.

It is true that the defendant testified that he had paid for the land, but there are circumstances in evidence from which a jury might infer that he had not paid for it. The note alleged to have been given for the $4,000 contract was paid 2 April, 1906, which was due 1 January, 1908. On 18 April, sixteen days after the note was executed, there is another credit entry of $1,500, and in January, 1907, another payment of $1,600, and in about two months another payment of $1,031.25. Thus he paid off the note nearly a year before it was due.

The evidence shows that the defendant was not a man of means. He contends that he got some of the funds from the sale of his wife's land. Furthermore, he testifies that Jeremiah Fields, to whom the note was

payable, gave him the money with which he paid the note. It is hardly to be supposed that Jeremiah Fields handed him the cash and he immediately returned it. If Jeremiah Fields forgave the defendant the debt, then he would not be a purchaser for value. If these credits are fictitious, as contended by the plaintiff, such evidence would tend strongly to prove that the defendant was not a purchaser for value.

The evidence as to the payment of the $2,500 note is more or less like that relating to the payment of the $4,000 note. The witnesses have stated that the wife's money had been used in paying the first note, and if so, it could not have been used in paying the second. The testimony that the defendant is a purchaser for value is not of that harmonious and consistent character which would justify the charge of the court.

New trial.

Cited: Bank v. Mitchell, 203 N. C., 344.

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(523)

J. L. AND H. H. TATE v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 31 March, 1915.)

1. Railroads—Crossings—Obstructions—Damages—Equity—Injunctions.

Across a certain point on the defendant's railroad track in a certain town a roadway had existed for seventy-seven years, and the company, to enlarge its yard facilities, lay more tracks, etc., acquired at this place 40 acres of land, resulting in stopping and blocking the roadway, for which the plaintiffs bring their action for damages and injunction. The plaintiffs had previously contracted with the vendor of these lands for hauling timber from a tract on one side of the railroad to the vendor's planing mill on the other side thereof, using for that purpose the roadway in question. *Held:* The defendant was liable in damages to the plaintiffs for obstructing the roadway in this manner, and an injunction forbidding the defendant from obstructing it "by leaving box cars or other obstructions thereon," not extending to shifting cars in the manner allowable by law, etc., was properly granted.

2. Same—Preliminary Negotiations—Notice—Evidence—Merger — Deeds and Conveyances.

In negotiating for the sale of lands to a railroad company to be acquired by it for laying more tracks and extending its yard in a town, the vendor refused to make the sale if the company should, in making the extension, obstruct a roadway that for a great number of years had crossed the railroad track at that place, to which the proper official of the company replied, by letter, that there were only two ways in which it could be done, by condemnation or by consent of the supervisors of

public roads. The roadway in question had not been dedicated to public use or accepted as such by the proper public officials. Theretofore the vendor of the lands had contracted with the plaintiffs to deliver timber at his mills, with which the obstruction of the roadway would interfere, who bring their action for damages and an injunction. *Held:* Though the negotiations leading up to the transaction merged in the deed to the lands accordingly acquired by the defendant railroad company, the letters of the defendant were competent to show that there was a road across its track at the point named which it agreed that it would not attempt to obstruct, except in the manner stated.

3. Railroad Crossings—Obstructions—Roads and Ways—Public Rights—Interpretation of Statutes.

By statutory construction, *it is held*, under the circumstances of this case, that an "established road or way" which a railroad company may not obstruct in crossing it with its tracks extends to those whose use is of a private nature, and not necessarily those dedicated to a public use, Revisal, secs. 2569, 2601, 3753, 2681, 2567 (5). And in such instances, where the rights of a railroad and the rights of the public to the use of their roads or ways conflict, the former must give place to the latter.

4. Railroad—Public and Private Ways—Grade Crossings—Corporation Commission.

Authority is conferred by statute [Rev., 1097 (10)] upon the Corporation Commission to abolish grade crossing by a railroad company when by the operation of the railroads they become dangerous or inconvenient to the public traveling along their highways or private ways.

BROWN, J., dissenting.

(524) APPEAL by defendant from *Ferguson, J.*, at January Term, 1915, of WARREN.

T. T. Hicks and Tasker Polk for plaintiffs.
Murray Allen for defendant.

CLARK, C. J. This is an action to enjoin, and also to recover damages for the blocking of a "crossing" by the defendant's train near Norlina, N. C. In February, 1912, the defendant purchased 60 acres of land from W. R. Creed & Co. in order to enlarge its yards at Norlina, and soon thereafter constructed five tracks across the same in pursuance of that purpose.

The plaintiffs, prior to the purchase of this land by the defendant, had a contract with said W. R. Creed & Co. for handling timber on a 2,400-acre tract of land on the south side of the defendant's track. The planing mill of the plaintiffs to which the timber on this 2,400-acre tract was to be hauled is on the north side of defendant's track near the point mentioned in the complaint as "A" Street. The road used for this purpose crossed defendant's track at that point. This was not a public

crossing and has not been accepted by the public road authorities, but has been used ever since the railroad was built, and it is also contended that the contract of the plaintiffs with Creed & Co. entitled the plaintiffs to continue to use this crossing and to have the defendant prohibited from obstructing its use.

The jury responded to the issues that the defendant obstructed the crossing as alleged, and assessed the plaintiffs' damages at $150, and the court upon the pleadings and findings forbade and enjoined the defendant from obstructing "the crossing described in the pleadings at the northern terminus of 'A' Street at or near Norlina by leaving box cars or other obstructions thereon; but this shall not prevent the shifting of the cars thereon to the extent that is allowable by law and that will not constitute an obstruction of the same." Damages are allowable for obstruction of highway. *Sloss v. Johnson,* (Ala.) 8 L. R. A. (N. S.), 226, and notes.

The defendant excepts to the evidence as to the existence of the right of the plaintiffs to cross the railroad track at that point.

The testimony shows that there was a road at that point in 1836 when the Raleigh and Gaston Railroad (the predecessor of the defendant) was built, and that it has been in use ever since, and that during all the time since 1836 it has been a material and necessary crossing for a large number of people, and especially to the tenants, now 39 (525) in number, on the 2,400-acre farm on the south side of the railroad. When the defendant was negotiating the purchase of this 60 acres from W. R. Creed & Co., the said Creed had contracted with one of the plaintiffs and Mr. Foust to have the timber on this 2,400 acres marketed and to sell to Tate & Foust a half interest therein. This contract was executed 21 November, 1906, and is set out in the record. During the negotiation between Creed & Co., and the defendant in regard to the sale and purchase of the 60-acre tract of land, said Creed & Co. wrote the defendant a letter in which they stated that it was absolutely necessary, before Creed & Co. would sell said 60 acres to the defendant, that it should be understood that "A" Street must be left open, and that they would not agree to a change in this road and crossing which the defendant had proposed. To this the general manager and vice president, C. H. Hix, who was acting for the defendant, replied: "The road or outlet to which you refer is a public thoroughfare and can only be closed by us in one of two ways: Condemnation or the consent of the board of supervisors of public roads." These letters were in evidence and are set up in the record.

It is true that in the deed thereupon made by said W. R. Creed & Co. to the defendant there is no reference to said crossing, but this evidence

was competent to show an admission and knowledge on the part of the defendant of the nature of said crossing and that the purchaser could not abolish or obstruct the same without legal condemnation. This is not the case where the preliminary negotiations between the parties are merged in the final contract or conveyance, which is the final conclusion of the contracting parties. But this is the recognition of a status of the surrounding conditions in the acknowledgment that there was a public crossing at that point which the defendant could not and would not attempt to obstruct or abolish.

The duty of railroad companies to so construct their roads as not to interfere with the use of any public road or private way is fully discussed, with the citation of authorities, in *R. R. v. Goldsboro,* 155 N. C., 356 (affirmed on writ of error, 232 U. S., 548); *Cooper v. R. R.,* 140 N. C., 229, and *Wilson v. R. R.,* 142 N. C., 333, and additional authorities are set out in the concurring opinion in *Herndon v. R. R.,* 161 N. C., 650. In the latter case Elliott on R. R., sec. 1138, is cited: "The rule, however, is that a deed to a railroad does not constitute a waiver of a right of way to a private crossing, and the owner whose land has been severed into parcels may claim and enforce the right to a crossing, notwithstanding his unconditional instrument of conveyance." The correspondence above quoted was competent as showing that the defendant's representative had knowledge of the existence of this crossing
(526) and stated that he knew he could not interfere with it except by condemnation or the consent of the road authorities of the county.

Besides, the defendant and its predecessor had maintained that crossing for seventy-seven years, including two years after the deed to it by Creed & Co. of the 60 acres of land in January, 1912, which was accepted after the defendant had expressed its knowledge of the existence of the crossing and that it had no right to abolish it and no intention to do so.

Even if this had been a case where the railroad had been freshly constructed, it was required in crossing "established road *or ways* to so construct its works as not to impede the passage or transportation of persons or property along the same" (Rev. 2569), and also to "make and keep in constant repair crossings to any plantation road thereon." Rev., 2601; *Raper v. R. R.,* 126 N. C., 563.

The word "ways" in above cited Rev., 2569, is construed to embrace "recognized and customarily used roads and ways less than highways." *Goforth v. R. R.,* 144 N. C., 569. This is cited with approval in *Herndon v. R. R., supra,* quoting Rev., 3753, which makes it an indictable offense for any railroad to "fail to make and keep in constant repair crossings to any plantation road thereupon."

A public highway is defined, Rev., 2681. In *Goforth v. R. R., supra,* it is said: "Rev., 2567 (5), does not restrict defendant's duty to crossings by 'public highways,' which might include any road used by the public as a mill and church road or in going to town, as was this road. Revisal, sec. 2569, is still more explicit by placing on the railroad company the duty of not impeding the passage of persons and property by the construction of its road over 'established roads or ways'; that is, as we understand it, recognized and customarily used roads and ways, less than highways. Indeed, we think this would be so, as of common right, independent of any statute, under the maxim, *Sic utere tuo, ut alienum non lædas.*"

There is no contention that the correspondence between Creed & Co. and the defendant prior to the conveyance of the 60 acres created this right of way. The deed embraced the contract between the parties, and the preliminary treaty was merged into it. But such preliminary correspondence was competent to show, if it had been necessary, that the defendant was aware of the crossing and expressed its intention not to interfere with it. Certainly the defendant and its predecessor having recognized the existence of this crossing for seventy-seven years, cannot now be heard to deny its existence, or to assert for the first time, in its answer, the right to obstruct it.

This legislation is simply the assertion of the inalienable right of the public that when the public convenience and the convenience of a corporation (which derives its life from public authority) or of any other enterprise conflict, the convenience of the sovereign, the (527) people, who create corporations and support all business, is paramount. A railroad company itself is chartered for the public convenience, the right to a profit therefrom being incidental.

There is no excuse for such conflict, not only when, as here, the road or way existed before the railroad was built, but on any occasion, for the corporation can always avoid any conflict by putting in a subway crossing either for itself or for the use of the public. In many countries, and in several of our states, grade crossings by railroads are absolutely forbidden. With our steadily increasing traffic, both on railroads and on the roads and ways of the people, this will soon be a necessity here. The Corporation Commission has long had authority to abolish grade crossings. Rev., 1097 (10). When such crossing becomes dangerous or inconvenient to the public, it is the operation of the railroad that makes it so, and as the use of the railroad is in subordination to the rights of the public, instead of taking from the people the use of their roads and ways, the railroad company should avoid such interference at their own expense.

No error.

BROWN, J., dissenting: My views of the rights of the defendant as founded upon well recognized principles of law force me to dissent from the opinion of the Court in this case. If we should seek to dispose of the case upon the basis of public convenience and public benefit alone, in my opinion, the result would be contrary to that reached by the majority of the Court. A private crossing by its very nature serves the few. The railroad company in the exercise of its charter rights, and controlled, as it is, by strict public regulation, must serve the entire public. If the rights conflict, certainly the public interest would be better served by the abolishment of the private crossing. But in this case, as I will show, the abolishment of a private crossing is not the real question presented.

The defendant found it necessary to enlarge its freight yards at Norlina in order to better perform its duties to the public as a common carrier. This required the purchase of additional land adjacent to its tracks and at a point where its yards could be enlarged and extended to the greatest advantage. A tract of land belonging to W. R. Creed & Co., containing 60 acres, located at a point south of the town of Norlina, answered the purpose, and negotiations were opened for its purchase. At the conclusion of the negotiations, which were carried on by C. H. Hix, vice-president and general manager, for the railroad, and by W. R. Creed for W. R. Creed & Co., a deed in fee simple for this 60-acre
(528) tract was executed by W. R. Creed & Co. to Seaboard Air Line Railway. This deed contained no exception and no attempt was made to reserve a right of way across the land conveyed.

1. There is no evidence of a contract to keep a private way open across this land. As the *Chief Justice* says: "The deed embraced the contract between the parties, and the preliminary treaty was merged into it." This removes all question of a contract to keep open the private way across the land purchased by the defendant, and destroys the force of *Herndon v. R. R.*, 161 N. C., 650, as authority in support of plaintiff's contention. In that case there was evidence of an agreement to keep the way open.

2. There is no question in this case of the right of a railroad to close a public crossing. The following admission appears in the record: "Plaintiffs admit that the said road, the crossing in question, is not a public road and crossing and has not been dedicated to nor accepted by the county commissioners of Warren or board of road commissioners or any other road authorities of Warrenton Township in which it is located, and has not been worked nor kept up by said public road authorities." The cases of *R. R. v. Goldsboro*, 155 N. C., 360, and *Raper v. R. R.*, 126

N. C., 566, relate exclusively to public ways, and this admission makes them inapplicable to the facts of this case.

3. This is not a way of necessity. The owner's land was not severed into parcels. Creed & Co. owned no land on the north side of the railroad, and the tract of land sold to the defendant does not divide part of this land from another part. There is not a line of evidence in the record tending to support the application of the principle that "the owner whose land has been severed into parcels may claim and enforce the right to a crossing notwithstanding his unconditional deed of conveyance," and Elliott on Railroads, sec. 1138, quoted by the *Chief Justice,* does not apply.

4. We come, then, to the real question in the case, Can the owner of land in fee simple close a private way extending across it where it is not a way of necessity and there is no contractual obligation to keep it open? The answer to this question is to my mind so obvious it seems hardly to require the citation of authority. It has been repeatedly answered in the affirmative by this Court. It is so answered in *Boyden v. Achenbach,* 86 N. C., 397, in which *Chief Justice Smith* says: "It would be unreasonable to deduce from the owner's quiet acquiescence—a simple act of neighborhood courtesy, in the use of a way convenient to others, and not injurious to himself, over land unimproved or in woods—consequences so seriously detracting from the value of the land thus used, and compel him needlessly to interpose and prevent the enjoyment of the privilege in order to the preservation of the right of property unimpaired." In the later case of *S. v. Fisher,* 117 N. C., 733, (529) *Mr. Justice Avery* says: "The continuous use by the people living in the neighborhood or in the State for a period of even sixty years does not deprive the owner of the right to resume control, nor does it devolve upon the properly constituted authorities of the county or town, as the case may be, the duty, with the incidental expense to the public, of its reparation."

It cannot be doubted that upon these authorities the defendant's grantors, Creed & Co., could have closed this way, unless prevented by contract from doing so. Certainly their grantee by unconditional deed of conveyance has the same right. Can it make any difference in the application of this principle that the grantee is a railroad company? In this respect a railroad is not different from an individual owner. In fact, the law looks with more favor upon the title of a railroad to its property and prohibits the acquisition of title to such property by possession. Revisal, sec. 388. If the defendant should have desired to use this 60-acre tract for a warehouse, could its right to do so have been denied upon the ground that it would interfere with this private way?

Could the defendant have been denied the right of closing this private way across its land before the construction of its side-tracks? Its dominion over the property by virtue of its ownership included the right to say that this private way should not be used; and whether it was closed by one obstruction or another or at the time of or after purchase makes no difference in the application of this principle. At the time title was acquired there was no crossing on this tract of land. The defendant's right to close the private way arose immediately and could be exercised whenever the defendant so desired. That it permitted the way to be used for a period of two years could not be deemed a waiver of this right. Revisal, sec. 388; *S. v. Fisher, supra.* Having the right to close this private way across its land, the defendant certainly has the right to place its cars on its side-tracks constructed on this land in shifting and making up its trains, and the plaintiffs, who have no claim of right therein, cannot complain of the incidental interference with a privilege which they exercised at the sufferance of the defendant. The case of *Goforth v. R. R.,* 144 N. C., 569, and the statutes referred to therein have no application. There is a broader question here than the interference with a private crossing created by the condemnation of a right of way in the exercise of the right of eminent domain. This case involves a property right of vital importance to the citizens of this State, and the defendant should not be charged with inexcusably creating a conflict with the plaintiffs.

Whatever may be the law of other States and countries relating to the abolishing of grade crossings, I venture to say that in no State or
(530) country has it been held that a railroad company should not only permit the use of its property as a private way by the people in the neighborhood when such use interferes with the operation of its trains, but should expend thousands of dollars in carrying the private way under the tracks in its freight yards in order to facilitate such permissive use.

I cannot give my consent to a decision that is so opposed to well established principles of law and justice and the prior decisions of this Court as I understand them.

Cited: McMillan v. R. R., 172 N. C., 858; *Pusey v. R. R.,* 181 N. C., 142.

THOMPSON v. BATTS.

(Filed 7 April, 1915.)

Wills—Devises—"Children"—Interpretation—Grandchildren.

A devise and bequest of the residue of real and personal property to the "wife and children" of the testator will not include therein his grandchildren, unless the contrary intent is shown by necessary implication from the terms or expressions used in the will; and in interpreting the will under consideration *it is held* that the testator used the word "children" in its ordinary sense.

(For plaintiffs' appeal, see *ante*, 333.)

DEFENDANTS' APPEAL.

ALLEN, J. The determination of the plaintiffs' appeal leaves open only one question on the appeal of the defendants, and that is whether the word "children" as used in the fourteenth item of the will of Alfred Thompson includes grandchildren.

This question was very fully considered and the authorities reviewed by *Justice Connor* in *Lee v. Baird*, 132 N. C., 755, in which he says: "Certainly the use of the words 'all of my children' by the testatrix is free from ambiguity, and the uniform current of authority in this and other courts sustains the proposition that they will not be construed to include grandchildren unless from necessity, which occurs when the will would be inoperative unless the sense of the word 'children' were extended beyond its natural import and when the testator has clearly shown by other words that he did not use the term 'children' in the ordinary, actual meaning of the word, but in a more extensive sense; that this construction can only arise from a clear intention or necessary implication, as where there are no children, but are grandchildren, or where the term children is further explained by a limitation over in default of issue."

The only fact appearing upon the record which might lead to (531) a different conclusion is that there is a devise to Elmira Eatman (one of the children of the testator, who was dead at the time of making the will) for life, with remainder to her children; but it appears in the seventeenth item that provision was made for such contingencies, as the testator there says: "In all cases where I have left the estate for life, remainder to children, I mean that those who may die leaving issue before my death shall be represented by such issue and take their share; but should any die without issue, such as survive shall take."

It also appears, as was said in *Mordecai v. Boylan*, 59 N. C., 365, that "The testator clearly shows by his will that he understood the dis-

tinction between children and grandchildren," because in the fourteenth item, after providing "that the residue of my estate, both real and personal, shall be equally divided between my wife and children, except George W. Thompson and T. J. Thompson," he also says, "hereby giving to my granddaughter, Lena Thompson, half share of my personal estate."

We are therefore of opinion that grandchildren were not included among the devisees under the designation "children."

Affirmed.

B. H. LLOYD v. TOWN OF VENABLE.

(Filed 7 April, 1915.)

1. Municipal Corporations—Condemnation—Statutory Authority—Unauthorized Acts.

A municipal corporation may not exercise the power of eminent domain in acquiring lands of private owners for street purposes unless the same is expressly conferred by statute or by clear or necessary implication from its terms.

2. Same—Damages—Compensation.

Where a municipal corporation has taken the lands of a private owner for street purposes under an unauthorized attempt to acquire it by condemnation, the latter may waive the tort and resort to his common law action for compensation.

3. Same—Tort Waiver.

Where a municipal corporation has assumed to take lands of a private owner for street purposes without his consent or legislative authority for condemnation, the latter may waive the tortious entry and want of power to condemn, and recover upon an implied *assumpsit*, on the part of the town, to pay a just and reasonable compensation.

4. Municipal Corporations—Unauthorized Acts — Condemnation — Statutory Authority—Consent of Owner.

The express or implied consent of the owner of lands that they may be taken by a municipality for street purposes will have the force and effect of a transfer to the municipality of the property thus taken; and where he sues to recover compensation therefor he will not be heard to assert otherwise.

5. Municipal Corporations—Condemnation—Unauthorized Acts—Evidence —Value of Lands—Appeal and Error—Harmless Error.

In this action to recover damages of a municipality for the unlawful appropriation of the plaintiff's lands for street purposes, testimony of a price offered by a witness for plaintiff's land, if not competent as substantive evidence, was only admitted for the purpose of contradicting him or impeaching his estimate of its value, and is not held as reversible error on defendant's appeal.

6. Trials—Issues, Sufficient—Appeal and Error.

Issues raised by the pleadings and evidence which are sufficient to present all controverted matters will not be held erroneous on appeal.

7. Municipal Corporations—Condemnation—Unauthorized Acts—Compensation—Agreement—Estoppel—Appeal and Error.

The defendant, a municipal corporation, which had attempted to appropriate a part of the plaintiff's land for street purposes by condemnation without legislative authority, cannot rely, on appeal, upon an agreement alleged to have been made with the plaintiff, as an estoppel, when it appears that the question as to the existence of an agreement was properly decided by the jury in the plaintiff's favor.

8. Municipal Corporations—Condemnation — Appropriation Unauthorized —Compensation—Measure of Damages.

The measure of damages to the plaintiff for the unlawful appropriation of a part of the lands for street purposes by a municipal corporation is the value of the lands taken, subject to the diminution in value to the remainder, or the difference in value before and after the street was opened.

APPEAL by defendant from *Rountree, J.*, at September Term, (532) 1914, of ORANGE.

A. M. Koonce and Bryant & Brogden for plaintiff.
John W. Graham and Alexander H. Graham for defendant.

WALKER, J. This action was brought by plaintiff to recover damages of the defendant for having taken and appropriated a part of his land in the town for the purpose of opening a street. The town of Venable (now Carrboro) was incorporated by Private Laws of 1911, ch. 315. There is no provision in its charter for condemning land for streets, though there is a provision that the taxes shall be used in defraying the expenses of the town, "and in repairing streets and sidewalks and keeping them in good order." Nor is there any provision in the general law for the condemnation of land for streets by cities (533) and towns, the provision in regard to streets being substantially the same in the general law as in the charter of defendant. The first position of defendant is that the common-law remedy of trespass for the taking of property for public purposes is superseded by the statutory remedy, and for this contention he cites numerous cases. *McIntire v. R. R.*, 67 N. C., 278; *Land v. R. R.*, 107 N. C., 72; *Dargan v. R. R.*, 131 N. C., 623; *Abernathy v. R. R.*, 150 N. C., 97. But in all those cases provision had been made for condemnation, including compensation. It was, therefore, very correctly held that the remedy of the statute was exclusive; but when no such remedy is given, the landowner, where property has been taken for the laying out of streets, may resort to his

common-law action for compensation; otherwise, he would be without remedy. "The right of eminent domain," as said in 15 Cyc., 567, "is one which lies dormant in the State until legislative action is had pointing out the occasion, mode, conditions, and agencies for its exercise, and the right to exercise the power must be conferred by statute, either in express words or by necessary implication. The power should not be gathered from doubtful inferences, but should be unmistakably expressed," or, as above stated, clearly and necessarily implied. There is no inherent power residing in a municipality to condemn property for its uses. 4 McQuillin on Mun. Corporations, sec. 1459. We have held, approving the principle as stated in 1 Lewis on Eminent Domain, sec. 240, that "The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. If the act is silent on the subject, and the powers given by it can be exercised without resort to condemnation, it is presumed that the Legislature intended that the necessary property should be acquired by contract. Thus the authority to construct and maintain booms or bridges does not carry with it the right to condemn property. If the act makes no provision for compensation, it is presumed that the Legislature did not intend that the power of eminent domain should be exercised." *Comrs. v. Bonner,* 153 N. C., 66. The subject is fully discussed by *Justice Hoke* in that case, and many cases are cited in support of the doctrine. The following authorities may be added: "It requires legislative action, embodied in the form of a statute, to confer a right to appropriate private property, for the Constitution does not either create or execute the right of eminent domain. It is only called into exercise by the ruling power, and with us that is the Legislature, acting under the Constitution and in accordance with its terms." Elliott on Roads and Streets (Ed. of 1890), 148. "While it is true, the Legislature, in the charter of the city of Waycross, granted power to the municipality to lay out and open streets, it did not grant power to take or damage (534) private property for the purpose, or to provide by ordinance for assessing or otherwise ascertaining the amount of compensation." *B. and W. R. Co. v. Waycross,* 21 S. E., 145. "The right which a municipality has to take or damage private property for public use is no greater, because it has an element of sovereignty in it, than is that of any other corporation having the eminent domain power. No milder or more liberal rule of interpretation of the Constitution will be indulged in when the taking or damaging is done by a municipality than is to be applied to all alike." *Jackson v. Williams,* 92 Miss., 301. "No principle of law is better settled than that a municipal corporation can

only exercise the right of eminent domain when conferred upon it by the Legislature, expressly or by necessary implication, since a municipal corporation has no more right than any other corporation to condemn property." McQuillin on Mun. Corp., sec. 1459. There is no express or implied authority in defendant's charter to condemn land for streets, and the entry upon the plaintiff's property was therefore unlawful; but as the town authorities could contract for the purchase of the land necessary for its purposes, and as it authorized the entry, the plaintiff can waive the tortious entry and the want of power to condemn, and recover a just and reasonable compensation for the property taken; and this remedy is based upon the reason that there is an implied *assumpsit* by the town that, as it has taken the property of the plaintiff and applied it to its own use and has received and enjoyed the benefit of its use and appropriation, it should pay therefor its reasonable value, and the law, recognizing its duty, implies a promise on its part to do what, in equity and good conscience, should be done. Referring to a similar case, the Court said in *United States v. Lynah,* 188 U. S., 445 (47 L. Ed., 539, 546): "The Government may take real estate for a post office, a courthouse, a fortification, or a highway; or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited, as well as of many others. The action which was taken, resulting in the overflow and injury to these plaintiffs, is not to be regarded as the personal act of the officers, but as the act of the Government. That which the officers did is admitted by the answer to have been done by authority of the Government, and although there may have been no specific act of Congress directing the appropriation of this property of the plaintiffs, yet if that which the officers of the Government did, acting under its direction, resulted in an appropriation, it is to be treated as the act of the Government. *South Carolina v. Georgia,* 93 U. S., 4, 13; 23 L. Ed., 782, 784; *Wisconsin v. Duluth,* 96 U. S., 379; 24 L. Ed., 668; *United States v. Great* (535) *Falls Mfg. Co.,* 112 U. S., 645; 22 L. Ed., 846; 5 Sup. Ct. Rep., 306." See, also, *Boise Valley Constr. Co. v. Kroeger,* 28 L. R. Anno. (N. S.), 968, where an elaborate and valuable note on this question will be found. *Smith v. Chicago,* 107 Ill. App., pp. 270, 280.

The taking in this case was by the town, although the actual work of laying out and opening the street may have been performed by its agents or servants, who acted in pursuance of its direction.

As we construe the verdict, in the light of the evidence and the charge of the court, the plaintiff consented to the taking of his land, but reserved the right to just and adequate compensation for the loss and injury to him. Whether he did so or not, his present action implies such a consent on his part, and he will not be heard to assert the contrary, nor do we understand that he does so, but he is now willing to the appropriation if proper compensation is allowed. The right to a just compensation for property taken by the sovereign or by any corporation possessing a part of the sovereign power, springs from our sense of natural justice and "is a principle so salutary to the citizen, and concerns so nearly the character of the State," that this Court, in *R. R. v. Davis,* 19 N. C., 451, declared it to be an essential restriction upon the exercise of the power of eminent domain, even though no express provision may be found in our Constitution authorizing it or requiring it to be made, when property is so taken for a public purpose; and we have adhered to this rule ever since. *S. v. Haynie,* 169 N. C., 277. By analogy, the owner who consents to a taking of his property, when no legal right or power to do so exists, should receive the same measure of justice as in the other case, where the power does exist. The owner's consent, express or implied, will have the force and effect of a transfer to the defendant of the property taken, to the extent as held in *White v. R. R.,* 113 N. C., 610, upon substantially similar facts. This ruling should not be open to objection by the defendant, as it is permitted thereby to acquire the right of using the street in the exercise of its corporate functions and for the benefit of the public it represents, which it could not have done without the plaintiff's consent, and it cannot well be argued that it should not make fair recompense in money for the benefit it has thus received. The defendant very properly did not contest the plaintiff's right to compensation in its brief, or in the argument before us, but mainly relied upon the position that the town had the right of condemnation, and that his remedy, therefore, was special and must be sought in proceedings instituted for that purpose, and not by a separate civil action. This position we have held to be untenable, and for the reasons given. 4 McQuillin on Mun. Corp., sec. 153.

(536) We have not been able to discover any error in the charge as to the damages. The court instructed the jury to consider the benefits derived by the plaintiff from the opening of the street, and in this respect gave the defendant the full advantage of any deduction on that account, as if it had the right to condemn and had proceeded regularly in doing so. The question asked the witness C. G. Cates, as to his offer to buy the lot, was competent, if at all, only to contradict him or to impeach his estimate of the value, and for this purpose it was ad-

mitted. 2 Lewis Em. Dom. (3 Ed.), sec. 666; Abbott's Proof of Facts (3 Ed.), p. 875; *Hine v. M. R. Co.,* 132 N. Y., 447; *Sherlock v. R. R.,* 130 Ill., 403; *Atkinson v. R. R.,* 93 Wis., 362. It was proper to state the contentions of the parties, and we do not see that either party was given any advantage over the other, but the charge, on the contrary, appears, in all particulars, to have been full, clear, and impartial. *Clark v. R. R.,* 109 N. C., 430; *S. v. Cox,* 153 N. C., 638; *Jeffress v. R. R.,* 158 N. C., 215; *S. v. Blackwell,* 162 N. C., 672; *S. v. Fogleman,* 164 N. C., 458. The issues were sufficient to present all controverted matters to the jury, which is all that is required. *Tucker v. Satterthwaite,* 120 N. C., 119; *Lumber Co. v. Lumber Co.,* 135 N. C., 744; *Alford v. Moore,* 161 N. C., 382. The jury found against the defendant as to its agreement with the plaintiff, and therefore the question of estoppel, which has been discussed in the briefs, does not arise. The other exceptions do not require any separate comment. It seems to us that the court laid down the correct rule in regard to the measure of plaintiff's compensation. He is entitled to the value of what was taken, and to any diminution in value of the remainder, or, what is the same thing, to the difference in value before and after the street was opened. 15 Cyc., 687; *Liverman v. R. R.,* 114 N. C., 695; *Brown v. Power Co.,* 140 N. C., 333.

We have not discussed the question whether defendant was entitled to a deduction for benefits received by plaintiff from the opening of the street, as this part of the charge was favorable to defendant, and the plaintiff did not appeal. The court subtracted from the total damages, as assessed by the jury, the amount of benefits derived by the plaintiff, to wit, $164, permitting judgment only for $400, the reduced amount. The verdict seems to be fair, at least to the defendant.

No error.

Cited: Hardware Co. v. Buggy Co., 170 N. C., 301; *Bennett v. R. R.,* 170 N. C., 394; *Power Co. v. Power Co.,* 175 N. C., 679; *Dayton v. Asheville,* 185 N. C., 15; *Sandlin v. Wilmington,* 185 N. C., 260; *Milling Co. v. Highway Com.,* 190 N. C., 699; *Griffith v. R. R.,* 191 N. C., 89; *In re Assessment against the R. R.,* 196 N. C., 759.

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S. R. FOWLE v. A. D. McLEAN, TRUSTEE, ET AL.

(Filed 7 April, 1915.)

1. Estates—Timber Deeds—Defeasance—Judgment Liens.

Timber growing upon lands is regarded as realty, and a deed thereto giving power to cut and remove the same within a stated period creates an estate therein defeasible as to all timber not cut and appropriated within the time allowed; and while such estate exists it is subject to a lien of a docketed judgment against the grantee of the timber and to the ordinary methods of enforcing collection of the same.

2. Judgments—Presumptions—Mortgages—Interpretation of Statutes.

Revisal, secs. 574, 575, providing that all judgments entered during the term of court shall relate to the beginning of the term, and be deemed to have been then entered, will not apply where it will affect the rights of innocent *bona fide* purchasers for value under a conveyance of lands, and registered during the term of court at which the judgment had been obtained.

3. Mortgages—Purchasers for Value—Pre-existing Debt.

The principles that a mortgage given for a present loan of money constitutes the mortgagee a purchaser for value generally obtains in reference to mortgages and deeds of trust to secure past indebtedness. Revisal, secs. 961-964.

4. Same—Principal and Surety—Equity—Subrogation.

Judgment having been rendered against the principal on a note and H., one of his sureties, H. and K. mortgaged their interest in certain standing timber, and thereafter judgment was rendered against K. and M., sureties on the same note; the mortgage of H. and K. was registered at the same term of the court at which the second judgment was rendered, but prior in point of time. M. paid the judgment creditor and had the judgment assigned to a third person to his use. The plaintiff was the purchaser at the sale under the mortgage. *Held:* M., the surety who had paid the judgment, is subrogated to the rights of the judgment creditor, and holds a lien prior to that of the mortgage on the interest of H. in the timber, but not on that of K., for as to K. the mortgage is regarded as having been registered before the rendition of the judgment.

5. Principal and Surety—Judgments—Payment—Assignment of Judgment—Uses and Trusts.

A surety may preserve the lien of judgment against the principal and himself by paying the judgment creditor and having the judgment assigned to a third person for his own benefit; and this also applies to a judgment against his cosureties and himself in enforcing an equality of obligation between them.

6. Principal and Surety—Contribution—Insolvency—Jurisdiction—Property.

The liability of sureties among themselves is controlled by the equitable principle of equality arising out of a common risk, and in case of insolvency or nonresidence these rights are adjusted by reference to the num-

ber of sureties who are solvent or who have property available to process within the jurisdiction of the court.

7. Appeal and Error—Modified Judgment—Costs.

It appearing on this appeal that the lower court erred only in part in applying the equitable doctrine of subrogation to the facts set out, the costs thereon are equally divided between the parties.

APPEAL by defendant from *Bond, J.*, 28 January, 1915, at (538) Chambers. From BEAUFORT.

Civil action heard on return to restraining order, by consent, and upon case agreed. The facts agreed upon are as follows:

"This cause coming on to be heard before the undersigned judge on the return to an injunction heretofore issued, the following facts are, by consent, found, and are agreed upon by the parties hereto as the facts in the case:

"(1) It is found as a fact that on 11 November, 1911, summons was issued in favor of McKeel-Richardson Hardware Company against Washington Lumber Company, W. F. Harrell, L. I. Moore, and J. R. Kessenger, and that service of summons was made on Washington Lumber Company and on W. F. Harrell on 13 November, 1911, and on the defendant L. I. Moore on 11 November, 1911, and on J. R. Kessenger 29 November, 1911.

"It is further found as a fact that a duly verified complaint was filed in the office of the clerk of the Superior Court of Beaufort County on 22 November, 1911, and that judgment by default final was taken against the Washington Lumber Company and W. F. Harrell at the December (1911) term of the Superior Court of Beaufort County on the relief demanded in the complaint.

"It is further found as a fact that judgment by default final was taken against defendants Moore and Kessenger on 12 June, 1912, and was docketed and indexed in the office of the clerk of the Superior Court of Beaufort County on said date.

"It is agreed between the parties to this controversy that the complaint in the suit of *McKeel-Richardson Hardware Co. v. Washington Lumber Co., Harrell, Moore, and Kessenger,* and that the judgments in said action, which were rendered at the December (1911) term, and at the June (1912) term, shall constitute a part of the case on appeal.

"It is further found as a fact, and is admitted by the parties, that the judgment which was rendered at the December (1911) term of the Superior Court was duly docketed, indexed, and recorded, and that the judgment which was rendered at the June (1912) term was docketed, indexed, and recorded, and that said June term of court convened on 27 May, 1912, and adjourned 13 June, 1912.

"It is found as a fact that Harrell and Kessenger conveyed to A. M. Dumay, as trustee, to secure certain indebtedness, certain property or timber rights, a copy of one of the deeds to Harrell and Kessen-
(539) ger being set out herein and made a part of the statement of this case; it being further found as a fact, and agreed by all parties, that all of the deeds to Harrell and Kessenger are in the form similar to the copy set out herein; that the said deed from Harrell and Kessenger to A. M. Dumay, trustee, which was dated 1 June, 1912, was duly filed for registration in the office of the register of deeds of Beaufort County on 7 June, 1912.

"It is further found as a fact that A. M. Dumay, under the power of sale contained in the deed of trust to him, advertised the timber rights which had been conveyed to him by Harrell and Kessenger, and sold the same to S. R. Fowle, plaintiff in this action, for full value.

"It is further found as a fact that the plaintiff Fowle purchased the property from A. M. Dumay, trustee, without notice in fact of the judgments which had been rendered in the case of *McKeel-Richardson Hardware Co. v. Washington Lumber Co. et al.*, except such notice as was imposed upon him by law.

"It is further found as a fact that execution issued at the instance of the plaintiff in the suit of *McKeel-Richardson Hardware Co. v. Washington Lumber Co. et al.* against L. I. Moore, Washington Lumber Company, and J. R. Kessenger; that the same was returned 'Indulged by order of the plaintiff,' and that on 16 December, 1912, twelve days after the issuance of the execution, L. I. Moore furnished A. D. McLean the money and requested him to pay the same to the plaintiff, and to take an assignment of the judgment from the plaintiff McKeel-Richardson Hardware Company to A. D. McLean, as trustee for L. I. Moore.

"It is further found as a fact that the defendant Harrell is not now a resident of the State of North Carolina, and has no property therein sufficient to satisfy an execution issued in the case of *McKeel-Richardson Hardware Co. v. Washington Lumber Co. et al.;* and it is a fact that J. R. Kessenger is dead and that he left no estate on which an execution could issue.

"It is further found as a fact that Harrell is a citizen of the State of Georgia and receiving a salary of about $200 per month."

It appears from perusal of pleadings and judgment, in case of *Hardware Co. v. Lumber Co., Harrell, and Moore et al.*, made a part of the case agreed, that the individual defendants, Harrell, Moore, and others, were liable as indorsers on the notes of the lumber company, and that said company was principal and primarily liable for the debt on which the judgment was rendered.

His Honor, being of opinion that, on the facts presented, the judgment had been paid and satisfied by reason of the transaction between defendant Moore and the hardware company, the original creditor, and the lien thereof had been extinguished, entered judgment that present defendants be perpetually enjoined from issuing execution on said judgment or taking steps to enforce collection from the timber (540) rights acquired by plaintiff from Harrell and Kessenger, and defendant excepted and appealed.

Ward & Grimes for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

HOKE, J. There are numerous decisions in this State to the effect that standing timber is to be considered as realty and that a deed conveying such timber to the grantee and giving power to cut and remove same within a specified period creates a fee-simple estate in realty, not absolute, but defeasible as to all such timber as is not cut and appropriated within the time, and as the correct deduction from the position it was held, at the last term, in *Williams v. Parsons,* 167 N. C., 529, that such an estate, while it exists, is subject to the lien of a docketed judgment and to the ordinary methods of enforcing collection of the same, as in other cases of realty. Speaking to the subject in *Williams' case, supra,* the Court said:

"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, 70 S. E., 474; 34 L. R. A. (N. S.), 615; *Hornthal v. Howcott,* 154 N. C., 229, 70 S. E., 171; *Midyette v. Grubbs,* 145 N. C., 85, 58 S. E., 795; 13 L. R. A. (N. S.), 278; *Lumber Co. v. Corey,* 140 N. C., 462, 53 S. E., 300; 6 L. R. A. (N. S.), 468; *Hawkins v. Lumber Co.,* 139 N. C., 160, 51 S. E., 852.

"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. Staton,* 137 N. C., 670, 50 S. E., 331; Revisal 1905, sec. 629."

And in the recent case of *McKinney v. Street,* 165 N. C., 515, the Court held, in a well sustained opinion by *Associate Justice Brown:* "The rule of court, afterwards enacted into a statute, Revisal, secs. 574-575, that all judgments entered during a term shall relate to the beginning of the term and be deemed to have then been entered, is to prevent advantage being taken by litigants who may have been fortunate enough to have first secured their judgment, and unseemly endeavor to get first to the ear of the court; and will not apply to a judgment obtained (541) during a term of court subsequent by a day or a fraction of a day to the registration of a deed to lands, so as to affect the rights of an innocent *bona fide* purchaser for value."

Again, it is well established in this State that a mortgagee to secure a present loan is to be considered a purchaser for value within the meaning of both 13 Elizabeth, ch. 5, and 27 Elizabeth, ch. 4; Rev., secs. 961-964; and the same principle obtains in reference to mortgages and deeds of trust to secure a past indebtedness except as to an estate or interest existent in the property conveyed. *Sykes v. Everett,* 167 N. C., 600; *Branch v. Griffin,* 99 N. C., 174; *Brem v. Lockhart,* 93 N. C., 191; *Moore v. Ragland,* 74 N. C., 343; *Potts v. Blackwell,* 57 N. C., 59; *same case,* 56 N. C., 449.

On perusal of the facts presented, it appears that judgment by default final, in favor of the creditor, was taken at December Term, 1911, of the Superior Court of Beaufort County, against the lumber company, the principal debtor, and W. F. Harrell, one of the indorsers, and same was duly docketed and indexed; and judgment by default final against the other two individual defendants, Moore and Kessenger, on 12 June, 1912, the term of court having commenced 27 May, 1912; and same was duly docketed and indexed; that the property, this timber interest, was acquired by Kessenger and Harrell in February, 1912; that these owners mortgaged the same to Dumay on 1 June, 1912; that the mortgage was registered 7 June, 1912; that same was thereafter duly foreclosed by sale under provision of the deed, and plaintiff Fowle purchased for full value and without notice; and, applying the principles heretofore stated, it follows that the creditor's judgment, obtained and duly docketed in December, 1911, constituted a valid lien against the estate and interest of Harrell, a half owner of the timber, and that the judgment against Kessenger, owner of the other half interest, having been rendered after he had conveyed his interest to a purchaser for value and without notice, same will not constitute a lien on such interest by relation to the first day of the term, and, as to that interest, the plaintiff is the owner, freed from any claim or lien by reason of the judgment.

This being the status of the matter as to the judgment and lien existent in favor of the creditor, the question recurs as to the effect of the transaction between the defendant Moore and said creditor and by which Moore, having advanced the money in payment of the claim, took an assignment of the judgment to McLean, trustee, for the purpose of preserving and enforcing collection according to the rights of the parties.

In 2 Black on Judgments, sec. 995, it is stated to be the general rule on this question, "that payment of a judgment by one of two joint defendants operates as a satisfaction and extinguishment of the judgment, and the defendant cannot take an assignment of it or be subrogated to the rights of the creditor as against his codefendant or (542) keep the judgment alive in any manner or for any purpose, citing, among other cases, *Dunn v. Beaman,* 126 N. C., 764, and *Towe v. Felton,* 52 N. C., 216, and substantially the same statement is given in 23 Cyc., 1470, as follows: "Under this rule, it is not competent for one joint defendant, on payment of a judgment, to take an assignment of it so as to wield it against his codefendant, and it is none the less extinguished by the payment, although such assignment be made."

Whether this should be regarded as the proper rule in this jurisdiction, where the rights of parties on legal and equitable principles are now administered in one and the same court, it is not necessary to determine, for it has long been recognized with us and so held in numerous decisions that a surety on paying a judgment may preserve the lien as against the principal by taking an assignment to a third person for his benefit, and it has been expressly held that he may do this also as to his cosureties and use it to collect the proportionate part that may be due him in enforcing an equality of obligation between them. *Peebles v. Gay,* 115 N. C., 38; *Rice v. Hearn,* 109 N. C., 150; *Barringer v. Boyden,* 52 N. C., 187.

In many of the courts of this country, most of them, the principle prevails without resorting to an assignment. See case of *Nelson v. Webster,* 72 Neb., 332, reported with a very full and learned note on this subject in 68 L. R. A., p. 513. But in this State the rule is that an assignment to a third person must be taken in order, as stated, to preserve the lien of the judgment. *Tripp v. Harris,* 154 N. C., 296, and cases cited.

In *Jones v. McKinnon,* 87 N. C., 294, in which it was held that a surety could only keep a judgment alive as against a principal, and in several other cases, as in *Towe v. Felton, supra,* in which like intimation was given, the suits were regarded and dealt with as actions at law in which only the enforcement of strictly legal rights was permissible; but if these cases were ever sound, they should not now prevail, and we think

the position announced in *Peebles v. Gay, supra,* and that line of cases, is more in accord with our present more liberal system of procedure, in which both legal and equitable rights are administered in same action and in one and the same court.

Speaking to this question in the *Peebles case, supra,* the Court, among other things, said: "Upon general principles of equity a surety, paying the debt of his principal, was entitled to be substituted to all the rights of the creditor in the premises, as to collaterals, and could enforce the same in a court of equity. This is the doctrine of subrogation, and in it is included the right of the surety, on payment of the judgment, to have an assignment of the same to a trustee for his benefit. Indeed, (543) it was early laid down by our Court that the only way for a surety to preserve the lien of the judgment against his principal in his own favor was, upon payment by him of the same, to have the judgment assigned to a trustee for his use. If he permitted the judgment to be satisfied without an assignment, the remedy of subrogation was lost." And again: "In some jurisdictions these equitable rights are administered without an actual assignment. 2 Brandt on Suretyship, 309. Upon the same principle of equity and natural justice the right of one surety to compel contribution of another exists, and might have been enforced in a court of equity; as, also, might the right of one surety to the benefit of an indemnity given by his principal to another surety. . . . And it is broadly stated in Brandt on Suretyship, *supra,* that 'A surety who pays his principal's debt is entitled to be subrogated to all the rights and remedies of the creditor against the cosureties in the same manner as against the principal.' This is founded in reason and justice, and up to the adoption of our present Constitution was enforced in the courts of equity. Article IV, sec. 1, of the Constitution abolished the distinction between actions at law and suits in equity, leaving such rights and remedies to be enforced in the one court, which theretofore had administered simple legal rights."

In reference to the amount to be recouped by the surety in this instance, under our former system a surety was liable for his aliquot proportion, to be ascertained by the number of cosureties and without regard to their solvency or the availability of their property; but, in a court of equity and the principles now regarded as controlling, the liability of sureties is made dependent on the principle of equality arising out of a common risk, and, in case of insolvency or nonresidence, these rights are adjusted by reference to the number of sureties who are solvent or have property available to process within the jurisdiction of the court. *Powell v. Matthis,* 26 N. C., 83; Brandt on Suretyship (3 Ed.), sec. 314.

From the facts in evidence, it appears that the principal is insolvent; that the cosurety, Kessenger, is also insolvent and has died leaving no property available to the payment of the judgment or any part of it, and, under the principles heretofore stated, we are of opinion, and so hold, that the defendant Moore, in taking an assignment of the judgment to a trustee, has preserved the right to enforce collection to the extent of one-half the amount against the timber interest formerly belonging to his cosurety, Harrell, the same having been conveyed subject to the lien of the judgment.

The judgment below will be modified in accordance with this opinion and defendant Moore allowed execution for one-half the debt against the timber interests of Harrell in the property which became subject to the liens. The costs of appeal will be divided.

Modified.

Cited: Hardware Co. v. Holt, 173 N. C., 311; *Jernigan v. Jernigan,* 178 N. C., 86; *Jones v. Rhea,* 198 N. C., 192; *Weil v. Herring,* 207 N. C., 9.

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(544)

BEAUFORT COUNTY LUMBER COMPANY v. A. J. COTTINGHAM AND WIFE.

(Filed 7 April, 1915.)

1. Equity—Continuance of Cause—Conditions—Pleadings Stricken Out—Judgment Pro Confesso.

Where a continuance of a cause of an equitable nature coming on for trial is granted a defendant upon condition that he give a certain bond in relation thereto during the present term, which he fails to do, without just cause, he is in contempt of court, and as a punishment the judge may, as a matter in his discretion, strike out the answer and render such judgment *pro confesso* as the plaintiff may be entitled to under the allegations of his complaint.

2. Equity—Administration—Jurisdiction—Same Court—Specific Performance—Injunction—Interpretation of Statutes.

The plaintiff being a purchaser under the ordinary contract to convey timber, alleges that he is entitled to an extension period under the terms of the contract for cutting, etc., though not appearing upon its face by reason of a mutual mistake in the date thereof, and that he had in time tendered the defendant the consideration specified for the extension of the said period, which the defendant had refused, and that the defendant was then cutting the timber upon the land. *Held:* The plaintiff's action is of an equitable nature, asking specific performance of his contract and an injunction against the continued cutting of the timber by the defend-

ant; and though the technical difference between actions at law and suits in equity have been abolished, and both are administered by the same court, the powers and jurisdiction of the courts of equity are preserved.

APPEAL by defendant from *Cooke, J.*, at December Term, 1914, of ROBESON.

Civil action heard upon motion of plaintiff to strike out the answer and render judgment upon the complaint for the relief demanded. The court granted said motion. Defendants appealed.

McLean, Varser & McLean for plaintiff.

B. F. McLean, G. B. Patterson, W. H. Neal for defendants.

BROWN, J. In this action plaintiff seeks to require defendants, owners of certain land, to perform specifically the provisions of an extension clause for the cutting of the timber contained in a deed executed by the defendants to the plaintiffs, conveying the timber thereon to plaintiff.

The complaint alleges that the deed conveying the timber was dated 14 April, 1906, but was not delivered and did not go into effect until 30 May, 1906, from which last date the time for cutting the timber began to run; that by mutual mistake the original date of the deed was not changed; that under the terms of the contract plaintiff had five
(545) years from 30 May, 1906, within which to cut the timber, and a further period, not exceeding seven years after the expiration of the five years, upon paying defendants a sum equal to 6 per cent of the consideration expressed in this deed for each year in which they shall exercise said rights after the expiration of the term of five years.

The complaint further alleges that plaintiff has tendered the said sum of money within the time required, and notified defendants of its purpose to avail itself of the extension clause; that the defendants refused to receive said money, and denied the plaintiff's rights thereunder, and are proceeding to cut said timber themselves. The court made the following findings and judgment:

"That heretofore the plaintiff was allowed to amend its complaint, which amended complaint was filed 6 November, 1914, and the defendants filed their answer thereto, and the cause was set for trial at this term of court, and upon the defendants' motion at this term, as appears from an order entered in this case at this term, a continuance was allowed the defendants upon terms set out in said order, and the defendants accepted the terms therein set out, and the said terms were precedent to a continuance, and the defendants were allowed the remainder of the term to comply therewith after having so accepted the same, and at the end of said term it appeared that defendants had not given the

bond required in said order and had not offered any reasonable excuse for not so doing; and since it appears to the court that the plaintiff consented to the continuance, and the court ordered the same upon the giving of said bond, and that but for the requirement of the giving of said bond the court would not have ordered said continuance, nor would the plaintiff, through its counsel, have consented thereto, and that the defendants having obtained said continuance upon the acceptance of terms, which they now refuse to comply with:

"It is, therefore, on motion of McLean, Varser & McLean, attorneys for the plaintiff, ordered, adjudged, and decreed that the answers filed in this cause by the defendants be and they are hereby stricken out, and the said amended complaint is hereby taken *pro confesso* and the allegations therein are found to be true. And it is further ordered, adjudged, and decreed that on or about 14 April, 1906, the plaintiff agreed to purchase the timber described in the complaint, and in the second paragraph thereof, and that on 30 May, 1906, the deed described in the record in Book of Deeds 5-B, page 412, office of the register of deeds of Robeson County, was delivered to the plaintiff, and that 30 May, 1906, is the true date of said deed, the same having been omitted therefrom by the mutual inadvertence and mistake of the parties, and 14 April, 1906, having been left in said deed by the same mistake and inadvertence, and that the plaintiff has stood ready and willing at all times to pay the sum of money and all other sums of money due under and by (546) virtue of the terms of said deed to the defendants or into this court, and that within the proper time as provided in said deed, and before the extension period therein set out began, the plaintiff tendered to the defendants the sum of money equal to 6 per cent of the consideration expressed in said deed for the year first after the expiration of the first term of five years therein, which sum of money was refused by the defendants.

"And it is further ordered, adjudged, and decreed that the plaintiff pay into the office of the clerk of the Superior Court of Robeson County the sum of $180 for the first year, beginning 30 May, 1911, and $180 for each year thereafter as long as the plaintiff may desire to avail himself of said extension, not to exceed seven years after the expiration of the first term of five years provided in said deed, and that all accrued payments be paid into the office of the clerk of the Superior Court, and that all future payments thereunder, instead of being paid to the defendants, shall be paid to the clerk of this court in this action, and that this judgment shall operate as an extension of said deed for the period of seven years upon the payment of the money above provided as set out in said deed.

"It is further ordered and adjudged that the plaintiff recover of the defendants all costs herein taxed by the clerk of this court," etc.

It is well settled that the defendants, having refused or neglected to obey an important order of the court, although they accepted its benefits, were in contempt and liable to punishment. The court administered punishment by striking out the answer and giving judgment *pro confesso* upon the allegations of the complaint.

It is contended that the court had no power to make such order; that every defendant has a vested right to make a defense to an action begun against him, of which he cannot be deprived.

This action is equitable in its nature, and the relief demanded has always been obtainable solely in a court of equity. The plaintiff seeks specific performance of the contract and an injunction against the destruction of the timber.

While the technical difference between actions at law and suits in equity has been abolished, and both are administered by the same court, the powers and jurisdiction of the courts of equity are preserved.

One of the well settled rules that has always existed in the English Chancery is that a party in contempt will not be allowed to oppose the relief sought by the plaintiff by contradicting the allegations of the bill or bringing forward any defense. *Vowles v. Young,* 9 Ves., Jr., 173. It was the opinion of *Lord Eldon* in that case that a party to a suit who is in contempt cannot be heard. 2 Comyn Dig., Chancery Process D., 8; *Clark v. Dew,* 1 Russ. and Myl., 103.

(547) *Chancellor Kent* holds that the rule in the English Chancery is the rule here, saying: "For I take this occasion to observe that I consider myself bound by those principles which were known and established as law in the courts of equity of England at the time of the institution of this Court." *Manning v. Manning,* 1 Johns Ch., 527.

"The Court has the power," says the Court of Appeals of New York, "when and while a defendant in an equitable action is in contempt for disobeying its order, to refuse to hear him." *Walker v. Walker,* 82 N. Y., 260; *Brinkley v. Brinkley,* 47 N. Y., 41; *Saylor v. Mockbie,* 9 Iowa, 209; *O'Connor v. Ry. Co.,* 75 Ia., 617; *Kaskel v. Sullivan,* 31 Mo., 435.

In this case a party to an action was summoned as a witness and failed to attend. The court said it was no error to strike out his pleading and enter judgment against him.

In *Brisbane v. Brisbane,* 41 Supreme Court Reports of New York, it is held that "the power possessed by a court of equity to strike out a defense, in an action brought therein, because of a refusal to obey its

orders, was not taken away by the Code of Civil Procedure, but still exists." See, also, *Gross v. Clarke,* 87 N. Y., 272.

In 31 Cyc., p. 632, it is said: "Pleadings are frequently stricken out as a penalty for disobedience to orders of court." In the notes the editor cites cases from nearly every State in the Union to sustain the text, among them *Crump v. Thomas,* 89 N. C., 241.

The power to strike out the answer having thus been demonstrated as existing in the courts of equity of this day, the use of it was a matter in the sound discretion of the court, and we see no abuse of such power under the circumstances of this case. The answer having been stricken out, the case stands as if no answer had ever been filed. Therefore, the allegations of the bill or complaint are taken to be true *pro confesso,* and the plaintiff is to be awarded such relief as the allegations of the complaint warrant. An examination of the complaint in this case discloses that, taken to be true, the facts alleged fully warrant the judgment of the court.

Affirmed.

Cited: Lumber Co. v. Cottingham, 173 N. C., 324; *Finance Co. v. Hendry,* 189 N. C., 555; *Sugg v. Engine Co.,* 193 N. C., 820; *Texas Co. v. Fuel Co.,* 199 N. C., 495.

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(548)

CHARLIE MOTSINGER v. SAMUEL A. SINK.

(Filed 7 April, 1915.)

1. Malicious Prosecution—Without Cause—Compensatory Damages—Particular Malice—Punitive Damages.

Compensatory damages may be recovered in an action for malicious prosecution when the criminal case had knowingly and intentionally been brought by the defendant in the civil action, without legal cause or excuse; but for the recovery of punitive, exemplary, or vindictive damages it must be shown that the defendant had been actuated by particular or actual malice, committing the act complained of willfully, maliciously, or wantonly or that he did so as the result of a reckless indifference to the rights of others.

2. Malicious Prosecution—Probable Cause—Presumptions—Malice.

To recover punitive damages in an action for malicious prosecution, malice and a want of probable cause must be shown; and malice may be inferred from a want of probable cause, though a want of probable cause may not be inferred from malice alone.

3. Malicious Prosecution—Probable Cause—Knowledge of Prosecutor—Reasonable Belief.

In an action to recover damages for malicious prosecution, the want of probable cause for the criminal action must be shown from those facts and circumstances which were known to the prosecutor at the time, and if they afforded such grounds for starting the prosecution as a reasonable man under the circumstances would have acted upon, he would not be liable for damages in the civil action, though he had been inspired by malice and the defendant in the criminal action had been proven to have been innocent of the offense charged.

4. Malicious Prosecution—Vendor and Vendee—Mortgaged Property—False Pretense—Probable Cause—Trials—Evidence—Questions for Jury.

Where the defendant in a criminal action has three separate times been indicted upon as many charges in separate indictments alleged to have arisen from the defendant's having disposed of mortgaged property, in this case, a horse, and the defendant has been acquitted or found not guilty of all of the offenses charged against him, and brings his civil action for damages for malicious prosecution, introducing several affidavits and warrants in the criminal prosecution alleging false representations as to the encumbrances, which is denied by the defendant in this action, the prosecutor in the criminal one, with further evidence in his behalf that he was only acting as the agent of another in making the sale and was unaware of the existence of the mortgage. *Held:* The evidence as to probable cause is conflicting and leaves the question for the determination of the jury.

5. Same—False Pretense—Intent to Deceive.

The mere fact that a chattel sold to another was subject to the lien of a registered mortgage does not necessarily make the seller guilty of a false pretense in receiving the purchase money, for if he had acted as the agent of another in making the sale and was unaware of the existing lien of mortgage, the elements of false pretense are lacking, *i.e.*, that the purchaser was knowingly and intentionally misled or caused to part with his money by a false representation of the seller.

6. Malicious Prosecution—False Pretense—Debt—Enforcement of Collection—Evidence.

The fact that the prosecutor in a criminal action had instituted it in order to compel the payment of a debt by the defendant is evidence of a malicious motive in an action brought by the defendant therein against the prosecutor to recover damages for malicious prosecution.

(549) APPEAL by plaintiff from *Lyon, J.*, at November Term, 1914, of FORSYTH.

The plaintiff, as an employee of one W. H. Ziglar, traded a horse to the defendant, upon which it is alleged one W. N. Cundiff held a chattel mortgage, given by the man from whom Mr. Ziglar had purchased the horse. A civil action had been brought by the defendant against the plaintiff and others, and after the termination of this action the defend-

ant, on 19 April, 1913, caused a warrant to be issued by P. V. Critcher, judge of the recorder's court at Lexington, N. C., charging the defendant with disposing of mortgaged property in that "he assisted, aided and abetted in the disposition and sale of the horse, knowing him to be mortgaged, with the intent to hinder, delay, and defraud the rights of the mortgagee," contrary to the provisions of section 3435 of the Revisal. Four days thereafter the plaintiff was arrested on this warrant by the sheriff of Forsyth County, and was held in bail in the sum of $200 for his appearance before the court at Lexington for trial on this charge. The trial was had on 17 May, 1913, and at the close of the evidence a *nol pros* was entered by the solicitor for the State, and the plaintiff was discharged. On the same day, and after his discharge on that warrant, another warrant was issued, at the request and upon the affidavit of the defendant, by said P. V. Critcher, judge of the recorder's court at Lexington, N. C., charging this plaintiff with the crime of false pretense, in that it was alleged that he had sold this horse to the defendant Sink knowing it was mortgaged, with intent to cheat and defraud him. The plaintiff was arrested on this warrant and held to bail in the sum of $250 for his appearance at the court in Lexington on 19 May, 1913. The trial was had on that date, and at the close of the evidence for the State a motion was made by counsel for the defendant that the warrant be quashed, which motion was granted, and the defendant again discharged. On the same day, and after his discharge, the defendant similarly obtained a third warrant charging this plaintiff with a false pretense in the sale of the horse and alleging substantially the same facts as in the second warrant. Upon this warrant the plaintiff was again arrested for the third time, on 27 June, 1913, and was required to give bail in the sum of $200 for his appearance at the court in (550) Lexington to answer this charge. There were several continuances of the case on account of the serious illness of the plaintiff, which necessitated his being confined in the hospital for many weeks, and finally it was tried on 8 October, 1914, when the plaintiff was adjudged "not guilty," and for the third time he was discharged. On the same day that he was discharged the last time he brought this suit for malicious prosecution. These facts were testified to by the plaintiff, and he also swore that he was not guilty of any of the offenses with which the defendant had him charged; he also offered evidence which tended to show that he was a man of good character; that he had been put to considerable expense in counsel fees and otherwise, in attending these trials, and that he had suffered humiliation and mental anguish on account of being charged by the defendant with the crimes set out in the warrants. He also offered in evidence certified copies of the warrants,

with the judgments of the court thereon, and rested his case. The defendant moved to nonsuit for that, as he contended, the plaintiff had failed to show that the prosecution for these various offenses was either malicious or without probable cause. The court sustained the motion to nonsuit, and dismissed the action.

The only exception and the only assignment of error in the record is directed to the ruling on this motion, and to the order dismissing the action.

Louis M. Swink for plaintiff.
No counsel for defendant.

WALKER, J., after stating the case: There is sufficient evidence in this case for the jury upon the question of malice. The meaning of that word, as used in defining what is malicious prosecution, is not necessarily ill-will, anger, resentment, or a revengeful spirit, but simply a wrongful act knowingly and intentionally done the complaining party, without just cause or excuse. *Stanford v. Grocery Co.*, 143 N. C., 419; *Downing v. Stone*, 152 N. C., 525. It may be no more than the opposite of good faith. Hale on Torts, 354, says that "Any prosecution carried on knowingly, wantonly, or obstinately, or merely for the vexation of the person being prosecuted, is malicious. Every improper or sinister motive constitutes malice, in this sense." And Cooley on Torts, 338, says that "Legal malice is made out by showing that the proceeding was instituted from any improper or wrongful motive, and it is not essential that actual malevolence or a corrupt design be shown." *Holder v. Mfg. Co.*, 135 N. C., 392, and cases cited. If the object be to recover punitory or vindictive damages, particular or actual malice must be shown—something more than a mere injurious act committed without just or lawful excuse. *Stanford v. Grocery Co., supra.* The (551) primary object of an action for damages is to recover compensation for the actual loss or injury sustained. The liability for punitive or exemplary damages, however, being for the purpose of punishment or as an example, rests primarily upon the question of motive; and the jury are not at liberty to go beyond the allowance of a compensation, unless it be shown that the act was done willfully, maliciously, or wantonly, or was the result of a reckless indifference to the rights of others, which is equivalent to an intentional injury; and when there is no proof that the injury was so inflicted, exemplary damages should not be allowed. Joyce on Damages, sec. 119; *Wood v. Bank*, 100 Va., 306; *Gilreath v. Allen*, 32 N. C., 67. The wrongful injury gives the right of action for compensation, and the malicious or wicked motive adds to it

such other damages, sometimes called smart money, as the jury may reasonably award, as an example to others or in vindication of the law. *Holmes v. R. R.,* 94 N. C., 318; *Kelly v. Traction Co.,* 132 N. C., 369. This question is fully discussed in the above named cases, with a citation of the authorities, and further comment on this branch of the law is unnecessary. It is clear that within the principles stated there is evidence here of what may be called legal malice sufficient to sustain the action for compensation in damages, if not of express or actual malice. We, therefore, pass to the other points. There must not only be malice, but a want of probable cause, for both must concur and are essential to every suit for a malicious prosecution. Malice may be inferred by the jury from a want of probable cause; but the converse is not true, that a want of probable cause may be likewise inferred from malice. *Kelly v. Traction Co., supra;* Newell on Malicious Prosecution, p. 265, sec. 3; *Stewart v. Sonneborn,* 98 U. S., 187; *Sutton v. Johnstone,* 1 T. R., 493; *Foshay v. Ferguson,* 2 Denio (N. Y.), 617; *Murray v. Long,* 1 Wendell, 140; *Wood v. Weir,* 5 B. Mon. (Ky.), 514. It should be borne in mind, when passing upon the question of probable cause in such an action as this one that those facts and circumstances alone which were known to the prosecutor in the criminal action at the time he instituted the prosecution are to be considered in determining whether he had a probable cause for the course he pursued in respect thereto. It is not the innocence of the plaintiff in the civil action, defendant in the other, nor facts tending to prove the same, that bear upon this question, for, as *Judge Daniel* says in *Swaim v. Stafford,* 25 N. C., 289, "The question of probable cause rested only on those facts and circumstances which were known to the prosecutor *at the time* he made his affidavit for the warrant." See, also, Newell, p. 265, note and cases; *Foshay v. Ferguson, supra; Delega v. Highley,* 3 Bing. (N. C.), 950. In *Stacey v. Emery,* 97 U. S., 642 (24 L. Ed., at p. 1036), the Court said, quoting from *Justice Washington* in *Munns v. Dupont,* 3 Wash., 37: " 'If malice is proved, yet if probable cause exists, there is no liability. (552) Malice and want of probable cause must both exist' to justify an action. He then defines probable cause in these words: 'A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.' *Chief Justice Shaw* defines it in similar language: 'Such a state of facts as would lead a man of ordinary caution to believe or to entertain an honest and strong suspicion that the person is guilty.' *Ulmer v. Leland,* 1 Me., 135. In *Foshay v. Ferguson,* 2 Den., 617, the rule is laid down by *Chief Justice Bronson* in the same language, with this addition: 'And such cause will

afford a defense to a malicious prosecution, however innocent the plaintiff may be.' In that case there was evidence to justify a finding that the prosecution had been from a bad motive. This rule is so clear that it is not necessary to multiply authorities." And in *Delega v. Highley,* 32 Eng. C. L., 398 (3 Bing. N. C., 950), which was an action brought for a malicious charge before a magistrate, the defendant pleaded that he had caused the charge to be made upon reasonable and probable cause, stating what the cause was. Upon special demurrer, the plea was held insufficient in not alleging that the defendant, at the time of the charge, had been informed of or knew the facts on which the charge was made. "If the defendant," said *Chief Justice Tindal,* "instead of relying on the plea of not guilty, elects to bring the facts before the court in a plea of justification, it is obvious that he must allege, as a ground of defense, that which is so important in proof under the plea of not guilty, viz., that the knowledge of certain facts and circumstances which were sufficient to make him or any reasonable person believe the truth of the charge which he instituted before the magistrate existed in his mind at the time the charge was laid, and was the reason and inducement of his putting the law in motion. Whereas it is quite consistent with the allegations in this plea that the charge was made upon some ground altogether independent of the existence of the facts stated in the plea, and that the defendant now endeavors to support the propriety of the charge, originally without cause, by facts and circumstances which have come to his knowledge for the first time since the charge was made." So, also, the converse of this doctrine is true: If a defendant prove that, at the time of the arrest, he had reasonable cause to believe the plaintiff guilty, this cannot be rebutted by proof that, afterwards, he turned out to be entirely innocent. *Foshay v. Ferguson, supra.* It may be important to inquire if the plaintiff was guilty of the offense charged against him, in the sense that if he was, there could be no malicious prosecution. *Galloway v. Stewart,* 49 Ind., 156 (19 Am. Rep., 677).

But the authorities are generally agreed that if he was innocent
(553) it can make no difference, where defendant acted upon the existence of such facts and circumstances as would constitute probable cause, and did not know of his innocence. Mr. Newell, in discussing this matter, says in his work on Malicious Prosecution at p. 252, secs. 1 and 2: "Reasonable or probable cause is defined to be such a state of facts in the mind of the prosecutor as would lead a person of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty. It does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution. In order to maintain the

action for malicious prosecution, it is very clear that the plaintiff must aver and prove that the suit complained of was commenced and prosecuted without reasonable or probable cause, and that it was malicious. The groundlessness of the suit may, in many instances, be so obvious and palpable that the existence of malice may be inferred from it. The question of probable cause applies to the nature of the suit; and the point of inquiry is, whether the defendant had probable cause to maintain the particular suit upon the existing facts known to him," citing *Wills v. Noyes,* 29 Mass., 324, opinion by *Chief Justice Shaw.* See *Jones v. Phelps,* 11 Ad. and El., 483, 489; *Foshay v. Ferguson, supra; Harpham v. Whitney,* 77 Ill., 32; *Bacon v. Towne,* 4 Cush. (58 Mass.), 217. The existence of probable cause does not, therefore, depend upon the plaintiff's actual guilt, for he may be ever so innocent, and yet if the defendant, in starting the prosecution, acted upon reasonable grounds and probable cause, he would not be liable even if he was inspired by malice and defendant was also innocent of the accusation.

Applying these principles to the facts of this case, we find that there is an issue of fact raised by the pleadings and conflict of testimony. Plaintiff introduced in evidence the several affidavits and warrants in the criminal prosecutions before the recorder of Lexington, in which it is alleged that he made the false representation to the defendant that there was no lien or encumbrance on the horse. This evidence was offered for the purpose of showing that he had been prosecuted by the defendant for the crime mentioned in the papers, and perhaps it should have been confined to that purpose; but not deciding that question, and conceding that it should have been considered as proof upon the question of plaintiff's actual guilt and as tending to show probable cause, the defendant, testifying in his own behalf, denied his guilt and stated that he did not know that the horse had been mortgaged and did not hear of it until after the sale; that he was acting as employee of Mr. Ziglar, who owned the horse, the mortgage having been made by a man from whom Ziglar had bought the horse. This evidence carried the case to the jury, and the nonsuit, under the statute, was improper. The questions raised by this evidence were, whether the plaintiff had (554) made the false representation with the intent to cheat defendant, and, if so, whether the defendant was deceived thereby. In order to constitute a false pretense, indictable under our statute, there must be "a false representation of a subsisting fact calculated to deceive, and which does deceive, and is intended to deceive, whether the representation be in writing, or in words, or in acts, by which one man obtains value from another without compensation." *S. v. Phifer,* 65 N. C., 321. The definition thus given in that case has been frequently ap-

proved by this Court in subsequent cases, to be found in the Annotated Edition of the Reports. If the defendant did not know of the mortgage, how could he have had an intent to deceive by a false representation in regard to it? And if he made no false representation about the mortgage, how could he be guilty of a false pretense, or how could the defendant have been deceived to his prejudice? The mere existence of the mortgage at the time of the sale did not make the latter a false pretense, unless the defendant was misled by something done or said by the plaintiff to his prejudice and which induced him to part with his money. If the false representation was intentionally made to deceive, and defendant was influenced thereby to part with his money, there was probable cause; but the defendant, appellant, is entitled to have the question submitted to the jury, with proper instructions as to the elements comprised in the offense of false pretense. In *Ross v. Langworthy,* 13 Neb., 492, which is somewhat like our case in its facts, the Court said: "Probable cause is defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused was guilty. *Boyd v. Cross,* 35 Md., 197; *Cooper v. Utterback,* 37 Ind., 282. The question of probable cause is one of law and fact composing two distinct inquiries. The one, for the jury to say what facts are proved, and it is for the court to say whether those facts constitute probable cause. *Turner v. O'Brien,* 5 Neb., 547-8; *Johns v. Marsh,* 9 Rep., 143; *Boyd v. Cross,* 35 Md., 194. Probable cause does not depend upon mere belief, however sincerely entertained; because if that were so, any citizen would be liable to arrest and imprisonment without redress, whenever any person, prompted by malice, saw fit to swear that he believed the accused was guilty of the offense charged. The law, therefore, has imposed an additional ground, viz., such knowledge of facts as would induce a reasonable man to believe that the accused was guilty. Nothing short of this will justify the institution of a criminal charge against another. Cooley on Torts, 182. The defendant's own testimony shows very clearly that the object he had in causing the plaintiff's imprisonment was to aid him in collecting his debt, and not to vindicate public justice.

(555) The rule of law is, that a prosecution instituted for any other purpose than that of bringing the party to justice shows a malicious motive. *Johns v. Marsh,* 9 Rep., 143; *Mitchell v. Jenkins,* 5 B. and Ald., 594. The reason is, the prosecution was not instituted to vindicate the law and punish crime, but as a means of coercing the accused to comply with the wishes of the prosecutor."

If the plaintiff did not make the false representation, but was a mere agent of the owner, Mr. Ziglar, in making this sale, and knew nothing

about the mortgage, we do not perceive how there could have been probable cause. If a man buys property which is subject to a lien, of which the seller is ignorant, and there is no deceitful misrepresentation as to the fact, and no fraudulent concealment of it, the buyer takes it at his own risk. He can protect himself by a warranty, and unless he is in some way deceived in regard to it, or otherwise taken advantage of or imposed upon, there is no criminal offense committed. The case should have gone to the jury, and at the next trial the defendant may be able to show by better proof that he had probable cause, for what he did, or the plaintiff may acquit himself altogether of wrongdoing in the premises, and show that the defendant acted unreasonably and without probable cause. The evidence now is not very full, explicit, or satisfactory, but we cannot say that there is no evidence of plaintiff's cause of action.

New trial.

Cited: Holton v. Lee, 173 N. C., 107; *Cobb v. R. R.,* 175 N. C., 132; *Stancil v. Underwood,* 188 N. C., 478; *Harris v. Singletary,* 193 N. C., 588; *Dickerson v. Refining Co.,* 201 N. C., 96.

A. L. HERRING v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 7 April, 1915.)

Railroads — Relief Departments — Benefits — Negligence — Damages — Credits.

Where under the regulations of a railroad company its employee has been forced to enter its relief department, and thereafter is injured through its negligence and has received the benefits of the department, the defendant is only entitled to a credit for the moneys or benefits its employee has thus received when the recovery is in a larger sum; and the acceptance of such benefits does not bar his right of action.

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

APPEAL by defendant from *Allen, J.,* at September Term, 1914, of PENDER.

C. E. McCullen and E. K. Bryan for plaintiff.
Davis & Davis for defendant.

CLARK, C. J. This is an appeal from a verdict and judgment for personal injuries sustained by the plaintiff while working as a brakeman on defendant's train in its yard at Wilmington. While there (556)

are some exceptions to the evidence, and to the charge, they do not require serious consideration. The appeal substantially rests upon the defense that the plaintiff was a member of the defendant's Relief Department, and that, having received benefits thereunder, he is estopped to maintain this action. The jury find that the plaintiff was injured by the negligence of the defendant, that he was not guilty of contributory negligence, and that he received $146 of benefits under the Relief Department which should be deducted from the $5,000 damages as found by the jury, and the court rendered judgment accordingly for $4,854.

The evidence and the charge excepted to come within the ruling of this Court in *King v. R. R.*, 157 N. C., 44, and the cause was tried by the learned judge below strictly in accordance with that decision. It will serve no purpose to review and elaborate that case. The plaintiff was compelled, according to the rules of the defendant company then in force, to enter the Relief Department, and in taking the benefits that were paid him the defendant became entitled to no more than a credit therefor. The gross inadequacy of such benefits, $146, as compared with the extent of his injuries, $5,000, certainly when taken in connection with the evidence in the case and the charge, is conclusive of the plaintiff's right to maintain this action and to sustain this recovery.

In *R. R. v. McGuire,* 219 U. S., 549, and *R. R. v. Schubert,* 224 U. S., 603, it was held that the contracts of these Relief Departments are invalid, beyond being a payment on account. In paragraphs 2 and 3 of the complaint, being taken in connection with the answer of the defendant to those two paragraphs, it is admitted that the defendant was engaged in interstate commerce. It is unnecessary to go into the question as to the particular service in which the plaintiff was engaged at the time, shifting cars, whether any of the cars were destined for points beyond the State, as in *R. R. v. Behrens,* 233 U. S., 473, and other cases cited in *Ingle v. R. R.*, 167 N. C., 636.

The United States Supreme Court, in cases above cited, held that the Relief Department contracts, even where the employees entered therein willingly, were invalid by virtue of the Federal statute. Our statute (Private Laws 1897, ch. 56, now Revisal, 2646) is identical with the Federal statute in this particular, and besides, in this case, all the employees of the defendant were compelled to enter the Relief Department. It is not necessary to consider whether the decision of this Court in *Barden v. R. R.*, 152 N. C., 318, in which we held that such contracts were invalid, shall now be reinstated; *Burnett v. R. R.*, 163 N. C., 186; for, taking *King v. R. R., supra,* as still in force in every respect, this case has been tried in accordance therewith, and the verdict and judgment are fully sustained by it. Besides, the defendant company,

in consequence of the decision of the United States Supreme (557) Court in *McGuire's and Shubert's cases, supra,* above cited, and our statute, Laws 1913, ch. 6, have now ceased to plead the operation of their Relief Department as a defense to actions by employees for damages sustained from the negligence of the company or of fellow-servants of the injured employee.

No error.

BROWN, J., dissenting: I am constrained to dissent from the conclusion reached by the Court in this case for the reasons given in my dissenting opinion in *Barden v. R. R.,* 152 N. C., 318, and also in my opinion in *King v. R. R.,* 157 N. C., 44.

I see no evidence whatever in this case of fraud and undue influence which brings the case within the principle laid down by the majority of the Court in the *King case, supra.* There is no evidence that the plaintiff was injured while engaged in interstate commerce; certainly there is no finding of fact to that effect. Therefore, the provisions of the Federal act invalidating Relief Department contracts have no application. Neither has a similar act enacted by the Legislature of this State, for the reason that the injury occurred before the ratification of the act.

This whole question has been fully discussed in the cases I have cited, and as they cannot well arise in the future, it is useless to discuss this matter any further.

MR. JUSTICE WALKER concurs in dissenting opinion.

FOURTH NATIONAL BANK OF FAYETTEVILLE v. JOHN E. WILSON.

(Filed 7 April, 1915.)

1. Bills and Notes—Notice of Dishonor—Verdict—Indorser—Surety—Interpretation of Statutes.

Semble, that one writing his name on the back of a negotiable instrument may not show by parol evidence that he signed otherwise than as an indorser, "unless he clearly indicates by appropriate words his intention to be bound in some other capacity" (Revisal, secs. 2112, 2113); but it having been found by the jury under the pleadings, evidence, and correct instructions from the court, that such person was given due notice of dishonor, on which grounds he alone seeks to avoid liability, the question is not necessary to decide.

2. Bills and Notes—Notice of Dishonor—Trials—Verdict—Interpretation—Instructions.

A verdict of the jury may, in proper instances, be given significance by reference to the pleadings, evidence, and the charge of the court, and

therefrom it appears that the jury necessarily found, in this case, that the requisite notice of dishonor for nonpayment or nonacceptance of the negotiable instrument sued on had been given, the charge being in accordance with the language of the statute, Revisal, 2254.

3. Bills and Notes—Notice of Dishonor—Banks and Banking—Customs—Evidence.

Where want of notice of dishonor, etc., is relied upon as a defense in an action upon a negotiable instrument, it is competent, as corroborative evidence for the bank to show that proper notices were mailed to the defendant's address, and its custom as to the character and time of sending such notices.

4. Trials—Immaterial Issues—Instructions—Appeal and Error.

Where the answer by the jury to one of the issues submitted to them makes their answer to another immaterial, a charge of the judge upon the immaterial issue, if erroneous and applicable to that alone, will not be held for reversible error.

5. Trials—Instructions—Contentions—Objections and Exceptions—Appeal and Error.

An exception to the charge of the court is not held for reversible error in this case, the portion objected to being susceptible of the interpretation that it was a statement of the contentions of the appellee.

(558) APPEAL by defendant from *Cooke, J.*, at October Term, 1914, of CUMBERLAND.

Civil action to recover balance due on note of Cherokee Lumber Company, payable to plaintiff bank, on the back of which appeared name of defendant.

It was, among other things, admitted that plaintiff, for full value and before maturity, discounted the note signed by Cherokee Lumber Company, the same maturing 3 October, 1911, and that, at the time this was done, the name of defendant appeared on the back of the note, and no part of same was paid at maturity, and that the note with accrued interest is still due, subject to a credit of $300 of date 4 December; that the bank was located in Fayetteville, N. C., and defendant resided at Dunn, N. C., and the two towns were connected by railway and daily mail.

Defendant, in his answer, claims that he was indorser of the note and, as such, entitled to notice of dishonor, and that same was not given.

Plaintiff replied, setting up the facts of the transaction as claimed by him, and alleging that defendant was, in reality, surety on the note and, as such, not entitled to notice, and further, that, even as indorser, due notice had been given.

On issues submitted, the jury rendered the following verdict:

1. Is the plaintiff, the Fourth National Bank of Fayetteville, N. C., the holder in due course of the note marked Exhibit "A"? Answer: "Yes."

2. Did the defendant's name appear upon said note when the (559) same was acquired by the plaintiff? Answer: "Yes."

3. Did the defendant, John E. Wilson, execute the said note? Answer: "Yes."

4. If so, did he execute the same as surety? Answer: "Yes."

5. Was due notice given to the defendant of the nonpayment of the said note? Answer: "Yes."

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

Broadfoot & Broadfoot and Rose & Rose for plaintiff.
Clifford & Townsend for defendant.

HOKE, J., after stating the case: We have given this case our most careful consideration and are of opinion that no reversible error has been shown. In *Barden v. Hornthal,* 151 N. C., 8, speaking to the law as it existed prior to the time when the negotiable instrument act became effective, 8 March, 1899 (see Revisal 1905, sec. 2345), the Court said: "Viewed in that aspect, our decisions are to the effect that when a third person writes his name on the back of a negotiable instrument before delivery to the payee, and with a view to give additional credit to the maker, it is open to the original parties, and as between themselves, to show the intent and exact nature of the obligation assumed, whether as joint promisor and guarantor or as first and second indorser, etc.; and in the absence of such qualifying testimony the law will presume that such person signed his name as comaker, and in any event as surety, that being the relationship of the defendant alleged in the complaint." Citing *Lilly v. Baker,* 88 N. C., 151; *Tredwell v. Blount,* 86 N. C., 33; *Hoffman v. Moore,* 82 N. C., 313; *Baker v. Robinson,* 63 N. C., 191; *Good v. Martin,* 95 U. S., 90.

The statute in question evidently was intended to make some change in the former law in the respect suggested, *Perry v. Taylor,* 148 N. C., 362, and, in sections 2212 and 2213, it is provided as follows:

"SEC. 2212. A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

"SEC. 2213. Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules: (1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties; (2) if the instrument is payable to the order of

the maker or drawer or is payable to bearer, he is liable to all parties subsequent to the maker or drawer; (3) if he signs for the accom-
(560) modation of the payee, he is liable to all parties subsequent to the payee."

On the facts as presented it would seem to be the purpose of the statute to fix the status of this defendant as indorser and to exclude parol evidence to the contrary in this and all cases coming under the statutory provision, "unless he clearly indicates by appropriate words his intention to be bound in some other capacity." There is conflict of authority, however, as to the effect and extent of this statutory change (see Daniel on Negotiable Instruments [6 Ed.], pp. 806-7, annotations by T. H. Calvert, more particularly notes 32 and 33), and we are not called on to determine the question, in this case, for the reason that the jury, under a correct charge, has found that due and proper notice has been given, and defendant is liable, therefore, whether indorser or surety. The jury having found that defendant was surety, the verdict on this, the next issue, does not in itself fix the time and character of the notice given, but it is well understood that a verdict may, in proper instances, be given significance by reference to the pleadings, evidence, and the charge of the Court (*S. v. Murphy,* 157 N. C., 615; *Richardson v. Edwards,* 156 N. C., 590), and, on examination of the record, it appears that the charge of his Honor on this issue is in exact accord with the statutory requirement as to notice of dishonor for nonacceptance or nonpayment of negotiable instruments. Revisal, sec. 2254.

There is pertinent evidence tending to show that the proper notices were mailed to defendant's address, and the custom of the bank as to the character and time of sending their notices was clearly competent on this issue as to notice. *Vaughan v. R. R.,* 63 N. C., 11; *Asher v. DeRosset,* 53 N. C., 241; *Union Bank v. Stowe,* 50 Me., 595; *Matthews v. O'Neil,* 94 Mo., 520; Wigmore on Evidence, sec. 93; 1 Greenleaf (16 Ed.), 14 J.

The exceptions to the charge of the court on the fourth and fifth issues, the fourth as to suretyship and fifth as to notice, to the effect that the same, in certain aspects, amounted to an expression of opinion by the trial judge adverse to defendant, may not be sustained.

As we have seen, the verdict on the fourth issue has become immaterial, since the jury, in response to the fifth issue, has established notice sufficient to fix and hold defendant as indorser; and there is nothing to show that the error on the fourth issue, even if it existed, had any effect or bearing on the fifth.

As to his Honor's charge on the latter issue, the portion objected to is clearly susceptible of the interpretation that his Honor was stating the

contention of the plaintiff, and should not, in our opinion, be held for reversible error.

On the record, as stated, we find no sufficient reason for disturbing the results of the trial, and the judgment in favor of plaintiff must be affirmed.

No error.

Cited: Bank v. Johnston, 169 N. C., 528; *Reynolds v. Express Co.,* 172 N. C., 491; *Ball v. McCormick,* 172 N. C., 682; *Howell v. Pate,* 181 N. C., 119; *Kannan v. Anad,* 182 N. C., 78; *S. v. Snipes,* 185 N. C., 747; *Gillam v. Walker,* 189 N. C., 192; *Dillard v. Mercantile Co.,* 190 N. C., 227; *Nance v. Hulin,* 192 N. C., 665; *Wrenn v. Cotton Mills,* 198 N. C., 91; *Trust Co. v. York,* 199 N. C., 627; *Carr v. Clark,* 205 N. C., 266; *S. v. Whitley,* 208 N. C., 664.

(561)

STINSON POWELL ET AL. v. JUNIUS M. POWELL ET AL.

(Filed 7 April, 1915.)

Deeds and Conveyances—Date of Execution—"Children"—Estates—Limitations.

A grant of land directly to the children of a living person conveys the title only to those who are alive at the time of the execution of the deed, including a child then *en ventre sa mere,* it being necessary to the validity of a deed that there should be a grantee, as well as a grantor and thing granted; but where there is a reservation of a life estate in the parent or another, with limitation over to the children, the reason for this rule ceases, and all the children who are alive at the termination of the first estate, whether born before or after the execution of the deed, take thereunder.

APPEAL by plaintiff from *Cooke, J.,* at November Term, 1914, of ROBESON.

This is a proceeding for the partition of land, and the only question presented for decision depends upon the construction of a deed executed on 27 September, 1889, by William W. Powell to his son, William C. Powell, and to the children of William C. Powell, which reads as follows:

This deed, made this the 27th day of September, 1889, by William W. Powell, party of the first part, to William C. Powell and his children, parties of the second part, all of said county and State, witnesseth:

That the said William W. Powell, in consideration of the natural love and affection he has for the said William C. Powell and for his children, and for the sum of $1 to him paid, the receipt of which is hereby acknowledged, has sold and conveyed and by these presents does bargain, sell, and convey unto the said William C. Powell during the term of his natural life, and after his death to the children of the said William C. Powell, their heirs and assigns forever, the following tracts of land in said State and county:

[Description of land omitted.]

To have and to hold said land unto the said William C. Powell during the term of his natural life and after his death to his children and to their heirs and assigns forever; and in the event any child of William C. Powell shall die during the lifetime of the said William C. Powell, leaving a child or children who shall be living at William C. Powell's death, then the surviving child or children of said deceased child of William C. Powell shall have and hold to themselves, their heirs and assigns forever, the share or portion that their ancestors would have taken under this deed if she or he had survived William C. Powell.

(562) In testimony whereof the said William W. Powell has hereto set his hand and seal the day and year first above written.

WILLIAM W. POWELL. [SEAL]

There were six children born to William C. Powell prior to the execution of said deed and four born thereafter.

The plaintiffs contend that all the children of William C. Powell who were alive at the time of his death took the remainder in fee simple in and to said land in equal shares, and the infant defendants, Athesia Powell and Quessie Powell, and their guardian *ad litem,* make the same contention as the plaintiffs.

The defendant Junius M. Powell and wife contend that only those children of William C. Powell who were alive and in being at the time of the execution of the deed from William W. Powell to William C. Powell, to wit, on 27 September, 1889, took the remainder in fee simple in and to said lands, subject to the life estate of their father, William C. Powell.

His Honor rendered judgment holding that only those who were alive and in existence at the date of the execution of the deed of William W. Powell took any interest under said deed, and the plaintiffs and the infant defendants excepted and appealed.

E. J. Britt for plaintiffs.

No counsel for defendants.

ALLEN, J. The doctrine is well established at common law that in a conveyance to children only those children take who are living at the time of the execution of the deed, because a grantor, a grantee, and a thing granted are necessary requisites of a valid deed, and this principle has not been modified with us except in favor of a child *en ventre sa mere* (*Heath v. Heath,* 114 N. C., 547); but the rule is otherwise when the conveyance is not direct to the children and there is an intermediate life estate.

Chief Justice Pearson says, in *Dupree v. Dupree,* 45 N. C., 164: "A bequest or use limited to the children of A. passes only to such children as A. has at the time (and we will suppose a child *en ventre* would be included); but a bequest or use limited to the children of A. after an estate to her for life remains open, so as to take in all the children she may have at her death. And this class of cases is put on the ground that by reason of the life estate it does not become necessary to fix the legal ownership until the death of the taker of the first estate"; and this seems to be the generally accepted doctrine.

In 24 A. and E. Enc., 394, the author says: "Where a remainder is given to a class, as, for instance, the children of a designated person, it will be held a vested remainder unless the terms of the (563) instrument creating it clearly show that the ascertainment of the individuals composing the class is to be postponed until the determination of the precedent estate. But such a remainder, though vested, will open to let in members of the class who may be born during the continuance of the precedent estate."

Also in Tiffany on Real Property, sec. 122: "Where there is a remainder to a class of persons, as to children, grandchildren, issue, or brothers and sisters, all the members of the class living at the time of the testator's death, or, in case of conveyance *inter vivos,* at the time of the delivery of the instrument, take *prima facie* vested remainders, the benefit of the provision being, however, extended to others of the same class who afterwards come into being before the determination of the particular estate, the shares of those previously born being in that case proportionately diminished"; and in 2 Reeves Real Property, sec. 879: "Where a remainder in fee is given to a fluctuating class of persons, and there are no words of survivorship or other qualifications, it vests in the existing members of the class, and opens to let in other members, as they come into being or are ascertained."

In 13 Cyc., page 663, the same principle is declared: "Where property is conveyed to a certain person and his children it has been determined that no title will pass to after-born children. But where a deed creates an estate for life with remainder over to the children, the re-

mainder will vest in children already born, subject to be opened at the birth of each succeeding child." See, also, *Adams v. Ross,* 30 N. J. L., 505; *Coursey v. Davis,* 46 Pa. St., 25, to the same effect.

We are therefore of opinion, as an intermediate life estate is conveyed in the deed under consideration, that children born after the execution of the deed take with those born prior thereto.

Reversed.

Cited: Roe v. Journigan, 175 N. C., 263; *Sharpe v. Brown,* 177 N. C., 298; *Hutton v. Horton,* 178 N. C., 550; *Cole v. Thornton,* 180 N. C., 91; *Johnson v. Lee,* 187 N. C., 757; *Waller v. Brown,* 197 N. C., 510.

J. W. RING v. J. S. MAYBERRY.

(Filed 7 April, 1915.)

1. Injunction—Deeds and Conveyances—Covenants.

A conveyance of a part of the grantor's lands, adjoining his building, with covenant on the part of the grantee, for himself, his heirs and assigns, that he will erect and perpetually maintain a stairway between the plaintiff's building and one to be erected by himself next to it, is a binding covenant running with the lands, and is enforcible.

2. Deeds and Conveyances—Covenants of Grantee—Acceptance—Easements.

The acceptance of a deed to lands containing a covenant running with the land on the part of the grantee is equivalent in this case to the grant of an easement.

3. Deeds and Conveyances—Covenants of Grantee—Equity—Mutual Mistake—Parol Evidence.

A deed may be corrected by parol evidence so as to show the omission, by mutual mistake, of a covenant on the part of the grantee, running with the lands conveyed.

4. Injunction—Restraining Order—Deeds and Conveyances—Covenants of Grantee—Erection of Stairways—Mandatory Injunction.

In a suit to restrain the breach of a covenant to maintain a stairway for the use of the plaintiff, an adjoining owner, there was allegation and proof that this stairway had been maintained for a period of years in a building which had been destroyed, and that the defendant was erecting a new building in its place in such manner as to leave it out. *Held:* An order restraining the construction of the building as stated, without leaving open a space for the stairway, was proper, as it was conducive to the less inconvenience; and the objection of the defendant that a mandatory injunction was the proper remedy to be sought was rendered nugatory.

RING *v.* MAYBERRY.

APPEAL by defendant from *Lyon, J.*, at Chambers in Winston, (564) 18 September, 1914. From SURRY.

L. F. Hendren and W. F. Carter for plaintiff.
A. E. Holton and J. H. Folger for defendant.

CLARK, C. J. The plaintiff obtained a temporary restraining order to prevent the defendant from completing a brick store in Elkin, N. C., on the allegation that the defendant is under obligation to build a stairway between the defendant's building and one adjacent thereto owned by the plaintiff, and that he was proceeding to erect the building without any provision for such stairway. At the return of restraining order the court modified the order so as to authorize the defendant to proceed with the construction of said building, "provided he shall, in the construction of the same, leave a space between the buildings of plaintiff and defendant, as described in the petition, sufficiently wide for the construction of the stairway, claimed by plaintiff, leading from the sidewalk to the second story of the plaintiff's said building, if on final hearing it shall be decreed that said stairway shall be built"; and the restraining order, as thus modified, was continued to the hearing.

According to the affidavits for the plaintiff, he sold to one R. L. Poindexter the lot on which this building is now being erected, with an agreement that said Poindexter should build a stairway from the sidewalk up to the second story of the building which has been erected by (565) plaintiff on the lot and along the wall of plaintiff's building, at his (Poindexter's) cost; that plaintiff and his heirs and assigns should have the perpetual use of the said stairway for the benefit of plaintiff's building; that subsequent to this transaction R. L. Poindexter orally contracted to sell and convey said lot to the defendant, who entered into the same agreement as to the building of the stairway as had been made between R. L. Poindexter and the plaintiff; that the defendant, in completing the building, put up a stairway as agreed upon; but the building and stairway being destroyed by fire in 1913, the defendant is now proceeding to put up the building without erecting said stairway.

When the building was put up by the defendant the stairway was constructed, and at the request of R. L. Poindexter the plaintiff executed a deed to the lot to the defendant. The plaintiff avers that this deed contained a covenant that the building should contain said stairway for the use of the adjoining lot, and the plaintiff has no way of reaching the second story of his building except by the stairway agreed to be built and maintained. The plaintiff further avers that the defendant, who

received from him said deed, has failed to record the same, and that if this deed does not contain the said covenant it was omitted by mutual mistake, and he asks, in that event, for the correction of the deed. The stairway was maintained by defendant and was used by the plaintiff for fourteen years prior to the fire, without any objection on the part of the defendant and without demanding any compensation for its use.

The defendant contends that the remedy of the plaintiff is a mandatory injunction to compel the building of a stairway, and not a preventive injunction against the construction of the building. This objection has been obviated by the modification which was made in the order permitting the erection of the building, leaving open a space for said stairway until the determination of the facts at the hearing.

The defendant further contends that the plaintiff has shown no right to such order, and that the temporary injunction should have been dissolved. *But this was a covenant running with the land.* Aside from the express averment of the creation of the easement, the acceptance of the deed containing a covenant on the part of the grantee is equivalent to the grant of an easement by the defendant. Such covenants run with the land and are not at all unusual. They are good even against assignees in fee, where the intention to create them is clear. 11 Cyc., 1045 B, 1058-9, 1091e, 1092; *Norfleet v. Cromwell,* 64 N. C., 1.

If there were such covenant to maintain the stairway, and the same was omitted from the deed through the mutual mistake of the parties, it can be corrected by parol evidence. Adams Eq., 348, 349, note; 2 Pomeroy Eq. Jur., secs. 853, 857, 859, 866, 870. The evidence shows that this stairway was maintained by the defendant for use of the plaintiff for fourteen years up to the fire.

(566) In a proceeding of this nature much will depend upon whether the greater inconvenience will be suffered by denying or granting the restraining order to the hearing when the facts can be determined. High on Inj. (4 Ed.), sec. 13. We think that in view of the modification of the order made by the judge in continuing the injunction to the hearing, there was less inconvenience and detriment in requiring the space to be left open for the stairway until such determination of the facts, and the judgment is

Affirmed.

SARAH C. WITTE, ADMINISTRATRIX OF GEORGE C. WITTE, v. ATLANTIC COAST LINE RAILWAY COMPANY.

(Filed 7 April, 1915.)

Railroads—Negligence—Construction of Railroad Yards—Rules of Safety—Trials—Instructions—Appeal and Error.

In an action brought against a railroad company for the negligent killing of plaintiff's intestate, alleged to have been caused by a horse becoming frightened at the noise and steam issuing from defendant's steam engine and running upon the intestate, there was further allegation that the defendant's railroad yard was not constructed or laid out properly for the safety of those having business there, and that proper rules for that purpose had not been made for or observed by the defendant's employees there, but without sufficient evidence tending to prove these further allegations. *Held:* A charge of the court interwoven with instructions bearing upon the negligent construction of the railroad yards and the question of proper rules, is misleading and constitutes reversible error.

APPEAL by defendant from *Allen, J.*, at September Term, 1914, of NEW HANOVER.

Civil action tried upon these issues:

1. Was the plaintiff's intestate killed by the negligence of the defendant Atlantic Coast Line Railroad Company, as alleged in the complaint? Answer: "Yes."

2. Was the plaintiff's intestate guilty of contributory negligence, as alleged in (by) the defendant Atlantic Coast Line Railroad Company? Answer: "No."

3. What damage, if any, is the plaintiff entitled to recover? Answer: "Five thousand dollars ($5,000)."

From the judgment rendered, the defendant appealed.

E. K. Bryan for plaintiff.
Davis & Davis for defendant.

BROWN, J. It appears in evidence that the plaintiff's intestate (567) went to the defendant railroad's freight warehouse on business; that as he was leaving, walking along a plankway, one of the horses attached to a wagon belonging to the Schloss Company became frightened at the noise and steam issuing from the defendant railroad company's switching engine, moving up and down near the freight warehouse in the freight yards. The horses ran away, and in the endeavor to control them the bit of one of the horses broke, the driver lost control of the horses, and they turned around and ran in the opposite direction, overtook the intestate, who was very deaf, ran into him, and killed him.

By consent, the case has been tried separately as to the defendant railroad company, with the result set out in the issues. The case has not been tried as to the other defendant. There are a great many exceptions in the record, which, in the view taken by the Court, it is not necessary to consider.

One of the allegations of negligence upon which the plaintiff bases his right to recover is that the defendant railroad company, some years ago, negligently and carelessly constructed its freight warehouses and negligently laid out and arranged its tracks in its shifting yards so that it was hazardous for employees and patrons of the said railroad company, and other persons who were rightfully upon its premises, from runaway teams which may become frightened and unmanageable.

The plaintiff further alleges that the defendant railroad has negligently failed to make any sufficient rules to guard against such occurrences; or, if it has made any such rules, its servants and employees violate the same.

His Honor charged the jury as follows: "Now, was the railroad company negligent in having various switching tracks around its warehouses and having them all together, and in not having certain rules, if you find that they did not have such rules, by which the switching could be regulated with reference to the getting freight out of the depot, and was its engineer negligent in running by this team at the time when he did run by, and in blowing off steam and making the noise? Under all the circumstances, was that negligence? And if so, did that negligence cause the horses to run away, and did they run over and kill the deceased?"

We think that there is no evidence in this record tending to prove that the warehouse and freight-yard tracks were constructed and laid out in a negligent manner. There is no evidence that they were laid out differently from the manner in which other freight yards are laid out.

There is no evidence that it is customary among railroads to have rules and regulations governing the use and operation of moving trains in their freight yards, or regulating the ingress and egress of patrons visiting the freight warehouses.

(568) The evidence shows that these yards and warehouses were constructed and laid out a great many years ago—in fact, at the time when the railroad was first built. We think it was error in his Honor to have interwoven this ground of negligence along with the alleged negligence of the engineer in operating the train. From such charge the jury may have inferred that they had a right to find against the defendant railroad company because of the alleged improper construction and laying out of their freight yards.

The stational facilities of railroads must be reasonably sufficient and must necessarily be constructed according to the particular location. Terminal yards are necessary to a railroad in order to facilitate its business of transportation. It would seem to be impossible to so construct them as to guard absolutely against dangers from runaway teams; but whether that be true or not, there is no evidence in this case that the defendant company has been guilty of any negligence in arranging its freight stational facilities.

Whether depots, station buildings, yards, and other stational facilities are sufficient must, it is evident, depend in a great measure upon the demands of traffic at the place where they are located, the custom and usage of the railroad company's business, and matters of similar nature, for it is evident that facilities sufficient in one locality and under the same circumstances would not be sufficient in other localities and under different circumstances and conditions.

New trial.

Cited: White v. R. R., 171 N. C., 311.

MINNIE C. STANLAND, D. G. HEWETT, AND H. G. HEWETT v. PETER ROURK AND MARY E. ROURK ET AL.

(Filed 7 April, 1915.)

Burning of Woods — Statutory Notice—Tenants in Common—Waiver—Verdict—Appeal and Error.

Where, contrary to the provisions of Revisal, sec. 3346, the owner sets fire to the woods on his own lands and injures the adjoining lands of tenants in common, without having given them prior written notice of two days required by the statute, and relies upon the waiver of one of the tenants, in possession and control, as binding upon them all. *Semble:* The waiver of notice by this tenant would be binding upon them all; but this question does not arise for decision in this case, the jury having found upon conflicting evidence that there had been no waiver of the notice by him.

APPEAL by defendants from *O. H. Allen, J.*, at August Term, 1914, of BRUNSWICK.

Civil action to recover damages for wrongfully setting fire to (569) woodland.

There was evidence on part of plaintiffs tending to show that defendants, on or about 17 March, 1911, set fire to their woods, adjoining a

large body of land owned by plaintiffs as tenants in common, without giving the written notice required by the statute; that the fire was communicated to the lands of plaintiff, doing considerable damage.

Defendant resisted recovery, insisting, chiefly, that H. G. Hewett, one of plaintiffs, had waived the giving of notice, and that such waiver on his part would prevent recovery for the damages caused, both as to him and his cotenants.

The jury rendered the following verdict:

1. Did the defendants give the plaintiffs two days notice in writing of their intention to burn their own land? Answer: "No."

2. Did the defendants set fire to and burn the lands of the plaintiffs? Answer: "Yes."

3. What damages are plaintiffs entitled to recover by reason of the said burning? Answer: "$350."

4. Did H. G. Hewett waive his rights to damage? Answer: "No."

Judgment. Defendants excepted and appealed.

Cranmer & Davis for plaintiffs.
Robert Ruark for defendants.

HOKE, J., after stating the case: Our statute on this subject, section 3346, provides: "If any person shall set fire to any woods, except it be his own property, or, in that case, without first giving notice in writing to all persons owning lands adjoining to the woodlands intended to be fired at least two days before the time of firing such woods, and also taking effectual care to extinguish such fire before it shall reach any vacant or patented lands near to or adjoining the lands so fired, he shall, for every such offense, forfeit and pay to any person who shall sue for the same $50, and be liable to any one injured in an action, and shall moreover be guilty of a misdemeanor."

The evidence of plaintiff tends to show that Dan Hewett, one of plaintiffs and tenant in common with the others, had especial charge and control of plaintiffs' property, adjoining the lands of defendants, on which the fire was set out, and that on the morning of 17 March, 1911, one Gaston Bennett, acting for defendants, came to Dan Hewett's store and told him the Rourks were going to burn their woods that afternoon, and he told Bennett it was then too late to fire woods and that it was too dry, and forbade their doing it. About 4 o'clock he discovered woods were burned, fire having been set out by defendants and great damage done to them.

(570) There is no substantial denial of these facts, and the testimony thus showing that defendants set fire to woodland adjoining plain-

tiffs' property, doing considerable damage thereto, and without giving the written notice required by the statute, plaintiffs have a clear right of action against defendants unless such right has been in some way waived. On this question there was evidence on the part of defendant tending to show a waiver by H. G. Hewett, one of plaintiffs, and evidence *contra* on part of plaintiffs, and his Honor, being of opinion that a waiver by H. G. Hewett, if established, would only affect his own interest, submitted the issue in the form presented, and the jury have decided the question in plaintiffs' favor. This being true, we are not called on to determine when and to what extent a waiver by one tenant in common would bar the right of action by his cotenants. On the facts and circumstances of this case the Court is inclined to concur in his Honor's view (38 Cyc., p. 101); but the jury, as stated, having found against the fact of waiver, the question of law is not presented.

On careful perusal of the record, we find no reversible error, and the judgment in plaintiffs' favor must be affirmed.

No error.

JOHN D. McRAINEY v. VIRGINIA AND CAROLINA SOUTHERN RAILWAY COMPANY.

(Filed 7 April, 1915.)

1. Trials—Nonsuit—Evidence—Questions for Court—Questions for Jury.

The court is confined to the single inquiry, upon a motion to nonsuit upon the evidence, whether there is any legal evidence upon which the jury may render their verdict in the plaintiff's favor; and if there is, it is for the jury to pass upon its weight and sufficiency under the rule that the evidence must be interpreted most favorably to the plaintiff.

2. Negligence—Circumstantial Evidence—Sufficiency.

Where negligence is alleged as the basis of an action it may be proven by circumstantial evidence, and while it must do more than raise a possibility or conjecture, the plaintiff is entitled to have it submitted to the jury if, after a fair consideration, the more reasonable probability is in favor of the plaintiff's contention.

3. Same—Railroads—Fires.

In an action to recover damages for loss by fire alleged to have originated from a spark from the locomotive of defendant railroad company igniting combustible matter upon its rights of way and then passing to the plaintiff's lands, evidence of the defendant's negligence is sufficient to be submitted to the jury which tends to show that defendant's train passed the place about three hours before the fire was first seen, the fire had burned slowly two or three hundred yards in a swamp, and finally passing through to the plaintiff's lands, going in the direction of the wind

and widening out from the defendant's roadway and indicating it had originated thereon; and that the only other evidence of a fire in that locality was a small one in the woods five or six days before.

(571) APPEAL by plaintiff from *Cooke, J.*, at October Term, 1914, of ROBESON.

Action to recover damages for loss by fire, the plaintiff alleging that the fire escaped from the engine of the defendant and ignited combustible matter on its right of way and then passed to his lands, causing him damage. This was denied by the defendant.

At the conclusion of the evidence his Honor entered a judgment of nonsuit, and the plaintiff excepted and appealed.

Sinclear & Dye for plaintiff.
McLean, Varser & McLean for defendant.

ALLEN, J. In actions against railroad companies to recover damages caused by fire the plaintiff makes out a *prima facie* case which entitles him to have the issue of negligence submitted to the jury upon offering evidence tending to prove that the fire which caused him damage originated from the engine of the defendant (*Hardy v. Lumber Co.*, 160 N. C., 113), and therefore the only question presented by this appeal is whether there is any evidence that the fire of which the plaintiff complains originated from the defendant's engine and passed to his land, causing him damage.

We have no power to pass upon the weight of the evidence nor to determine whether it is sufficient to satisfy the jury, our duty being confined to the single inquiry as to whether there is any evidence which a jury ought to consider, giving the evidence the interpretation most favorable to the plaintiff, as we are required to do upon judgments of nonsuit.

Negligence may be proven by circumstantial evidence, and while it must do more than raise a possibility or conjecture, the plaintiff is entitled to have it submitted to the jury if, after a fair consideration of it, the more reasonable probability is in favor of the plaintiff's contention. *Henderson v. R. R.*, 159 N. C., 581.

In *Fitzgerald v. R. R.*, 141 N. C., 530, which was approved in the last case cited, the Court stated the rule as to the proof required as follows: "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,
(572) 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 not. To hold otherwise would be to deny the value of circumstantial evidence. As already stated, the plaintiff is not required to prove his case beyond a reasonable doubt, though the facts shown must be more consistent with the negligence of the defendant than the absence of it. It has never been suggested that evidence of negligence should be direct and positive. In the nature of the case, the plaintiff must labor under difficulties in proving the fact of negligence, and as that fact is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly on the fact of negligence—a kind of evidence which might not be satisfactory in other classes of cases open to clear proof. This is on the general principle of the law of evidence which holds that to be sufficient and satisfactory evidence which satisfies an unprejudiced mind.' "

Applying this rule, we are of opinion there was some evidence as to the origin of the fire, which ought to have been submitted to the jury.

The fire occurred on 6 May, 1911, and there is evidence that the train passed the place where it was first seen at 10:45 a. m.; that the fire was not seen until 2 o'clock; that there was combustible matter on the right of way of the defendant; that the fire was where the railroad crosses the swamp; that when the witness who first went to the fire reached it the fire had burned up the swamp two or three hundred yards; that it burned slowly in the swamp and finally passed through it and onto the land of the plaintiff; that the wind was blowing from the railroad towards the plaintiff's land; that the fire had burned on the right of way of the defendant and then continuously to the plaintiff's land; that the fire widened as it passed from the right of way, and one witness stated, without objection, "that the fire looked like it started on the right of way," and another witness "that it widened after it left the railroad track something like 20 yards wide, burning on the right of way; that is, when it left the right of way the wind carried it directly away from the railroad." There was no evidence of any other fire near the place of the burning on that day, and the only reference to any other fire except that in the engine of the defendant was as to a small fire in a part of the woods five or six days before.

(573) From these circumstances the inference may be drawn that the engine of the defendant set out the fire, and although the fact that the fire was not discovered for more than three hours after the engine passed weakens the force of the evidence, it is not of sufficient import to justify withdrawing it from the jury.

In *Caton v. Toler,* 160 N. C., 105, the fire smoldered in some stumps for twenty-four hours before being communicated to the plaintiff's land, and the case was submitted to the jury upon the question of the defendant's liability, which was answered, however, in favor of the defendant, and in *Deppe v. R. R.,* 152 N. C., 79, the time between the passing of the defendant's train and the discovery of the fire was variously estimated to have been from three-quarters of an hour to one hour and three-quarters.

We refrain from discussing the evidence further, as the case is to be tried before a jury, and an argument in support of the position that there is some evidence might be understood as an expression of opinion as to its weight.

New trial.

Cited: Moore v. R. R., 173 N. C., 313; *Boney v. R. R.,* 175 N. C., 355; *Osborne v. R. R.,* 175 N. C., 596; *Perry v. Mfg. Co.,* 176 N. C., 71; *Bradley v. Mfg. Co.,* 177 N. C., 155; *Royal v. Dodd,* 177 N. C., 212; *Williams v. Mfg. Co.,* 177 N. C., 516; *Stone v. Texas Co.,* 180 N. C., 559; *Peterson v. Power Co.,* 183 N. C., 246; *Nowell v. Basnight,* 185 N. C., 148.

WILLIAM CARR GUTHRIE v. CITY OF DURHAM.

(Filed 7 April, 1915.)

1. Parties—Courts—Discretion.

The refusal of the trial court to make parties not necessary to the controversy rests within the discretion of the trial judge, which is not reviewable.

2. Same—Tort-Feasors—Separate Degree of Liability.

Where two tort-feasors are sued for damages arising from an act for which one of them is primarily liable, and subject to an action for the commission of the same tort by the other one, who is secondarily liable, it being the policy of the law to determine controversies of this character in one action rather than in two, it is reversible error, when the plaintiff has brought his action against the one secondarily liable, to refuse, at the instance of the defendant or of both tort-feasors, to permit the one primarily liable to become a party defendant and set up and show his defense for the benefit of them both.

3. Same—Contribution.

While ordinarily there is no contribution between tort-feasors, and a recovery against one joint feasor sued alone will not permit a recovery by him against the other, this principle will not apply when their liability for the act committed is not in the same degree, one of them being a primary liability and the other a secondary one; for when the action is solely against the one secondarily liable, he has not the same incentive for resisting a recovery.

4. Parties—Court's Discretion—Tort-Feasors—Municipal Corporations—Excavation—Degrees of Liability.

Where a municipality permits a property owner to excavate along the sidewalk of its streets, who, while the excavation is being dug, surrounds it with a fence, which gives way while a pedestrian is leaning thereon, who, being injured, brings his action against the city alone for alleged negligence in permitting a dangerous condition to exist, the negligent act of the property owner would be antecedent, in point of time, to that of the city, in failing to exercise a proper degree of supervisory care; and the liability of the city is secondary to that of the property owner who caused the excavation to be made.

HOKE, J., dissenting; ALLEN, J., concurring in dissenting opinion.

APPEAL by defendant from *Daniels, J.*, at November Term, (574) 1914, of DURHAM.

Fuller & Reade for plaintiff.
Charles Scarlett and Victor S. Bryant for defendant.

CLARK, C. J. This is an appeal from the refusal of the court to grant the motion of the defendant to make A. E. Lloyd a party defendant.

The plaintiff, who was an infant 11 years of age at the time of the injury complained of, brings this action by his next friend against the city of Durham for damages caused by its alleged negligence in permitting a dangerous excavation, immediately adjoining one of its streets, to be insufficiently guarded and protected, alleging that this negligence resulted in injuries to the plaintiff. A. E. Lloyd, who was owner of the lot upon which the excavating was done, in excavating for the foundations for his building, desiring an entrance through the sidewalk to his basement, excavated under the width of the sidewalk for the whole extent of his lot. It appears from the answer that Lloyd erected a plank fence across the sidewalk and along the edge of the street to prevent those using the sidewalk from falling into the excavation. This fence was 4½ or 5 feet high. On Sunday, 2 August, 1914, there was a heavy rainfall which caused the dirt sustaining this fence to give way. Those in charge of the work were engaged in making the fence more secure when the plaintiff rode up on his bicycle and leaned against the fence.

When warned to leave, he did not do so, but leaned against the fence, which gave way, tumbling him and his bicycle into the excavation, and in falling his arm became entangled in the bicycle and was broken.

The city of Durham, upon the allegations set up in its answer, moved to have A. E. Lloyd made a party. Upon notification of said motion, Lloyd appeared and asked to be made a party, that he might make his defense, but the court declined the motion, and the defendant excepted.

The making of new parties defendants where they are not necessary is a matter within the discretion of the trial judge, and his refusal is not reviewable. *Aiken v. Mfg. Co.,* 141 N. C., 339. But in this (575) case, if there should be a recovery against the defendant the city of Durham, A. E. Lloyd would be liable to the city, and it could recover in an action against him. It is the policy of the law to determine a controversy in one action rather than several, when it can be done. Besides, A. E. Lloyd is entitled to a day in court, and it is but just that he should have an opportunity to defend the suit against the city in order to defeat a recovery, or to reduce the amount for which he must answer over, by setting up his defense in his own way and through his own counsel. The city has not the same interest in defeating the action, or in reducing the amount, if it can recover over against a solvent party. This has been fully discussed and settled in several cases. *Dillon v. Raleigh,* 124 N. C., 184; *Brown v. Louisburg,* 126 N. C., 701; *Raleigh v. R. R.,* 129 N. C., 265; *Gregg v. Wilmington,* 155 N. C., 18.

The discussion in *Gregg v. Wilmington, supra,* is very full and elaborate, citing authorities from the Federal Supreme Court and several States as well as those from North Carolina. *Walker, J.,* says: "The Code contemplates this method of trial to avoid circuity and multiplicity of actions."

It is true that there is no contribution between tort-feasors, and that ordinarily where there is a recovery against one joint tort-feasor sued alone, he cannot recover of the other tort-feasors. But there is an exception when, as in this case, there is evidence tending to show that Lloyd is primarily liable, if there was negligence, and the city secondarily so. In the *Gregg case, supra, Walker, J.,* points out that the exceptions to the rule that there is no contribution among joint wrongdoers is subject to two exceptions: "(1) Where the party claiming indemnity has not been guilty of any fault, except technically or constructively, as where an innocent master is held to respond for the tort of his servant acting within the scope of his employment; or (2) where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury. Very

familiar illustrations of the second class are found in cases of recovery against municipalities for obstructions to highways caused by private persons. The fault of the latter is the creation of the nuisance, that of the former the failure to remove it in the exercise of its duty to care for the safe condition of the public streets; the first was a positive tort and the efficient cause of the injury complained of, the latter the negative tort of neglect after notice express or implied," citing many cases.

The fact that the plaintiff could sue both the city of Durham and Lloyd does not determine that they are both liable in the same degree. It is true that the city gave Lloyd the permit to make the excavation and was charged with the duty of supervising his operations to prevent injury to the public, and if it neglected to do so, it is (576) liable to the plaintiff. But the primary liability may be upon Lloyd, there being evidence tending to show that his negligence, if any, was antecedent to that of the city if it was negligent in not giving efficient supervision.

Upon the facts set out in the answer the defendant, the city of Durham, was entitled to have Lloyd made a defendant, and he was *a fortiori* entitled to have his motion, to come in and defend the action, granted.

Reversed.

HOKE, J., dissenting: On the facts presented, while A. E. Lloyd may be a desirable, he is not a necessary party, and under our decisions, as I interpret them, where this is true, the question of making him a party is referred to the discretion of the trial court. *Aiken v. Mfg. Co.*, 141 N. C., 339. Although there may be a condition of primary and secondary liability as between Lloyd and the city of Durham, the negligent acts of both having concurred in producing a single injury, the authorities are that, with or without concert between them as to plaintiff and his cause of action, they are considered as joint tort-feasors, and unless the court below otherwise orders, he has the election to sue and proceed against them together or separately, as he may be advised. *Hough v. R. R.*, 144 N. C., 692; *Clark v. Guano Co.*, 144 N. C., 64; 38 Cyc., 490 *et seq.*; 28 Cyc., 1463.

There is nothing in *Gregg v. Wilmington*, 155 N. C., 18, that necessarily militates against this view. In *Gregg's case, supra,* all the persons involved in the alleged tort were made parties defendant, and the question chiefly presented was as to the effect and interdependence of certain issues on the rights of the respective parties. Whether the plaintiff could, at his election, have proceeded against one or all of the defendants was not directly involved.

In the opinion, however, and as to the nature of plaintiff's demand, it was said, among other things: "In an action against a city and its licensee for injury caused by the negligent act of the latter, of which the city had notice, their liability, as between them and the plaintiff, would be *joint* and *several*. . . ."

Under this principle and the authorities apposite, I am of opinion that the ruling of the lower court should be affirmed.

ALLEN, J., concurs in the dissenting opinion of HOKE, J.

Cited: Hipp v. Farrell, 169 N. C., 554; *Conway v. Ice Co.,* 169 N. C., 578; *Temple v. Hay Co.,* 184 N. C., 242; *Bank v. Murphy,* 189 N. C., 481; *Bowman v. Greensboro,* 190 N. C., 616; *Benevolent Asso. v. Neal,* 194 N. C., 403; *Trust Co. v. Transit Lines,* 200 N. C., 418; *Williams v. Hooks,* 200 N. C., 421; *Brown v. R. R.,* 202 N. C., 263; *Baucom v. Bank,* 203 N. C., 828; *Odom v. Palmer,* 209 N. C., 97.

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(577)

FARMER-COLE PLUMBING COMPANY v. WILSON HOTEL COMPANY.

(Filed 14 April, 1915.)

1. Judgments—Default and Inquiry—Contracts—Pleadings—Defenses.

In an action to recover upon a contract for work done, with allegation that the plaintiff had performed his part in accordance with its terms and a certain stated sum was due him thereunder, it is essential for the defendant to set up in his answer any damages he may claim as arising from the negligence of the plaintiff in his performance of his contract, or in breach thereof; and where, upon failure to file answer, a judgment by default and inquiry has been entered, it estops the defendant from claiming damages of the character stated.

2. Judgments—Default and Inquiry—Admissions — Evidence — Counter Demands.

A judgment by default for the want of an answer is an admission of every material and traversable allegation of the declaration or complaint necessary to the plaintiff's cause of action, and evidence upon the inquiry tending to prove that no right of action existed, or denying the cause of action, is irrelevant and inadmissible.

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

Civil action heard upon exceptions to report of referee and motion to set aside a judgment by default and inquiry, rendered at December

Term, 1913, by *Cooke, J.*, and a judgment of September Term, 1914, confirming the report, no exceptions thereto having been filed.

His Honor declined to set aside this judgment by default and inquiry, but set aside the judgment of September, 1914, confirming the report, and permitted the defendant to file exceptions thereto. Whereupon the defendant filed exceptions as follows:

1. That the said referee excluded evidence of the cost and expenses incurred by the defendant in placing the fixtures in position and in installing the same, the plumbing amounting to $450.

2. The referee excluded evidence that the plaintiff had performed its work so negligently and carelessly, and had failed to comply with the contract to an amount in excess of $250.

3. That the referee found that the defendant was indebted to the plaintiff in any sum whatever.

And in support of these said exceptions the defendant refers to the affidavit of S. A. Woodard filed in this case at this term, and his motion to set aside the judgment of December, 1913.

Upon hearing the exceptions, his Honor overruled them and by consent allowed a credit of $55 and adjudged that the plaintiff recover $648.87, with interest and costs.

The defendant excepted and appealed.

J. C. Little, Allen J. Barwick for plaintiff. (578)
S. A. Woodard, Winston & Biggs for defendant.

BROWN, J. The plaintiff alleges in the complaint:

(1) That heretofore, to wit, on or about 14 September, 1912, the plaintiff contracted with the defendant to install the plumbing and furnish the roughing-in material in the annex of the New Briggs Hotel in the city of Wilson, county of Wilson, State of North Carolina, at the agreed price of $1,650.

(2) That in pursuance of said contract the plaintiff installed plumbing and furnished roughing-in material and completed said work according to contract on the New Briggs Hotel, and fully complied with its part of the contract.

(3) That from time to time the defendant paid to said plaintiff the sum of about $1,200, leaving due and unpaid the sum of $450.

(4) That over and above the work on the contract hereinbefore referred to, there was extra work done on the said hotel, and materials furnished; said work and materials being of the value of $253.87.

As we understand this case, the exceptions relate exclusively to matters foreclosed by the judgment by default and inquiry, which are set out in sections 1, 2, 3 of the complaint. These sections allege a contract

to install plumbing in defendant's hotel at an agreed price, that the work was properly done in pursuance of and in accordance with the contract, that so much was paid on it, and that there is a balance due of $450 on the contract.

The exceptions are confined to alleged error in excluding evidence as to costs and expenses incurred by defendant in placing the plumbing in and installing the same, and in excluding evidence of the negligent manner in which the plaintiff contractor had done its work.

These are matters of defense relating to the proper performance of the contract, and should have been properly pleaded. The judgment by default and inquiry for want of an answer bars defendant from setting up such defense upon the inquiry as to damages.

The referee very properly confined the inquiry under those allegations of the complaint to the amount due under the contract.

The default is an admission of every material and traversable allegation of the declaration or complaint necessary to the plaintiff's cause of action. 23 Cyc., 752.

It admits all the material averments properly set forth in the complaint, and of course everything essential to establish the right of the plaintiff to recover. Any testimony, therefore, tending to prove that no right of action existed, or denying the cause of action, is irrelevant and inadmissible. *Gerrard v. Dollar,* 49 N. C., 176; *Lee v. Knapp,* 90 N. C., 171; *Blow v. Joyner,* 156 N. C., 140; *Graves v. Cameron,* 161 N. C., 550.

Affirmed.

Cited: Hollifield v. Tel. Co., 172 N. C., 722; *Mitchell v. Express Co.,* 178 N. C., 237; *Mitchell v. Ahoskie,* 190 N. C., 236; *Earle v. Earle,* 196 N. C., 415; *Bowie v. Tucker,* 206 N. C., 59; *DeHoff v. Black,* 206 N. C., 688.

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(579)

ATLANTIC COAST LINE RAILROAD COMPANY v. J. R. BUNTING.

(Filed 14 April, 1915.)

1. Railroads—Easements—Right of Occupation—Use of Owner of Lands.

A railroad company may occupy its right of way to its full extent whenever the proper management and business necessities of the road, in its own judgment, may require it, with the right of the owner of the land to use and occupy the part not thus used by the railroad, in a manner not inconsistent with its full and proper enjoyment of the easement; and

when the railroad has entered into the enjoyment of its easement, its further appropriation and use thereof may not be destroyed and sensibly impaired by reason of the occupation of the owner or other person.

2. Same—Injunction.

A railroad company, in the use and enjoyment of a right of way extending 100 feet each way from the center of its track, sought to enjoin the erection of a brick building by an owner of lands abutting on its easement, to replace a wooden building which had been destroyed, and on a line of a substantial block of buildings which had been erected since the operation of the railroad, and extending over and upon its right of way, leaving a space of 65 feet between the building and the track and also used as a public street of the town for about thirty years. Nothing appearing to show that the plaintiff railroad has any present purpose to use that part of the right of way occupied by the defendant, as stated, or that such occupation will sensibly increase the hazards incident to the operation of the railroad, *it is held*, the injunction should not be granted.

3. Railroads—Rights of Way—Easements—Property Rights—Railroad Purposes.

A railroad company has no right or authority to rent out its right of way to an individual for strictly personal or private business purposes, and not necessary for the enjoyment of its easement for railroad purposes. *Coit v. Owenby*, 166 N. C., 136, cited, approved, and discussed.

WALKER and BROWN, JJ., dissent.

APPEAL by defendant from *Peebles, J.*, at September Term, 1914, of PITT.

Civil action to enjoin erection of a brick building on defendant's right of way, heard on return to preliminary restraining order.

On the hearing the restraining order was made permanent and enjoining defendant from further proceeding with the building, whereupon defendant excepted and appealed.

S. G. Cooper and Harry Skinner for plaintiff.
Jarvis & Wooten and F. G. James & Son for defendant.

HOKE, J. Our decisions are to the effect that a railroad right of way, when once acquired, may be occupied and used by the company to its full extent, whenever the proper management and business necessities of the road may so require, and the company is made the (580) judge of such necessity. *McLean v. R. R.*, 158 N. C., 498; *Earnhardt v. R. R.*, 157 N. C., 358; *R. R. v. Olive*, 142 N. C., 257. And further, that to "the extent that the land covered by the right of way is not presently required for the purposes of the road," the owner may continue to occupy and use it in a manner not inconsistent with the full and proper enjoyment of the easement. *Lumber Co. v. Hines,*

126 N. C., 254; *R. R. v. Sturgeon,* 120 N. C., 225. Both positions will be found stated and approved in the more recent cases of *Coit v. Owenby,* 166 N. C., 136, and *Hendrix v. R. R.,* 162 N. C., 9; and it is further established in this State, both by statute and precedent, that when the company has acquired and properly entered on the enjoyment of its easement, the further appropriation and use of the right of way, as indicated, may not be destroyed or sensibly impaired by reason of the occupation of the owner or other person. Revisal, sec. 388; *Beattie v. R. R.,* 108 N. C., 425; *R. R. v. McCaskill,* 94 N. C., 746.

A correct application of these principles to the facts in evidence, about which there is no substantial dispute between the parties, is, in our opinion, against the ruling of the court below on the question presented. From these facts it appears that plaintiff is now operating a railroad through or by the town of Bethel, and that, under its various charters, its right of way extends for 100 feet each way from the center of its track; that formerly the town was some further away, but soon after the completion of the road, about 1885, the business portion was moved towards the southern side of the track and a substantial block of business buildings, including a bank, two hotels, and some large brick stores, were erected along said track and fronting the same, leaving a space of 65 feet between said buildings and the track, which space was used as a public street known as Railroad Street, the principal business street of the town, and had been since the before-mentioned date, 1885; that plaintiff, owning one of the lots on this street, had bought an old warehouse from the company and placed it on the lot and had used it as a business house or warehouse for several years, till the fall of 1914, when he tore it down with intent to erect on the lot a brick business building, this being substantially in line with the buildings already along the street and situate, for some distance, on plaintiff's right of way.

In making our present decision, we must not be understood as holding that, under usual or ordinary circumstances, the owner of property, subject to such an easement, would be justified in building a permanent brick structure on the plaintiff's right of way; but there is nothing in this record which shows or tends to show that plaintiff company has any present purpose of putting in a double track or that the proposed building will tend to interfere with the proper and efficient operation
(581) of the road, or that it will sensibly increase the hazards incident to its operation, and, in the absence of some such evidence, we must hold, as stated, that on the facts presented there is nothing to indicate that the proposed building or its contemplated use will in any way tend to interfere with the "full and proper enjoyment of plaintiff's easement," the test suggested in *Coit v. Owenby, supra,* and the authori-

ties cited in its support. It was only a business building in line with the other buildings on the block, and, so far as appears, it did not even sensibly increase the obstruction to the view, at times desirable for the safe operation of plaintiff's trains.

The case of *Coit v. Owenby, supra,* was cited on the argument as authority for the position that, on the facts in evidence, the plaintiff might have some proprietary interest in that portion of defendant's lot on the right of way which it might rent or lease for warehouse or other business purposes to some patron of the road. Owing to the fact that the testimony on that point in *Coit v. Owenby, supra,* was somewhat obscurely stated in the case on appeal, the decision may, in some aspects of the evidence, permit of such an interpretation, and we deem it well, therefore, to say that, in the case referred to, the Court never intended to hold that a railroad had the right to rent out the right of way to an individual for strictly personal or private business purposes. The decision was made to rest on that aspect of the testimony which permitted the interpretation and tended to show that the right of way had been let to a patron of the road as a terminal facility for receipt and shipment of freight, and it was held that the company might do this to the extent that it did not interfere with the facilities for serving the public.

A railroad company would not be permitted to sell or farm out any portion of its right of way to an individual for any purposes extraneous to its chartered rights and duties.

We find there was error in the judgment rendered, and, on the record, the same must be

Reversed.

WALKER and BROWN, JJ., dissent.

Cited: Tighe v. R. R., 176 N. C., 244; *Howard v. Mfg. Co.,* 179 N. C., 120; *Griffith v. R. R.,* 191 N. C., 87; *Wearn v. R. R.,* 191 N. C., 579.

(582)

W. B. AND C. L. MORTON v. WASHINGTON LIGHT AND WATER COMPANY.

(Filed 14 April, 1915.)

1. Water Companies—Contracts with City—Rights of Citizens—Fire Damage.

A citizen whose property has been destroyed by fire may recover damages of a water corporation for a breach of its contract with the city "to afford a supply of water for the use of the citizens—and protection from

fire," when the damages were proximately caused thereby. *Gorrell v. Water Supply Co.*, 124 N. C., 328, cited and sustained.

2. Same—Decisions—Corporation Charter—Implied Provisions.

The right of a citizen and taxpayer to recover for the loss of his property by fire caused by the failure of a water corporation to perform its contract with the city to furnish a supply of water for fire protection, impliedly incorporates within the provisions of its charter the law then existing; and in this action for damages for destruction by fire, it appearing that *Gorrell v. Water Supply Co.*, 124 N. C., 328, had been decided some two years before the defendant had acquired its charter, it acquired its charter rights subject to the doctrine therein announced by the Supreme Court.

3. Pleadings—Amendments—Court's Discretion—Appeal and Error.

An exception to an amendment allowed in the discretion of the trial judge, which does not change the issues raised by the pleadings, will not be considered on appeal unless this discretionary power has been abused; and the same rule applies when the issues are changed, unless it appears that the appellant has been prejudiced in not being able to secure and introduce his evidence.

4. Water Companies—Contract with City—Breach—Damage by Fire—Other Fires.

Where a citizen sues a water company for damages from fire alleged to have been caused by the failure of the defendant to supply the agreed quantity of water for fire protection under a contract with the city, and the evidence thereon is conflicting, it is competent for the plaintiff to show that the defendant had failed to thus supply water at other fires which had occurred under ordinary and usual conditions.

5. Appeal and Error—Unanswered Questions.

An exception to the exclusion of an answer to a question asked a witness will not be considered on appeal unless it is made to appear that its exclusion was prejudicial to the appellant.

6. Corporations—Officers—Subsequent Declarations—Principal and Agent—Evidence.

After the president and superintendent of a water corporation have been permitted to testify in its behalf as to the condition of the plant, in an action by a citizen to recover damages for a fire loss, it is competent for the plaintiffs to show on their cross-examination, and by other witnesses, declarations, made by them after the fire, to contradict their testimony; for declarations of this character do not fall within the prohibition as to declarations of ordinary agents made after the act complained of.

7. Pleadings—Tax Lists—Impeaching Evidence.

Where the complaint in an action to recover damages for property destroyed alleges that its valuation for taxation is the true one, the tax list thereof is competent to contradict the plaintiffs' testimony at the trial, and the ordinary rule does not apply.

BROWN, J., concurring in result.

WALKER, J., dissenting; HOKE, J., concurs in dissenting opinion.

MORTON *v.* WATER CO.

APPEAL by defendant from *Bragaw, J.,* at December Term, (583) 1913, of BEAUFORT.

This action is a consolidation of two actions originally brought and entitled "Charles L. Morton v. Washington Light and Water Company" and "W. B. Morton, trading as W. B. Morton & Co., v. Washington Light and Water Company." The alleged damage in each instance was based upon the same alleged negligence, and at the trial of the action the two causes were consolidated, by consent.

The plaintiff Charles L. Morton was originally suing for the destruction of a store building owned by him, by a fire which occurred on the night of 27 July, 1911, and the plaintiff W. B. Morton was suing for the destruction or loss of a stock of goods contained in the store at that time and owned by the said W. B. Morton.

Both plaintiffs, in their complaint, alleged that the defendant entered into a contract with the town of Washington in 1901 to build and maintain a waterworks system and to furnish a certain pressure with which to fight fires; that on the night of 27 July, 1911, a fire originated in a building adjoining the building of the plaintiff Charles L. Morton, and that by reason of the negligent failure of the defendant company to furnish the pressure which it contracted to furnish, the fire, originating in the George Morton building (that is, the building adjoining the Charles L. Morton building), spread to and destroyed or burned the building of the plaintiff Charles L. Morton, and the stock of goods therein, owned by the plaintiff W. B. Morton.

The contract stipulated that it was "to afford a supply of water for the use of the citizens of the town of Washington, and in order to furnish protection from fire to the property of said citizens."

The buildings were separated by a wooden partition.

The building owned by Charles L. Morton was insured for the sum of $4,000, which insurance he collected. The stock of goods owned by W. B. Morton was insured for $1,000, which insurance he collected.

The plaintiff Charles L. Morton, in his original complaint, sued for $2,000 for damage to the building and the plaintiff W. B. Morton sued for $1,500 for loss of personal property.

At the time and upon the day the cause was set for trial the plaintiff Charles L. Morton, for the first time, asked leave of the court to amend his complaint. The court, in its discretion, over the ob- (584) jection of the defendant, permitted the amendment. The defendant thereupon moved the court for a continuance of the cause until the next succeeding term. This motion the court refused, but continued the cause until the next succeeding day, or for a period of about twenty-four hours.

The following verdict was rendered by the jury:

1. At the time of the injury to and destruction of the property of plaintiffs by fire, had the defendant water company undertaken to furnish the city of Washington a supply of water according to the plans and specifications contained in the agreement and contract of 11 December, 1901, as set out in the complaint, in the quantity, under the pressure, and for the purposes therein recited? Answer: "Yes."

2. At such time was said defendant company engaged in supplying water to said city of Washington under and pursuant to said agreement and contract, and in the exercise and enjoyment of the privileges of the same, and demanding and collecting from the said city the price stipulated in the said agreement for furnishing water, at its customary times for making such collections, during the year and period in which plaintiffs' loss accrued? Answer: "Yes."

3. At the time of the injury to and destruction of the property of the plaintiffs by fire, did the defendant water company fail and neglect to furnish the quantity and pressure of water it had agreed to furnish on occasion of fire in its said contract with the city of Washington? Answer: "Yes."

4. If so, was the property of the plaintiffs injured and destroyed by the negligence of defendant, as alleged in the complaint? Answer: "Yes."

5. If so, what damages, if any, is the plaintiff Charles L. Morton entitled to recover of the defendant? Answer: "$2,500, with interest."

6. If so, what damages, if any, is the plaintiff W. B. Morton entitled to recover of the defendant? Answer: "$1,000, with interest."

The defendant raised the question as to its liability to the plaintiff by exception to the judgment, prayers for instruction, and by motion for judgment of nonsuit.

There are other exceptions relied on which will appear in the opinion of the Court.

There was judgment for the plaintiffs, and the defendant appealed.

Daniel & Warren and A. D. McLean for plaintiffs.

Rodman & Bonner, W. B. Rodman, Jr., W. A. Wilcox, and W. J. Wilcox for defendant.

ALLEN, J. The principles announced in *Gorrell v. Water Supply Co.*, 124 N. C., 328, establish the liability of the defendant to the (585) plaintiffs upon the facts found by the jury and those admitted in the pleadings, and the defendant, realizing this, asks us to overrule that case. We have therefore reëxamined the decisions in this and

other jurisdictions, and the arguments and reasoning upon which they rest, and after full consideration have determined to adhere to the former ruling of this Court.

It may be conceded, as contended by the defendant, that the weight of authority, measured by number, is against the decision in the *Gorrell case, supra,* but this was known and considered at the time of its rendition, and since then, instead of receding from the position then taken, the doctrine has been affirmed in *Fisher v. Water Co.,* 128 N. C., 375; *Lacy v. Webb,* 130 N. C., 546; *Gastonia v. Engineering Co.,* 131 N. C., 368; *Wadsworth v. Concord,* 133 N. C., 587; *Voorhees v. Porter,* 134 N. C., 591; *Kernodle v. Tel. Co.,* 141 N. C., 426; *Helms v. Tel. Co.,* 143 N. C., 386; *Wood v. Kincaid,* 144 N. C., 393; *Clark v. Bonsal,* 157 N. C., 270; *Brady v. Randleman,* 159 N. C., 434, and in *Jones v. Water Co.,* 135 N. C., 553.

In the last case the contract was similar to the one now before us, and the Court said, upon the right to sue: "There can be no real contention that the plaintiff, a citizen and taxpayer, and one of the beneficiaries in the purview of this contract, cannot prosecute this action. He is the real party in interest. He is taxed with payment of his pro rata of the annual rental. The town cannot maintain this action for the loss sustained by him by reason of the defendant's failure to perform the provisions of the contract above recited. For this injury the plaintiff alone can sue. This point was discussed and settled in *Gorrell v. Water Supply Co.,* 124 N. C., 328 (70 Am. St. Rep., 598; 46 L. R. A., 513), which has been followed in *Fisher v. Water Co.,* 128 N. C., 375, and cited and approved in *Lacy v. Webb,* 130 N. C., 546, and *Gastonia v. Engineering Co.,* 131 N. C., 368, in which last the doctrine is elaborated. The same principle had been often affirmed prior to *Gorrell's case, supra,* to wit, that "the beneficiary of a contract, though not a party to it nor expressly named therein, can maintain an action for a breach of such contract causing injury to him, if the contract was made for his benefit."

It also appears that the case has been followed in *Mugge v. Tampa Waterworks,* 52 Fla., 371, and *Springfield Ins. Co. v. Graves County Water Co.,* 120 Ky., 40; and in *Guardian Trust Co. v. Fisher,* 200 U. S., 57, the Court, affirming the principle, says: "It is true that a company contracting with a city to construct water works and supply water may fail to commence performance. Its contractual obligations are then with the city only, which may recover damages, but merely for breach of contract. There would be no tort, no negligence, in the total failure on the part of the company. It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act; but if the com- (586)

pany proceeds under its contract, and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for a tort."

Another reason for refusing to sustain the position of the defendant is that it entered into the contract with the city of Washington in 1901, two years after the *Gorrell case, supra,* was decided, and as all laws relating to the subject matter of a contract enter into and form a part of it as if expressly referred to or incorporated in its terms (*Lehigh Water Co. v. Easton,* 121 U. S., 391; *Wooten v. Hill,* 98 N. C., 48), it was within the contemplation of the parties at the time the contract was made that the defendant would be liable to the citizen for loss by fire caused by its negligent failure to perform the terms of the contract, as held in the *Gorrell case, supra,* and to hold otherwise now would relieve the defendant of a responsibility which it knowingly assumed.

The other exceptions relied on by the defendant will be considered in the order in which they are discussed in the briefs.

(1) The amendment to the complaint, which was filed by permission of the court on the day before the trial, only added an additional item of damage, and did not change the issues raised by the pleadings, and it does not appear in the record that the time allowed the defendant to prepare its evidence was not ample.

The rule as to a continuance when new parties are made or amendments allowed is correctly stated in *Watson v. R. R.,* 164 N. C., 176, where the Court says: "If new parties are made or amendments allowed, which change the issues, and a party is not prepared with his evidence to meet the changed conditions, he is entitled to a continuance as a matter of right (*Dobson v. R. R.,* 129 N. C., 289); but ordinarily the ruling of the judge upon a motion for continuance is a matter of discretion, and not reviewable, and in this case it appears that there was no change in the pleadings or issues, and no suggestion that it would be more prejudicial to the defendant to try at that time than at any other."

It does not appear that the defendant has been prejudiced, or that the discretion vested in the trial judge has been abused, and the exception to the refusal to continue must therefore be overruled.

(2) The plaintiffs introduced evidence tending to prove that (587) the capacity of the defendant's plant had decreased since its installation, and the defendant's evidence was that it had at all times complied with its contract.

The plaintiffs further introduced evidence, the defendant objecting thereto, that the defendant had failed to supply water according to its contract at other fires before the fire which destroyed the property of the plaintiffs.

This evidence does not fall under the condemnation of the rule which forbids the proof of other negligent acts as evidence of the negligence complained of, and was competent upon the question as to the condition and capacity of the plant at the time of the fire.

There were no exceptional circumstances connected with the other fires, and, so far as the evidence disclosed, the plant was in its usual condition.

If so, and the capacity had decreased, as the plaintiffs contend, the fact that it did not furnish water according to the contract at other fires would be some proof that it could not do so at the time of the fire complained of. The evidence comes within the principle of the case of *Blevins v. Cotton Mills,* 150 N. C., 493.

(3) A witness for the plaintiffs was asked a question by the defendant on cross-examination, which the court refused to permit the witness to answer, but as there is nothing to indicate what the answer of the witness would have been, the exception to the action of the court cannot be considered. *Wallace v. Barlow,* 165 N. C., 676.

(4) The defendant introduced its president and superintendent, each of whom testified substantially that the plant of the defendant was at all times properly equipped and maintained, and the plaintiffs were permitted to prove upon cross-examination, and by other witnesses, declarations of the president and superintendent, made after the fire, tending to contradict their testimony.

This does not come within the principle excluding the declarations of an agent as to a past occurrence, and the evidence was properly admitted. The rule and the exception are applied in *Pate v. Steamboat Co.,* 148 N. C., 511, as follows: "Of course, the declarations of the boat hand, made after the occurrence, are incompetent for the purpose of proving the dangerous condition of the bateau. *Southerland v. R. R.,* 106 N. C., 100. But, having been examined by the defendant as its witness as to the condition of the bateau, it was competent to impeach or contradict his evidence upon that point by his declarations on that subject to Glover. To lay the foundation for offering such impeaching evidence, it was proper to ask the witness on cross-examination the question objected to."

(588) (5) The plaintiffs introduced evidence of the value of the property destroyed by the fire. The defendant introduced the complaint, in which it is alleged that this property was valued for taxation at its *true value,* and then offered the tax list for the purpose of proving the value for taxation to be less than as shown by the evidence for the plaintiffs, which the court excluded.

Authority can be found in support of the general proposition that the tax list is inadmissible upon the question of value, but in none of the cases was the fact present as in this, that the party against whom it was offered had alleged that the tax list showed the true value.

If the plaintiff had made a declaration as to value on the streets, no one would question the right to offer this declaration against him, nor would the right to look at the tax list to ascertain the value be denied if it had been attached to the complaint as an exhibit.

If so, it can make no difference, as to the competency of the evidence, that the true value appeared on the tax list in the office of the sheriff or of the register of deeds instead of attaching the list to his complaint, and in our opinion the evidence ought to have been received.

This entitles the defendant to a new trial, but it is restricted to the issue of damages.

Partial new trial.

Note to opinion of the Court by MR. JUSTICE ALLEN, showing precedents to sustain the right of the plaintiff to recover under the contract made between the water company and the town:

Gorrell v. Water Supply Co., 124 N. C., 328; *Fisher v. Water Co.*, 128 N. C., 375; *Lacy v. Webb*, 130 N. C., 546; *Gastonia v. Eng. Co.*, 131 N. C., 368; *Wadsworth v. Concord*, 133 N. C., 587; *Voorhees v. Porter*, 134 N. C., 591; *Kernodle v. Tel. Co.*, 141 N. C., 436; *Helms v. Tel. Co.*, 143 N. C., 386; *Wood v. Kincaid*, 144 N. C., 393; *Clark v. Bonsal*, 157 N. C., 270; *Brady v. Randleman*, 159 N. C., 434; *Jones v. Water Co.*, 135 N. C., 553; *Mugge v. Tampa Waterworks*, 52 Fla., 371; *Springfield Ins. Co. v. Graves County Water Co.*, 120 Ky., 40; *Guardian Trust Co. v. Easton*, 121 U. S., 391; *Wooten v. Hill*, 98 N. C., 48.

WALKER, J., dissenting: The quotation from the contract between the town of Washington and S. S. Spruks, predecessor of defendant, which appears in the opinion of the Court, was taken from the first preamble of the agreement, and is of no special significance, when viewed in the light of subsequent provisions, as it should be (*Gudger v. White,* 141 N. C., 507; *Triplett v. Williams,* 149 N. C., 394; *Beacom v. Amos,* 161 N. C., 357), and considered with reference to the principles of law recognized and applied by *all* the authorities. I have said *all* the authorities, because it will be found, upon the most cursory examination, that the cases to which the Court refers in its opinion do not present the

facts we have in this case, but those which are essentially different, as I will show. It is well, in the beginning of the discussion, to understand precisely the terms of this contract, so that I may (589) make it perfectly clear that it bears no legal analogy to those contracts which were involved in the cases relied on by the Court. An analysis of the contract will place the matter squarely before us, upon its own legal merits and without regard to the construction or enforcement of agreements having different phraseology and, therefore, susceptible of a different meaning. The general scope of the contract shows that it was made for the purpose of supplying the town of Washington with water for the domestic use of its citizens; for use at public fountains; for the operation of its sewer system, if it should be established during the life of the contract, and for fire protection. The consideration for these public benefits was to be paid by the town, in the form of rent for the hydrants, at so much for each of them per year, and in addition thereto "a franchise or license" to construct and operate the contemplated system of waterworks for thirty years and to use the streets of the town for that purpose. It is recited in the contract that the town granted the franchise and agreed "to rent the hydrants" not less than fifty in number, in consideration of the benefits that will be derived by the town and its inhabitants and the water supply for public use. Provision is also made for an additional number of hydrants at the same price as for the original ones. Then come the provisions:

1. "The commissioners for the town of Washington agree to use the said hydrants for the extinguishment of fires only, except as hereinafter provided. It is expressly agreed that if said rent be not paid when due as above specified, then the water supply may be cut off without any liability to any one from said company."

2. "A constant water pressure equal to 50 pounds per inch for ordinary service shall be maintained, which upon the occasion of fires shall, *if necessary,* be increased by means of suitable pumps to 75 pounds per inch." (In order to meet this requirement, a pump house, with machinery, fixtures, and power sufficient to supply 360,000 gallons of water per day and standpipe with a capacity of 50,000 are agreed to be maintained.)

3. "Water from the fire hydrants may be used for the extinguishment of fire and for the necessary fire practice only: *Provided,* that not more than two companies be allowed to practice on the same day without permission from the water company; and *provided further,* that said practice shall not be oftener than once in each week, and not more than two hydrants shall be open at one time. The fire hydrants rented by the town of Washington shall constantly furnish effectual fire streams with-

out the aid of portable engines. The said fire hydrants shall be kept constantly supplied with water for fire service, and shall be maintained in effectual working order."

(590) 4. It is then provided that the fire hydrants shall be under the control and inspection of the chief of the fire department of the town, and if any hydrant shall be out of order at any time, after notice thereof, the owner is required to repair the same, and upon his failure to do so a deduction of $5 per week from the rental shall be made and continue until the proper repairs are made, "which shall be the limit of any damage or liability."

5. The owner, after the system shall be completed and in operation, "shall not suffer the suspension of the supply of water, either for fire or domestic purposes, unless the same shall be caused by accident or cause beyond his control; and in case of accident or other cause, said Spruks shall forthwith proceed with all possible diligence to repair and put the same in successful operation; and if said Spruks, his associates or assigns, suspend or fail to make such repairs as herein required, then the rights and privileges granted hereby shall be forfeited."

6. The contract was evidenced by an ordinance of the town, which was accepted by S. S. Spruks, and with reference thereto it is provided as follows: "This ordinance shall become binding upon the town of Washington in the event that the said S. S. Spruks, his associates or assigns, shall, within thirty days after the passage and publication of this ordinance, file with the town clerk of the said town of Washington its written acceptance of the terms, obligations, and conditions of this ordinance, and upon the filing within thirty days thereafter of a bond, to be approved by the board of commissioners for the town of Washington, in the penal sum of $2,500, conditioned for the faithful performance of the erection of said plant as is herein provided for, and thereupon this ordinance shall constitute the contract, and shall be the measure of the rights and liabilities of the town of Washington and of the said S. S. Spruks, his associates and assigns."

There is a provision in the contract that if S. S. Spruks or his assigns "cannot get a supply of water, such as is required by section 2 of this ordinance, at a reasonable expense, (he) shall have the right to surrender the franchise and the ordinance shall be void."

Section 2 refers to the pure quality of the water for domestic purposes.

The plaintiffs allege that the alleged cause of action accrued to them by reason of the defendant's negligent failure to furnish sufficient water and pressure at the hydrants.

In view of the above provisions of the contract *now* under consideration, it may be well to state, at the outset, that it bears no legal resem-

blance to those which were construed in *Gorrell v. Water Supply Co.*, 124 N. C., 328; *Fisher v. Water Co.*, 128 N. C., 375; *Mugge v. Tampa Waterworks*, 52 Fla., 371; *Springfield Ins. Co. v. Graves County Water Co.*, 120 Ky., 40, and *Guardian Trust Co. v. Fisher*, 200 U. S., 57, the cases mainly relied on by the Court. As to the other (591) cases cited, viz., *Lacy v. Webb*, 130 N. C., 546; *Gastonia v. Eng. Co.*, 131 N. C., 368; *Wadsworth v. Concord*, 133 N. C., 587; *Voorhees v. Porter*, 134 N. C., 591; *Kernodle v. Tel. Co.*, 141 N. C., 436; *Helms v. Tel. Co.*, 143 N. C., 386; *Wood v. Kincaid*, 144 N. C., 393; *Clark v. Bonsal*, 157 N. C., 270; *Brady v. Randleman*, 159 N. C., 434, they merely refer to the general doctrine that, within a certain limit, a person for whose benefit a contract, if made, may sue upon it, and the limitation of the principle is that the contract must have been made *directly* for his benefit. The *Gorrell and Fisher cases, supra,* involved the construction of one and the same contract between the city of Greensboro and the Water Supply Company, which contained this clause: "Said water company shall be responsible for all damage sustained by the city, or any individual or individuals, for any injury sustained from the negligence of the said company, either in the construction or operation of their plant." And the same may be said of the other two cases cited, *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky., 340, and *Mugge v. Tampa Waterworks*, 52 Fla., 371. In the Kentucky case there was a separate contract between the consumer and the water company which required the fire pressure to be furnished, and in the Florida case there was an express provision in favor of the consumer. That case was heard on demurrer and, of course, we understand that the facts stated in the declaration are to be taken as admitted, and the allegation is therein made that the company stipulated that it would protect the property of the consumer against injury or destruction by fire, or, at least, exercise reasonable care to do so. This special understanding was broadly stated in the complaint and admitted by the demurrer. It is conceded in the opinion of the Court in that case that the great weight of authority is contrary to its ruling, and a large number of cases decided in the other States are cited which hold the other way. Referring to the Kentucky case, the Supreme Court of Louisiana strongly criticizes it. The position of the Louisiana court in 1900, as stated in *Planters Oil Mill v. Monroe Waterworks Co.*, 52 La. Anno., 1243, was much like that taken in the *Paducah* and *Gorrell cases, supra,* but in 1905 that case was overruled, without a dissent, in *Allen & Currey Mfg. Co. v. Shreveport Waterworks Co.*, 113 La. Anno., 1091, a majority of the Court having taken part in the earlier decision. In the later case the Court says: "We conclude that the engagement of the

defendant company to the city of Shreveport to furnish water to her for the use of her fire department was not a stipulation *pour autrui.* We have discussed the case thus far as if the question it involves were *res nova;* but the exact question has been decided repeatedly in other jurisdictions, and once already by this Court. Upon the latter decision (*Planters Oil Mill v. Monroe Waterworks and Light Co.,* 52 La. Anno.,
1243, 27 So., 684) the plaintiff places much reliance. But for
(592) the reasons hereinabove given, we are not satisfied with the conclusion there reached, and we have concluded to overrule it. By doing so we take this Court from among a slender minority and range it among the very large majority of the courts of the country which have had occasion to consider this question." This was said after a very able and learned discussion of the matter from every possible standpoint and the citation of all the cases upon the subject, with a careful review of many of them. A petition to rehear that case was filed and afterwards denied by the Court. We have specially referred to the case, as it contains an unusually clear and logical treatment of the question, and the conclusion, which was most carefully considered, involved the overturning of a prior decision. But the Court did not hesitate to do this and place itself in line with the numerous cases which were in direct conflict with its former ruling. In *Lovejoy v. Bessemer Waterworks Co.,* 146 Ala., 374, the *Chief Justice* considers the question at length, and reviews the entire range of authorities. He says: "The overwhelming weight of authority is against the right of the plaintiff to maintain this action. The reason why he may not do so is that there is want of privity between him and the defendant which disables him from suing for a breach of the contract, or for the breach of duty growing out of the contract. It is impossible at this late day to say anything new upon the subject, and it would be affectation to attempt any elaborate discussion of the question involved. Only two courts in the United States, as far as we can ascertain, have sustained an action of this kind. The first case is *Paducah Lumber Co. v. Paducah Water Supply Co.,* 89 Ky., 340, which cited no authorities, and which holding was unnecessary, since there was in that case a private contract between the water company and the consumer which required the fire pressure to be furnished. The later Kentucky cases but followed the first decision. In *Gorrell v. Water Supply Co.,* 124 N. C., 328, it was held by a divided Court that a similar action would lie. The decision was rested upon the principle, stated by the Court in general terms, that one not a party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach; and many cases are cited which are assumed to sustain the general proposition, which was stated without qualification.

It is not true, however, that the principle can be maintained to the full extent and in the unqualified terms stated by the Supreme Court of North Carolina in the *Gorrell case, supra.*" The Florida case had not been reported, if it had been decided, at that time. The Court, in *Hone v. Presque Isle Water Co.,* 104 Me., 217, delivered a strong opinion denying the right of a consumer to recover upon such a contract as we have in this record. Referring to the cases to the contrary, it said: "On the other hand, three cases are cited in support of the (593) plaintiff's contention that such an action for negligence is maintainable in favor of an individual owner of property against a water company under contract with the municipality to furnish a supply of water. The first case in which this doctrine is held is *Paducah Lumber Co. v. Paducah Water Supply Co.,* 89 Ky., 340. But it distinctly appears in the opinion in that case that there was a private contract directly between the water company and the plaintiff lumber company, and no cases are cited in the opinion, and the case itself is not an authority to sustain the plaintiff's contention at bar. *Gorrell v. Water Supply Co.,* 124 N. C., 328, and *Mugge v. Tampa Waterworks Co.,* 52 Fla., 371, follow the *Paducah case* in Kentucky, although the facts are materially different. It is sufficient to observe that the reasoning in these cases is not satisfactory." Speaking for myself, I do not concur in the last comment of that Court with reference to the *Gorrell* and *Mugge cases, supra.* The special clause in the *Gorrell* contract, *supra,* making the company liable to the consumer was not reported, and therefore the Court was misled as to its true nature. It is set out in *German Alliance Ins. Co. v. Home Water Co.,* 226 U. S., 220 (to which we will hereafter refer), and some stress laid upon it, as, perhaps, differentiating it from the other cases; and in the *Mugge case,* as I have already shown, the plaintiff stated the contract his own way, according to his conception of it, and the demurrer admitted the allegation, which contained a clause of special liability to the consumer. The *Paducah, Gorrell,* and *Mugge cases, supra,* may, therefore, be sustained upon this ground, provided it is sound doctrine that it is within the power of a municipal corporation to make such a contract for the individual inhabitant of the town or city, which some of the cases seriously question; but it is not necessary that I should pause to discuss that matter. It is stated in 23 L. R. A. (note to *Howsmon v. Trenton Water Co.*), at p. 147: "The general doctrine deducible from all opinions is that the waterworks company is not liable for the inadequate supply of water for fire purposes, under a contract with a city or corporation to furnish water for the extinguishment of fire." The same is substantially said in 21 L. R. A. (N. S.), p. 1021, where all the more recent cases on the subject are collected, presenting a

uniform course of decision, the three cases deciding otherwise being exceptional in their character, because of the special clause by which the water company stipulates for its responsibility directly to the consumer. At p. 1021 of 21 L. R. A. (N. S.) (note to *Hone v. Water Co., supra*) the following conclusion, after a minute consideration of all the cases, is thus stated: "The great weight of authority denies the right of a property owner to maintain an action against the water company for loss of his property proximately resulting from its failure to provide sufficient water for fire purposes as required by its contract with the (594) municipality." In order to show the practical unanimity of the courts upon the principle just stated, I have cited some of the leading cases in a note appended to this opinion.

But a very luminous discussion of the question will be found in a case recently decided by the Supreme Court of the United States, *German Alliance Ins. Co. v. Home Water Co.,* 226 U. S., 220 (2 Dec., 1912) in which the opinion was written by *Mr. Justice Lamar.* It is of great practical value, as the matter is considered from the viewpoint of the difference between the contracts passed upon in the *Paducah, Gorrell,* and *Mugge cases, supra,* and those upon which a large number of the cases were decided. It also shows conclusively that the case of *Guardian Trust Co. v. Foster,* 200 U. S., 571, opinion by *Mr. Justice Brewer,* which is much relied on in the opinion of the Court in the case at bar, is really no authority for the position now taken. The question in the *Fisher case, supra,* related entirely to the character of the cause of action therein, whether in contract or tort, and the Court simply followed the construction of our statute upon the subject by this Court. Referring to the *Fisher case,* the Court in *G. A. Insurance Co. v. Home Water Co.* says: "It was urged, among other things, by the bondholders that the suit in the State court was really for breach of contract, and that entering the judgment as for a tort did not change the nature of the action so as to entitle the plaintiff to the benefits of the North Carolina statute. It was that question alone, as to the character of the suit and judgment, which was before this Court. What was said in the opinion must be limited, under well-known rules, to the facts and issues involved in the particular record under investigation. The *Fisher case, supra,* could not have decided the primary question as to the right of the taxpayer to sue, for that issue had been finally settled by the State court. It raised no Federal question and was not in issue on the hearing in this Court. Neither did the *Fisher case* overrule the principle announced in *National Bank v. Grand Lodge,* 98 U. S., 123, 124, that a third person cannot sue for the breach of a contract to which he is a stranger unless he is in privity with the parties and is therein given a

direct interest." That disposes of the *Fisher case, supra* (200 U. S., 57), as an authority against my view. *Justice Lamar,* in the later case of *G. A. Ins. Co. v. Home Water Co.,* just cited by me, shows conclusively that the doctrine upon which the plaintiff relies cannot be sustained. He says, at p. 230: "Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must at least show that it was intended for his direct benefit. For, as said by this Court, speaking of the right of bondholders to sue a third party who had made an agreement with the obligor to discharge the bonds, they 'may have had an indirect interest in the performance of the undertakings; but that is a very different thing from the privity necessary to enable them to enforce the (595) contract by suits in their own names.' *Natl. Bank v. Grand Lodge,* 98 U. S., 123, 124. *Hendrick v. Lindsay,* 98 U. S., 143, 149; *Natl. Savings Bank v. Ward,* 100 U. S., 195, 202, 205. Here the city was under no obligation to furnish the manufacturing company with fire protection and this agreement was not made to pay a debt or discharge a duty to the Spartan Mills, but, like other municipal contracts, was made by Spartanburg in its corporate capacity, for its corporate advantage, and for the benefit of the inhabitants collectively. The interest which each taxpayer had therein was indirect—that incidental benefit only which every citizen has in the performance of every other contract made by and with the government under which he lives, but for the breach of which he has no private right of action. He is interested in the faithful performance of contracts of service by policemen, firemen, and mail contractors, as well as in holding to their warranties the vendors of fire engines. All of these employees, contractors, or vendors are paid out of taxes. But for the breaches of their contracts the citizen cannot sue, though he suffer loss because the carrier delayed in hauling the mail, or the policeman failed to walk his beat, or the fireman delayed in responding to an alarm, or the engine proved defective, resulting in his building being destroyed by fire. 1 Beven Negligence in Law (3 Ed.), 305; Pollock on Torts (8 Ed.), 434, 547; *Davis v. Clinton,* 54 Iowa, 59, 61. Each of these promisors of the city, like the water company here, would be liable for any tort done by him to third persons. But for acts of omission and breaches of contract he would be responsible to the municipality alone. To hold to the contrary would unduly extend contract liability, would introduce new parties with new rights, and would subject those contracting with municipalities to suits by a multitude of persons for damages which were not, and in the nature of things could not have been, in contemplation of the parties." He directs attention to the special feature in the *Gorrell* con-

tract, by which the water company undertook to become directly responsible to the injured consumer, as one of its patrons, and this applies equally to the *Paducah, Gorrell,* and *Mugge cases, supra.* The contract, as shown in this record, is substantially like the one construed in *Ins. Co. v. Home Water Co., supra.* I have quoted somewhat at length from the latter case, as it is a weighty authority and some of the reasons for the conclusion reached by the Court are very clearly and strongly stated. The opposing cases may well stand as correct decisions upon the particular facts presented in them, but they cannot be regarded as authorities for the plaintiff's right to recover in this case, where the contract is substantially different.

In *Jones v. Water Co.,* 135 N. C., 553, the plaintiff appealed and a new trial was given because of an erroneous charge of the judge (596) in regard to the stipulation of the contract as to notice. The validity of the cause of action was not questioned, though discussed incidentally, the Court treating the contract as one made for the direct benefit of the consumer. There was a provision in that contract for a forfeiture of the rent and a cancellation of the contract if the water company failed to furnish an adequate supply of water for extinguishing fires; but this clause was not adverted to, and the judgment of this Court, giving a new trial, was based on the single error in the charge. The contract now before us, as will be seen by reference to the statement of facts, provides a specific remedy in case of a breach. Speaking of a contract like the one herein sued on, Page on Contracts, sec. 1313, says that the great weight of authority holds that there can be no recovery, citing many cases in the note to sustain the text.

Every case should be tried by the touchstone of its own facts, and there should be no other criterion by which to test the correctness of its decision and its scope and influence as a precedent. Expressed in homely phrase, "Every tub must stand upon its own bottom." The contract in this case, when read as a whole and without severing any particular clause from its context, evidences a purpose on the part of the water company to avoid liability for such damages as are now claimed, and to so word the agreement as to confine the remedy for a breach to a forfeiture of the rents, or, if continued for the specified time of thirty days, to a forfeiture of all rights under the contract, or to restrict any damages for a breach to those recoverable by the town alone. The parties undoubtedly had the right to make such a contract, and it should be construed as they have written it, and the case should not be governed by precedents based upon an entirely different state of facts. We are not at liberty to make a contract for the parties, but can only enforce the one they have made for themselves.

In *Ancrum v. Water Co.*, 82 S. C., 284, a case analogous to this one in its facts, the Court, by *Justice Woods,* in a well considered opinion, held: The obligations of a water company to a citizen of a city with which it has contracted to furnish water for fire protection for damage sustained by negligent failure of the company to supply sufficient water pressure during a fire are limited by the contract between the city and the company. The contract between the city of Camden and the water company, it was further held, did not create any liability on the part of the latter to an individual, who was an inhabitant and taxpayer of the city, for a loss sustained by fire, which would have been extinguished if the water company had not neglected to comply with its contract in keeping the proper pressure on its water pipes. The Court also stated that when the city employed the water company to construct and operate the waterworks, instead of doing so itself, under the *permission* given in its charter, the liability of the water company was (597) exactly that of the city, under similar circumstances, and no more; and further, that the parties could provide in the contract what should be the damages if there was a breach. "Equally free were the city and water company to agree on such sanctions and penalties as they saw fit for the enforcement of the obligations assumed by the water company," is the language of the Court.

The cases in at least thirty out of thirty-four States of the Union which have passed upon the question hold that the water company is not liable:

1. Because there is no privity of contract where there is no obligation, except the general one to furnish water and pressure for the extinguishment of fires, and no agreement of the company to be directly responsible to the citizen for losses by failure to do so.

2. That the municipality is under no legal duty to contract for a supply of water for such a purpose, unless it is imposed by its charter, and therefore no liability to an inhabitant could arise out of such a contract when there is such a claim.

3. That the town has no power to make any such contract in behalf of its citizens, except collectively and in discharge of its public duty, as it is not within its corporate capacity to do so.

4. That where there is no special provision, as in the *Gorrell, Paducah,* and *Mugge cases, supra,* creating a liability to each inhabitant, who suffers a loss from fire, the contract is restricted, in its operation, to damages suffered by the municipality itself, on account of a breach to supply the necessary quantity and pressure to protect property. "The violation of a contract entered into with the public, the breach being by mere omission or nonfeasance, is no tort, direct or indirect, to private

property of an individual, though he is a member of the community and a taxpayer to the Government. We are unable to see how a contractor with the city to supply water to extinguish fires commits any tort by failure to comply with his undertaking, unless to the contract relation there is superadded a legal command by statute or express law." *Fowler v. A. C. Waterworks,* 83 Ga., 219.

There are other reasons assigned, but those stated are the principal ones. All will be found in the authorities cited in the note to this opinion, and especially in *G. A. Ins. Co. v. Home Water Co.,* 226 U. S., 220; *Hone v. P. I. Water Co.,* 104 Me., 217; *Holloway v. M. G. and Water Co.,* 64 S. E. (Ga.), 330; *Ancrum v. Water Co.,* 82 S. C., 284; *Hull v. Passaic,* 83 N. J. L., 771; *Fitch v. S. Water Co.,* 139 Ind., 214, and *Davis v. C. Waterworks,* 54 Ia., 57, where there is an elaborate discussion of the question, with a collation of all the cases, many of which have not been cited herein.

(598) It is suggested that all contracts are presumed to be made with reference to existing law, and *Hill v. R. R.,* 143 N. C., 539, is cited in support of this suggestion. The doctrine may be conceded, but it has no application here, as this Court had not decided the law to be as is now asserted. In *Gorrell v. Water Supply Co.,* 124 N. C., 328, which is mainly relied on, the contract was radically different from this one, and expressly provided for the protection of individual property, and afforded a remedy for a breach of the stipulation, as we have shown. The premise of this argument is therefore disproved, for it assumes something in regard to the law which has no existence in fact, and the deduction, therefore, by reasoning from it, must be erroneous.

In view of the above reasons and the overwhelming weight of authority in the Federal and State courts supporting the view herein expressed, I am compelled, regretfully, to differ with my brethren of the majority, and to dissent from the opinion of the Court and its judgment, as I think there should be a nonsuit, instead of a new trial.

HOKE, J., concurs in the dissenting opinion of MR. JUSTICE WALKER.

NOTE OF PRECEDENTS DIRECTLY SUSTAINING DISSENTING OPINION.—*Boston Safe Dep. Co. v. Salem Water Co.* (C. C.), 94 Fed., 238; *Metropolitan Trust Co. v. Topeka Water Co.* (C. C.), 132 Fed., 702; *Lovejoy v. Bessemer Waterworks Co.,* 146 Ala., 374; *Collier v. Newport Water, L. and P. Co.,* 100 Ark., 47; *Town of Uriah v. Uriah Water Co.,* 142 Cal., 173; *Nickerson v. Bridgeport Hydraulic Co.,* 46 Conn., 24; *Holloway v. Macon Gaslight and Water Co.* (Ga.), 64 S. E., 330; *Bush v. Artesian, etc., Water Co.,* 4 Idaho, 618; *Davis v. Clinton Waterworks Co.,* 54 Ia., 57; *Becker v. Keokuk,* 79 Ia., 419; *Peck v. Sterling Water Co.,* 118 Ill. App., 533; *Rostan v. Chicago,*

163 Ill. App., 63; *Fitch v. Seymour Water Co.*, 139 Ind., 214; *Mott v. Cherryvale Water and Mfg. Co.* (48 Kan.), 15 L. R. A., 257; *Allen & Currey Mfg. Co. v. Shreveport Water Co.*, 113 La. Ann., 1091; *Hand v. Brookline*, 126 Mass., 324; *Hone v. Presque Isle Water Co.*, 104 Me., 217; *Wilkinson v. Light, Heat and Water Co.*, 78 Miss., 389; *Howsmon v. Trenton Water Co.*, 119 Mo., 304; *Metz v. Cape Girardeau Waterworks Co.*, 202 Mo., 324; *Eaton v. Fairbury Waterworks Co.*, 37 Neb., 546; *Ferris v. Carson Water Co.*, 16 Nev., 44; *Hull v. Passaic*, 83 N. J. L., 771; *Bush v. Great S. Bay Water Co.*, 82 App. Div. (N. Y.), 427; *Wainwright v. Queens*, 78 Hun. (N. Y.), 146; *Akron Waterworks Co. v. Brownless*, 10 Ohio Cir. Ct. R., 620; *Blunk v. Dennison*, 71 Ohio St., 250; *Lutz v. Tahlequah Water Co.* (Okla.), 36 L. R. A. (N. S.), 568; *Thompson v. Springfield Water Co.*, 215 Pa., 275; *Ancrum v. Camden Water, Light and Ice Co.*, 82 S. C., 284; *Cooke v. Paris Mt. Water Co.* (S. C.), 64 S. E., 157; *Foster v. Lookout Water Co.* (Tenn.), 3 Lea, 42; *House v. Houston Waterworks Co.*, 88 Tex., 233; *Wilkins v. Rutland*, 61 Vt., 336; *Nichol v. Huntington Water Co.*, 53 W. Va., 348; *Britton v. Green Bay Waterworks Co.*, 81 Wis., 48; *Kron v. Antigo* (Wis.), 140 N. W., 41. The cases cited in the note to the Court's opinion are easily distinguishable from this case.

BROWN, J., concurring in result: I recognize the fact that the overwhelming weight of authority, including that of the Supreme Court of the United States, is against the decisions of this Court in the *Gorrell, Fisher,* and *Jones cases, supra,* cited in the opinions in (599) this case. But all three of those cases were decided and the opinions published before the contract in this case was entered into. Those decisions were well known to be the law of North Carolina when the franchise given to the defendant was applied for, and when it was agreed upon and its terms accepted.

Whether those cases were correctly decided or not, they were the accepted law of this State at that time, and upon well established principles entered into and formed a part of the contract under which the defendant operated, unless there is something to be found in the contract excluding such hypothesis.

In referring to this well settled rule of law, *Mr. Justice Walker* says, in *Hill v. R. R.,* 143 N. C., 539: "We adopted that rule in *Long v. Walker,* 105 N. C., 90, where it was held that a former adjudication of the Court in construing a statute or the organic law should stand, when it has been recognized for years, and in such case the principle settled or the meaning given to the statute becomes a rule for guidance *in making contracts,* and also a rule of property, and that it should not be disturbed, even though the conclusion reached may not be satisfactory to the Court at the time the same matter is again presented."

Under the decisions of this Court, the contract was made by the city for the benefit of its citizens, and they had a right to sue on it for a breach thereof.

It was perfectly competent for the defendant to have inserted a clause in the contract excluding such right or providing that the defendant would indemnify and hold harmless the city, or that the city only should sue.

It could easily have been made to appear from the contract, if such was the agreement of the parties, that the defendant was dealing exclusively with the city, and was accountable only to it.

Taking this contract as a whole, there is nothing in it from which we can infer that the city alone must sue for its breach.

Cited: Lowe v. Casualty Co., 170 N. C., 448; *Powell v. Water Co.*, 171 N. C., 295; *McCausland v. Construction Co.*, 172 N. C., 711; *McLaughlin v. R. R.*, 174 N. C., 185; *Wilkins v. R. R.*, 174 N. C., 282, 283; *Howland v. Asheville*, 174 N. C., 752; *Lumber Co. v. Johnson*, 177 N. C., 47; *Small v. Morrison*, 185 N. C., 578; *Shaw v. Handle Co.*, 188 N. C., 236; *Newbern v. Hinton*, 190 N. C., 111; *Mabe v. Winston-Salem*, 190 N. C., 488; *Brick Co. v. Gentry*, 191 N. C., 639; *Lumber Co. v. Lawson*, 195 N. C., 845; *Foundry Co. v. Construction Co.*, 198 N. C., 179; *Hubbard v. R. R.*, 203 N. C., 678.

JENKINS BROTHER SHOE COMPANY v. E. L. TRAVIS AND WILLIAM T. LEE.

(Filed 14 April, 1915.)

Corporation Commission—Corporate Acts—Ministerial Duties—Individual Members—Mandamus.

The Corporation Commission acts as a body and in a corporate capacity, and an action or proceeding to compel that body to perform its ministerial duties must be brought against it in that capacity and not against its members, for its functions are not individual or personal, but corporate. Hence *mandamus* to compel the refund of taxes alleged to have been paid under an excessive valuation of property will not lie against two of the commissioners, as individuals.

(600) APPEAL by plaintiff from *Lyon, J.*, at September Term, 1914, of FORSYTH.

Plaintiff, a corporation having its residence in Winston-Salem, N. C., where it conducts its business and has real and personal property of a tangible nature, applied to the board of commissioners of Forsyth County to correct and reduce the valuation of said property, because it was excessive. The application was granted in proceedings taken under

sections 78 and 79 of the Machinery Act (Public Laws of 1913, ch. 203), a certificate as to the reduction in value of the property and as to nt of the tax to be refunded was made out by the clerk of the ier its seal, it being $302.07 as to county taxes and $79.49 as taxes. The county refunded its share, and demand was made ne State Tax Commission to have refunded the $79.49, which was xcess collected by the State, and to issue a proper warrant therefor, ch the Commission has failed to do. Plaintiff asks for a *mandamus* compel the Commission to perform its "ministerial duty" in compliance with the law. The suit was brought, not against the State Tax Commission, but against two of the individuals at present composing that body, Hon. E. L. Travis and Hon. William T. Lee, the reasons for not joining the third, Hon. George P. Pell, being that he has consented to issue the warrant and otherwise to comply with plaintiff's demand.

Defendants demurred upon the grounds:

"1. This action is brought against the defendants individually, but the complaint does not state, or purport to state, any cause of action against them as individuals. The alleged cause of action attempted to be stated is against the defendants in their official capacity as State Tax Commissioners.

"2. Even if the action be considered as against the defendants in their official capacity as State Tax Commissioners, no cause of action is stated against them as such, in that:

"(*a*) Section 79 of the Machinery Act, referred to in section 1 of the complaint, has application to the assessment of the property of persons, as distinguished from corporations, and even in those matters the action of a board of county commissioners is subject to supervision and review by the State Tax Commission and may be by them disapproved and overruled, under the general powers conferred by section 3 of the Machinery Act. That the warrant provided for in said section 79 is to be issued by the State Tax Commission only when, in the exercise of their supervisory discretion, they approve, and do not overrule, the action of the board of commissioners.

"(*b*) The plaintiff, being a corporation, as distinguished from (601) a person, the value of its capital stock was originally assessed by the State Tax Commission under section 43 of the Machinery Act and certified to the State Auditor. Its State taxes were properly computed on this assessment, and required to be paid direct to the State Treasurer. The county commissioners have no power to change, and it is not alleged that they attempted to change, this assessment, which was in no way affected by a change in the local assessment of its tangible property. Section 46 of the Machinery Act requires plaintiff also to pay its county,

township, and city taxes on this assessment, and the alleged action of the board of commissioners in granting a refund of their county taxes, without a reduction of this assessment of their capital stock by the State Tax Commission, was illegal and unauthorized.

"(*c*) That the alleged duty which it is sought to have defendants to perform as officials is not ministerial, but involves the exercise of their judgment and discretion as officials."

The court, Hon. C. C. Lyon, presiding, sustained the demurrer, and from the judgment plaintiff appealed.

Alexander, Parrish & Korner for plaintiff.
Watson, Buxton & Watson for defendants.

WALKER, J., after stating the case: This case, but for a defect of parties, would present some very important and serious questions as to the proper procedure for reducing excessive valuations and refunding any amount due the taxpayer by reason thereof, and as to the jurisdiction and supervisory powers of the State Tax Commission, which body was created by chapter 203 of the Public Laws of 1913, known as the Machinery Act, with certain well-defined powers and capabilities. The duty of acting in regard to the refund of taxes overpaid is conferred, by sections 78 and 79 of the said act, upon it as a body, in its corporate capacity, and not upon its individual members, and any action or proceeding to compel that body to perform its ministerial duties must be brought against it in that capacity, and not against its members, for this function is not individual or personal, but corporate. It is the same in the case of this body as it is with respect to the board of county commissioners, and we have held that, in the latter case, all actions or proceedings by or against a county should be brought in the name of the board of county commissioners as a corporate body, and not against the individuals composing the board, who can be proceeded against only when there has been disobedience of the process issued to the board by the court. *Askew v. Pollock,* 66 N. C., 49. It was expressly held in *Thomas v. Comrs.,* 66 N. C., 522, that a writ of mandamus against commissioners of a county should run against them as "a board," and not against the individual members of the board. It is called a body
(602) politic and corporate because all the persons are merged or made into a body and, as such alone, have the capacity to take, grant, sue and be sued, by and in the corporate name, which is a means of identification of the body and an essential incident to the corporate life and action. Bacon Abr., title "Corporations" C.; 1 Blackstone Com., 474-5; 10 Coke Rep., 28; 28 Cyc., 120. Speaking of the corporation,

its nature and character, as a distinct entity and creation of the law, and as something having an existence separate and apart from that of its members, Blackstone, vol. 1, at p. 468, gives the familiar illustration: "For all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law—a person that never dies—in like manner as the river Thames is still the same river though the parts which compose it are changing every instant." So it comes to this, that the plaintiff, if it desired to enforce its right, if it has any, should have proceeded against the corporate entity or governmental agency charged with the duty, as it alleges, of affording relief, and not against the persons, or a part of them, composing it. There is a very interesting discussion of the duties, powers, and supervisory jurisdiction of the State Tax Commission, in regard to all matters of taxation, to be found in the defendants' brief, but having decided that the action was improperly brought, it is not necessary to make any further reference to it. There was no error in the judgment of the court.

Affirmed.

L. R. BURCH v. S. H. SCOTT, M. A. PENNY, AND THE AMERICAN REALTY AND AUCTION COMPANY.

(Filed 14 April, 1915.)

1. Contracts, Vendor and Vendee—Equity—Mental Incapacity—Intoxication—Cancellation—Fraud—Ratification—Trials—Issues.

In a suit to set aside a contract for the sale of lands on the ground of mental incapacity of the plaintiff at the time, with evidence that thereafter he paid a part of the purchase price and executed his notes for the balance, an issue as to the mental incapacity of the plaintiff to make the agreement of purchase is insufficient; for in suits of this character equity will afford no relief, in the absence of fraud, or if the complaining party has suffered no disadvantage, or if he has subsequently ratified his acts; and under the circumstances of this case separate and appropriate issues should also have been submitted to the jury. *Cameron v. Power Co.*, 138 N. C., 365, cited and distinguished as an action at law.

2. Contracts—Equity—Cancellation—Intoxication—Fraud—Presumptions.

A presumption of fraud will arise from dealing with a person so intoxicated that his condition is manifest, and a court of equity will afford relief if he is imposed upon.

3. Contracts, Vendor and Vendee—Equity—Intoxication—Mental Incapacity—Evidence.

In a suit to set aside a contract for the sale of lands, to recover a part of the purchase price paid by the plaintiff and to cancel notes given by

him for the balance thereof, on the ground that the plaintiff was mentally incapacitated from drink at the time, an instruction from the court to answer the issue in plaintiff's favor if the jury found that his drunkenness was so excessive as to render him incapable of consent, "or for the time to incapacitate him from exercising his judgment," constitutes reversible error on the alternative proposition, the measure of the plaintiff's disability being such as would incapacitate him from understanding the nature of his act, its scope and effect, or consequences.

HOKE, J., concurs in the result.

(603) APPEAL by defendant Realty Company from *Whedbee, J.*, at October Term, 1914, of WAKE.

Civil action tried upon this issue: "Did plaintiff L. R. Burch, on 8 December, 1913, have sufficient mental capacity to make the contract set out in the pleadings? Answer: No."

Thereupon the court adjudged that certain notes and contract executed by the plaintiff for purchase money of certain lands be canceled, and that he recover from the defendants, the American Realty and Auction Company, the sum of $660, the cash payment made on said land. Defendants appealed.

Percy J. Olive, J. C. Little for plaintiff.
Winston & Biggs for defendant.

BROWN, J. In this action the plaintiff seeks the aid of the Court to set aside and declare void certain notes, and a contract, executed and delivered by him to defendants, and to recover a sum of money paid by him to the defendants, all of which represented the purchase money of certain lands purchased at public auction by the plaintiff from defendants.

The lands were sold at public auction on 8 December, 1913, by the defendant auction company, as the property of the defendant M. A. Penny, the defendant Scott holding a purchase-money mortgage thereon and consenting to the sale.

Scott and Penny contracted with the auction company to advertise and sell the lands under a contract by which the said company practically controlled as well as conducted the sale. The plaintiff became the purchaser and the same day paid $660 cash to the auction company and executed certain notes payable to Scott, secured by a written contract of sale.

(604) The plaintiff alleges that at the time he purchased said land and executed the notes and paid over the cash payment he was in a state of intoxication and did not know what he was doing, "but notwithstanding plaintiff's intoxication, and the knowledge of said defend-

ants that plaintiff was so intoxicated, the said defendants continued to urge said plantiff to consummate said sale by paying a portion of the purchase price and giving his notes for the balance of the said purchase price."

These allegations are denied by the defendants.

It is contended by the defendant that the issue submitted is not determinative of the controversy, and will not support the judgment rendered, as questions raised by the pleadings and material to the inquiry have not been determined. *Bryant v. Ins. Co.,* 147 N. C., 181.

This involves the consideration of the character of this action and the relief sought. It is essentially a suit in equity in which plaintiff seeks to set aside an executed contract. In that respect it differs materially from *Cameron v. Power Co.,* 138 N. C., 365. That was an "action at law" for damages for breach of a contract entered into by the president of the power company, whereby the latter contracted to purchase of the plaintiff an engine. The contract had never been executed and the intoxication of defendant's president who made the contract was pleaded in bar of a recovery. In law the contracts of an intoxicated person are avoided on the ground of incompetency, but in equity they are avoided on the ground of fraud.

There is very respectable authority for the position contended for by the learned counsel for defendant, that equity will afford relief only where the intoxication has been taken advantage of by the other party, or where the intoxicated party has been taken advantage of or been imposed upon. But where the party against whom relief is asked had no knowledge of the intoxication, took no advantage of it, and practiced no fraud, equity will not interfere. 14 Cyc., 1105, and cases cited; *Swan v. Talbot,* 17 L. R. A., U. S., 1066, and notes; *Wright v. Waller,* 54 L. R. A., 440.

A presumption of fraud will arise from dealing with a person so intoxicated that his condition is manifest, and a court of equity will afford relief if the person is imposed upon. *Sprinkle v. Wellborn,* 140 N. C., 163.

As this case is to be tried again, we will not definitely pass upon these questions until the facts are found in response to proper issues. Additional issues should be submitted as to whether the defendants had knowledge of such intoxication, and took advantage of it, and again whether plaintiff, after purchasing the land, afterwards, when recovered from his condition, ratified the purchase with full knowledge by paying the purchase money and executing the notes.

The defendant excepts to that part of his Honor's charge in which he instructed the jury: "If you find from the evidence that the plain-

(605) tiff was drunk at the time of the alleged transactions, and his drunkenness was so excessive as to render him incapable of consent, or for the time to incapacitate him from exercising his judgment, then your answer to the issue should be 'No.'" The objection is to the alternative "or for the time to incapacitate him *from exercising his judgment.*"

The charge of the learned judge was full and generally correct as to what constitutes "mental incapacity," but we think he erred in directing the jury to answer the issue "No" if the drunkenness incapacitated the plaintiff from exercising his judgment, and possibly they were misled. The measure of capacity is the ability to understand the nature of the act in which he is engaged, and its scope and effect, or its nature and consequences; not that the plaintiff should be able to act wisely or discreetly, nor to drive a good bargain. *Cameron v. Power Co., supra; Sprinkle v. Wellborn, supra.*

It is a matter of common knowledge that a person under the influence of liquor is not likely to act with that wisdom and discretion which would be exercised when perfectly sober, for it is a true and trite saying that when "wine is in, wit is out!"

The law does not undertake to relieve a man from contracts made when he is under the stimulus of liquor. It will only afford relief sometimes when it appears that the party seeking it was so drunk that he was destitute of reason and unable to comprehend the nature of the contract and its consequences.

New trial.

PER CURIAM. This disposes of both appeals in this case as to all parties, as ordered.

HOKE, J., concurs in result.

STATE BANK v. CUMBERLAND SAVINGS AND TRUST COMPANY.

(Filed 22 April, 1915.)

Banks and Banking—Bills and Notes—Forged Signatures—Payment by Drawer—Liability of Cashing Bank.

The indorsement on a draft in course of collection by corresponding banks, "All prior indorsements guaranteed," does not give the drawee bank a cause of action against the cashing bank when the name of the drawer has been forged and draft is paid by the cashing bank in good faith, and

thereafter the draft is paid by the drawee bank, for the latter is presumed to know the signatures of its depositors and detect the forgery; therefore the drawee bank may not recover from the cashing bank the amount it has thus paid, upon the allegation that the latter has not acted with reasonable precaution in cashing the draft.

APPEAL by defendant from *Lane, J.*, at November Term, 1914, (606) of SCOTLAND.

Russell & Weatherspoon for plaintiff.
Walter H. Neal for defendant.

CLARK, C. J. The complaint alleges that the defendant, a bank in Fayetteville, cashed a check, purporting to be drawn by the Wade Trading Company on the plaintiff bank in Laurinburg, and purporting to be indorsed by D. C. Jackson, but that the signature of the said drawer and said indorser were forged, and that thereafter in the course of business the said forged check was sent through a bank in Wilmington to the plaintiff with the indorsement, "All prior indorsements guaranteed," and that it was the custom and practice to take such checks relying upon the exercise of due prudence and diligence on the part of the bank which first cashed the check, and alleging that the signature of the drawer being forged, the defendant should refund to the plaintiff the amount of said check which the plaintiff had paid by reason of the negligence of the defendant bank in failing to use due prudence and diligence in accepting and paying the said check.

The defendant demurred upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The judge overruled the demurrer, and the defendant appealed.

The drawee bank pays a check upon the faith of the genuineness of the signature of the drawer.

"When a drawee pays a check upon which the drawer's signature had been forged, he cannot, upon discovery of the forgery, recover back the amount if the party to whom he paid it was a *bona fide* holder. The drawee is held bound to know the signature of his drawer, and the banker, even more, to know that of his depositor; and if they fail to discover the forgery before payment, they must stand the loss." This is the heading of an extended note to *Bank v. Bank,* 17 Am. St., 890, citing very numerous authorities. This rule seems to have been established by *Lord Mansfield* in 1762 in *Price v. Neal,* 3 Burr., 1355, who said that "It was incumbent upon the drawee to be satisfied of the genuineness of the drawer's signature before accepting or paying the bill, and that if he made a mistake it was his neglect or misfortune and not that of the drawer."

In *Bank v. Bank,* 10 Wheaton, 33, decided in 1825, *Mr. Justice Story,* referring to *Price v. Neal, supra,* said: "After some research we have not been able to find a single case in which the general doctrine thus asserted has been shaken or even doubted." A proposition of mercantile law considered beyond question as correct by *Mansfield* and *Story* must be deemed settled unless changed by statute.

(607) In *Bank v. Bank,* (Tenn.) 112 Am. St., 1817, it is held: "It is negligence for a bank to pay a forged check drawn on it in the name of one of its customers whose signature is well known to it, where the cashier does not examine the signature closely, which would have disclosed the forgery, but is thrown off his guard by indorsements on the paper. An indorser of a check does not warrant to the drawee, but only to subsequent holders in due course the genuineness of the signature." This last proposition seems to be now the well settled law, though there were some earlier decisions which would seem to indicate a liability on the part of the indorser who negligently pays a check without fully satisfying itself as to the genuineness of the signature of the drawer. The proposition which now obtains, almost universally, is thus laid down in *Howard v. Bank,* (La.) 26 Am. Reports, 105: "The drawee of a bill is presumed to have better knowledge of the signature of the drawer than the holder, and where a bank cashed a draft and afterwards collected of the drawee, and the draft was a forgery, the drawee cannot recover the amount paid from the bank to which it was paid, though the latter received the draft from an unknown holder without requiring his indorsement."

In *Bank v. Savings Inst.,* 62 Barb., 101, and *Bank v. Boutell,* 27 L. R. A., 635 (*s. c.,* 51 Am. St., 519), it is held: "The holder of a check or draft presenting it to the drawee for payment owes it no duty to inquire into the genuineness thereof. The drawee bank has no right to assume that the holder has made such investigation. Failure of a bank to follow the usage or practice adopted for its own security of requiring proof of the payee's identity before receiving on deposit the check drawn on another bank does not excuse the drawee bank from its duty to examine its customer's signatures to checks presented by another bank or other holder in due course." See, also, numerous citations 10 L. R. A. (N. S.), 57-59.

The same proposition is fully discussed and held in *Bank v. Bank,* (30 Md.) 96 Am. Dec., 567, and notes, a very carefully considered case. In *Howard v. Bank,* (28 La.) 26 Am. Reports, 105, it is held, as above stated, that the drawee of a bill is presumed to have a better knowledge of the signature of the drawer than the holder.

In Morse Banks (4 Ed.), sec. 463, it is said, quoting many cases: "A bank cannot recover money paid on a forgery of the drawer's name from the person to whom it was paid. The bank is bound to know the signature of the drawer." Morse, *supra,* cites, among other authorities, *Bank v. Bank,* 10 Vt., 141, which was exactly like the present case in that the signature of the drawer was forged, and the drawee bank in action against the cashing bank asked for instructions that if the jury should find that the cashier of the purchasing bank received the check, without due circumspection or the exercise of due diligence in ascertaining its genuineness, or the title of the person presenting it, the (608) drawee bank was entitled to recover; but the Court held that it was only necessary that the cashing bank should appear to have received the check in ordinary course of business and in good faith.

In 5 Cyc., 541, there is quoted in the notes the following proposition: "A factor who has received drafts from his principal drawn on him, which have been discounted by a bank, and he has paid them, must stand the loss of those which are discovered to be forgeries."

The latest and fullest discussion of the subject will be found in 3 Ruling Case Law, sec. 244, with full citations of the more recent authorities. The law is thus summed up: "Where a bank receives in good faith for collection a check upon another bank, the signature of the drawer of which is forged, and receives payment and pays over the proceeds to its customer, the drawee bank cannot recover from the collecting bank the money so paid to it. In order, however, that the collecting bank may claim protection, it must have been a *bona fide* holder; but the mere fact that the collecting bank receives the check from a stranger does not itself prevent it from claiming protection as a *bona fide* holder."

Where the cashing bank acts in good faith the drawee cannot recover the amount which it has paid on the forged check. The drawee should know the signature of the drawer, its own depositor, better than the holder. The drawee cannot plead a custom that would entitle it to pay such draft without the signature being genuine.

The demurrer should have been sustained.

Reversed.

Cited: Holloway v. Barbee, 203 N. C., 716.

THOMAS SNIDER, ADMINISTRATOR OF ADDIE SNIDER, v. CITY OF HIGH POINT.

(Filed 22 April, 1915.)

Municipal Corporations—Cities and Towns—Governmental Duties—Health—Negligence—Personal Injury—Damages.

Negligent acts of the employees of a municipality which cause personal injuries are not ordinarily actionable against the city, when done in pursuance of authority conferred on the city by law for the public benefit; and where such employees have collected trash and garbage from the premises of its citizens, and burn the trash on the city lot, and the dress of a child left with other children on the lot, catches fire, resulting in her death, the negligence of the employees in charge, if any, arises from the performance by the city of a governmental function for the preservation of health, and there being no statutory liability imposed upon the city in such matters, it cannot be held to respond in damages in an action to recover them. *Hines v. Rocky Mount*, 162 N. C., 409, where the wrongful acts are held to amount to a taking of private property in injuring the value of lands, etc., cited and distinguished.

WALKER and ALLEN, JJ., concur in result.

(609) APPEAL by plaintiff from *Devin, J.*, at December Term, 1914, of GUILFORD.

Civil action. There was evidence tending to show that, on 6 June, 1914, the intestate, a child between 9 and 10 years old, while playing around a trash pile which had been fired by employees of defendant, caught on fire and was so severely burned that she died the following day; that the agent and employees of defendant, by permission of the owners, were engaged in hauling the trash, refuse, and garbage from the city, consisting of paper, rags, beef bones, rotted potatoes, bananas, etc., out on a 40-acre tract of land within the corporate limits of the city of High Point, and setting fire to same.

On the occasion in question there were several children near where the pile was fired, including the intestate and others about the same age; and the man, Ephraim Davis, who was doing the work, having set fire to the trash, went on back to the city, leaving these children at or near the pile, and the clothing of intestate caught and she was burned, as stated; that the 40 acres was posted land, and the trash was dumped somewhere near the center and about 200 yards, in direct line, from home of plaintiff, and with a field, fence, and deep ravine between, and that it was 300 yards from any public road, but a path, leading from plaintiff's house, in an indirect way, ran near the pile.

On motion entered in apt time, there was judgment of nonsuit, and plaintiff excepted and appealed.

T. B. Galloway and John A. Barringer for plaintiff.
Peacock & Dalton and Brooks, Sapp & Williams for defendant.

HOKE, J., after stating the case: On perusal of the facts in evidence there may be some question as to the existence of negligence on the part of defendant's employees; but if this be conceded to plaintiff on account of his evidence tending to show that there were several young children near the pile at the time the same was fired, we think the judgment of nonsuit must be sustained because the acts complained of were in pursuance of authority conferred by law for the public benefit, and comes within the principle that unless a right of action is given by statute a municipality may not be held liable to individuals for failure to perform or negligence in performing duties which are governmental in their nature. *Keenan v. Comrs.*, 167 N. C., 356; *Harrington v. Greenville*, 159 N. C., 632.

In *Keenan's case, supra,* an action for wrongful trespass upon realty, *Associate Justice Brown,* delivering the opinion, said: "Can the action be maintained against the county for the tort of its offi- (610) cials? 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," citing *White v. Comrs.*, 90 N. C., 437; *Jones v. Comrs.*, 130 N. C., 452; *Hitch v. Comrs.*, 132 N. C., 573. And in *Harrington's case, supra,* the Court said: "It is well recognized with us that unless a right of action is given by statute, municipal corporations may not be held civilly liable to individuals for 'neglect to perform or negligence in performing duties which are governmental in their nature,' and including generally all duties existent or imposed upon them by law solely for the public benefit," citing *McIlhenney v. Wilmington,* 127 N. C., 146; *Moffitt v. Asheville,* 103 N. C., 237, and *Hill v. Charlotte,* 72 N. C., 55.

The city of High Point, by its charter, Laws 1907, ch. 395, sec. 5, is invested with the power and charged with the duty to enact and enforce "all ordinances necessary to protect the health, life, and property of its citizens; to prevent and summarily abate and remove nuisances; to preserve and enforce good government, order, and security of the city, and to protect the lives, health, and property of all its inhabitants," and recurring to the evidence as to the character of this trash pile, the acts of defendant's agents come clearly within the purview of the authority thus conferred and the principles of the decided cases on the subject.

True, in some recent decisions of the Court, as in *Donnell v. Greensboro,* 164 N. C., 330; *Hines v. Rocky Mount,* 162 N. C., 409, recoveries against the municipality were sustained, but this was by reason of wrongful acts, which were held to amount to a "taking of the property and coming within the constitutional principle that a man's property may not be taken from him either for a public or private purpose except on compensation made pursuant to law.

The more general principle, with the suggested limitations upon it, is stated in *Hines' case, supra,* as follows: "Where a municipality, acting in accordance with the authority conferred by its charter, and for sanitary purposes, organizes, through its proper officers, and directs a general cleaning up of the town, and in thus acting attempts to fill up a large hole in an unimportant street, partly to get trash and rubbish out of the way and partly for the better use of the street, and a suit is brought for damages against the city for the creation of a nuisance, alleging that garbage refuse, causing foul stench and odors, was thrown into this hole, causing sickness, etc., to the plaintiff and his family residing near. *Held:* The acts complained of were governmental in their character.

"2. The principle that a city may not be held liable in damages for its authorized acts of a governmental character which create a (611) nuisance is subject to the limitation that neither a municipality nor other governmental agency is allowed to establish and maintain a nuisance, causing appreciable damage to a private owner, without liability to the extent of the damage done to his property; for such is regarded and dealt with as a taking or appropriation of the property, to the extent of the damage thereto, and such an interference with the rights of ownership may not be made or authorized except on compensation first made pursuant to law.

"3. The principle upon which a recovery may be had of a municipality for damages arising from a nuisance caused by it in the exercise of a governmental function applying only to instances that amount to a taking of private property for a public use, the damages recoverable are restricted to the diminished value of the land, and do not include damages by reason of sickness, etc., caused by such nuisance to the owner or his family, considered as a direct element thereof."

And applying these principles, the order of nonsuit must be sustained, the facts showing, as stated, that the acts complained of were in the "performance of duties existent or imposed by law solely for the public benefit."

Affirmed.

WALKER and ALLEN, JJ., concur in result.

Cited: Price v. Trustees, 172 N. C., 85; *James v. Charlotte,* 183 N. C., 632; *Carpenter v. R. R.,* 184 N. C., 406; *Sandlin v. Wilmington,* 185 N. C., 260; *Scales v. Winston-Salem,* 189 N. C., 471; *Jenkins v. Griffith,* 189 N. C., 634; *Parks-Belk Co. v. Concord,* 194 N. C., 135; *Broome v. Charlotte,* 208 N. C., 730.

ROY SHAW v. NORTH CAROLINA PUBLIC-SERVICE CORPORATION.

(Filed 14 April, 1915.)

1. Electric Companies—Supervision—Negligence — Trials — Evidence — Nonsuit.

The plaintiff was employed in a foundry, and for the purpose of seeing how to clean out molds, which was a part of his employment, he was required to hold in his hand an electric light or bulb, connected with the current of electricity furnished by the defendant over its wires and equipment to his employer, and though he had been accustomed to doing this for several years without harm or injury to himself, on the occasion complained of he was suddenly and without warning shocked into insensibility and permanently injured, with evidence that the shock was far in excess of the voltage contracted for by his employer, and caused by a defect in a transformer on defendant's pole on the outside of the building used for lessening the voltage before supplying it to the employer; that the company owned and had sole management and control of the lighting, wiring, and appliances on the outside of the building, and that it had failed in its duty to properly inspect the same and keep them in proper condition. *Held:* Upon a motion to nonsuit, considering the evidence in the most favorable view for the plaintiff, the issue as to defendant's actionable negligence was for the determination of the jury. The charge in this case is approved.

2. Trials—Instructions—Requested Prayers—Appeal and Error.

A charge of the court given in response to appellant's request affords him no proper ground for exception on appeal.

3. Same—General Charge.

The refusal to give appellant's instructions in the language of the requests is not erroneous, if it appears that the judge has substantially given them in his own language in the general charge without weakening their legal force and effect, for a substantial compliance therewith is sufficient.

4. Electricity—Negligence—Inspection—Res Ipsa Loquitur.

A corporation which supplies electricity for lighting purposes deals in such a deadly instrumentality as to hold it to the highest degree of care in the supervision of its wires and appliances in connection therewith; and where there is evidence that an injury was received by an employee of its customer in using or handling an electric light or bulb in the course

of his employment, due to a defective transformer of the company, which had not theretofore occurred under the same circumstances, it is sufficient to take the case to the jury upon the question of the defendant's actionable negligence in failing to properly inspect its wires and appliances; and also for the application of the doctrine of *res ipsa loquitur*, the conditions causing the injury being exclusively within its control.

5. Same—Presumptions—Knowledge of Defendant.

Where an employee in a foundry has been injured by an unusual shock in using an electric light or bulb in the course of his employment, caused by a voltage much in excess of that an electric company was supplying under a contract with his employer, and the company used a transformer on one of its poles to reduce the voltage from that carried by the wires before supplying the building, the electric company being sued for the consequent damages may not avoid liability on the ground that there was no evidence shown that its transformer was defective, for the facts being peculiarly within its own knowledge, it must show that it had used the care required of it, or take the risk of an adverse verdict.

6. Trials—Evidence—Principal and Agent—Corroboration.

Held: In this case that a hypothetical question asked an expert witness was correctly framed upon the evidence; that a question asked was admissible for the purpose of contradiction or impeaching the credibility of a witness; and that certain other testimony was competent as not falling within the rule relating to declarations or statements of an agent after the fact.

(612) APPEAL by defendant from *Lyon, J.*, at January Term, 1915, of GUILFORD.

The defendant is a corporation engaged in the business of furnishing electricity to the inhabitants of the city of Greensboro for lighting purposes, and, as such, it contracted with the Cook-Lewis Foundry
(613) Company to supply it with electricity for said purpose, the current not to exceed 119 volts. Plaintiff was employed by the Cook-Lewis Foundry Company as an apprentice in the molding department of its business, and was, besides, learning the trade of molding. On 15 July, 1914, while in the performance of his duty of cleaning out molds, the plaintiff was required to use and hold in his hand an electric lamp or bulb attached to a wire cord, which was connected with the current of electricity furnished by the defendant to his employer, and while holding the bulb close to the mold for the purpose of cleaning it, "he was suddenly hurled from his feet with great force and violence, and was knocked unconscious by the electric current fed to the lamp which he was holding," and received serious and painful injuries, which proved to be of a permanent nature, disfiguring his hand and impairing to some extent its usefulness. He alleged that he had used and handled the electric lamp in the same way for several years, without the slightest

harm to himself, and that his injuries were caused by a sudden and considerable increase of the current of electricity by defendant, far in excess of the voltage contracted for by his employer, and that this was the result of a defect in what is known as a transformer, an instrument devised to control the current, by raising or lowering it, and attached to one of defendant's poles in the street near the foundry. It is also charged that this defect was due directly to the negligence of the defendant in not properly inspecting the transformer and keeping it in proper condition, that instrument being wholly within the control and management of defendant and belonging to it. It was also alleged and shown that the increase of the current was so great and it became so energetic and powerful that when one of his coemployees, who had come to his relief, touched his body, he was knocked 10 feet away, and plaintiff could not be separated from the wires until the lever or switch had been turned and the current entirely cut off.

The defendant averred that plaintiff's injuries were not caused by its negligence, but by that of his employer, whose electrical appliances in the foundry were defective and unsafe, and that its transformer was in good condition, as it was examined immediately after the accident by its experts, and found to be in perfect condition and in good working order, and that the real and proximate cause of the plaintiff's injuries, if he sustained any, was that the socket of the lamp which he was handling was defective and not properly insulated; that one of the wires upon the inside of said socket was broken and defective; that the cord from which said socket was suspended had become, through use and age, worn and uninsulated; that the plaintiff, who was standing upon the damp and wet ground, which accelerated or increased the current of electricity, did, by reason of the condition of the ground as aforesaid, and by reason of the defective socket and cord as aforesaid, (614) receive the full voltage of electricity going into the said building, which under the circumstances and conditions above set out is very dangerous and likely to produce injury. That the socket in use in the building of the Cook-Lewis Foundry Company is not the proper socket for the purposes for which it was used, and that it should have been protected by a porcelain or a wooden cover or guard, which is the proper socket covering, when it is to be handled, and especially is this true when the person handling the same is standing upon a damp or wet floor or surface. The defendant further, on information and belief, alleges that the electrical wiring and appliances had been installed in the building of the Cook-Lewis Foundry Company many years prior to the alleged injury to the plaintiff, as set out in his complaint, and that during all these years the said wiring and appliances had never been

inspected by the Cook-Lewis Foundry Company or by any one for it. That had an inspection been made of said wiring and appliances, the defects as hereinbefore set out could and would have been readily detected. Defendant also averred that the foundry company had furnished its own electric appliances inside its building, and had full charge and control of the same.

There was evidence to support the respective contentions of the parties. The jury found that plaintiff was injured by the negligence of defendant, and assessed his damages at $4,000. From the judgment upon the verdict, the defendant appealed.

C. C. Frazier and R. C. Strudwick for plaintiff.
J. I. Scales for defendant.

WALKER, J., after stating the case: The case seems to have been reduced practically to a question of fact, whether the plaintiff's injuries were due to the defective transformer or to the defective incandescent lamp attached to the cord, which he carried in his hands and used for throwing light on the molds, so that he could see how to clean them. The feed wire of the defendant, from which it supplied the current of 119 volts to the foundry, carried as much as 2,300 volts, which is not only a dangerous, but a very deadly current. It appears by strong inference from the evidence that the defective transformer was the cause of the injury, because if it was due to a defect in the lamp, or its socket, it is strange that the accident had not occurred before, as the lamp had been used for a long time for the same purpose and under like conditions. But this question was fairly submitted to the jury, with proper instructions, the burden of proof having been placed upon the plaintiff to establish his cause of action. The court properly overruled the motion for a nonsuit. There certainly was evidence of negligence on the part of the defendant, and the plaintiff was entitled to the (615) most favorable construction of it, upon such a motion. *Brittain v. Westhall,* 135 N. C., 492; *Freeman v. Brown,* 151 N. C., 111; *Lloyd v. R. R.,* 166 N. C., 24. The court told the jury that if the accident was due to a defect in the extension cord or in the socket, plaintiff could not recover, and they should answer the issue accordingly, but that if it was, on the contrary, due to a defect in the transformer caused by the negligence of the defendant, their verdict should be the other way. The charge was full, direct, and intelligible, and instructed the jury strictly in accordance with previous decisions of this Court in like cases. Most of the charge, or at least a large part of it, was given at the request of the defendant, and covered the case in all material respects. There is,

therefore, no ground for complaint left to the defendant as to this part of the charge, which was responsive to its own requests for instructions. But it is stated that the court refused to give its third and thirteenth prayers. If the defendant was entitled to have them given as they were framed, which is doubtful, the court gave them substantially in its general charge, and the defendant received the full benefit of the principles of law they embodied. It is not required that they be given in their very language, but the judge can modify the phraseology and use his own language, provided he does not thereby weaken their legal force and effect. A substantial compliance with a request to charge is sufficient, as we have often held. *Rencher v. Wynne,* 86 N. C., 269; *Graves v. Jackson,* 150 N. C., 383. If the general charge of the court is examined with the utmost scrutiny, nothing will be found therein that militates against the law of the case. It was correctly and amply stated throughout.

But the defendant urges that if the injury was caused by a defect in the transformer, whereby a strong and deadly current was sent into the foundry, even in violation of the stipulation of the contract that it should not exceed 119 volts, it has not been shown that the defective condition of the transformer was due to its negligence, as there is no evidence that it knew of such condition before the accident occurred and in time to prevent it. While there may be no evidence that it actually *knew* of it, there is some evidence that it should have known of it, and would have known of it if it had exercised proper care and diligence in respect to it. There are two answers to this contention: (1) Where it appears on the trial of a case that a certain fact, especially if defensive or exculpatory in its character, is peculiarly within the knowledge of the defendant, his failure to give to the jury the benefit of such knowledge, when, were the facts in his favor, he would naturally do so, is a sufficient circumstance to justify the inference that the fact is, in truth, against him; and if he wishes to avoid this inference being made, he should proceed or go forward with his proof. McKelvey on Ev., p. 71, and cases in note 11. He is not concluded by his silence, (616) but he leaves it open for the jury to decide the fact against him, or, in other words, he exposes himself to an adverse finding as to the facts. (2) We have very recently had occasion to discuss and decide the question as to when it may be necessary for one of the parties to proceed with his proof, if he would not take the risk of a disappointing or unfavorable verdict. We said in *Ridge v. R. R.,* 167 N. C., 510: "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 such care. *Ellis v. R. R.*, 24 N. C., 138; *Aycock v. R. R.*, 89 N. C., 321 (sparks falling on right of way); *Stewart v. Carpet Co.*, 138 N. C., 60, and *Womble v. Grocery Co.*, 135 N. C., 474 (elevator cases); *Ross v. Cotton Mills*, 140 N. C., 115, and *Morrisett v. Cotton 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., 238 (where sparks flew from the engine, as in the *Aycock case, supra*); and numerous other like cases which the present *Chief Justice* has collected in a note to the *Aycock case, supra* (Anno. Ed.), at marg. p. 331." We then referred to *Sweeney v. Erving*, 228 U. S., 233 (citing and quoting with approval from *Stewart v. Carpet Co., supra*), to this effect: "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking; but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they 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."

(617) Now we understand what the rule is and its extent. If a thing happens which ordinarily does not occur if due care is used, it is not only a natural but a common-sense inference that there must have been a lack of such care. It is only *prima facie* and does not necessarily establish a want of care, but is some evidence of it for the jury to consider; and in this sense of the term, *res ipsa loquitur*, it is a question for the defendant, or the party against whose interests the inference may be drawn, to consider whether he will take his chance before the jury

without explanation of the unusual circumstance, or whether, especially if the fact be otherwise than the situation and circumstances imply, he will proceed to explain it by proof that there was no negligence, or that, if there was, it was not his negligence. In *Haynes v. Gas Co.*, 114 N. C., 203, *Justice Burwell* (quoting from Whitaker's Smith on Negligence, 423), said: "If the accident is connected with the defendant, the question whether the phrase *res ipsa loquitur* applies or not becomes a simple question of common sense." And again, speaking of an electric wire which was trailing in a street of the city of Raleigh, he said: "Guided by the principle announced in these cases, we come to the conclusion that this plaintiff should have been allowed to say to this defendant: 'The wire you put in the street killed my son while passing along the highway, as he had a right to do. If you are not in default, show it, and escape responsibility.'" He did not mean to lay down the broad principle that this was an affirmative defense—the nonexistence of negligence—but that the circumstances pointed to the defendant as the responsible party, and as he had peculiar knowledge of the facts, fairness and justice required that he should come forward and give some explanation if he was not in fault, or his failure to do so might afford some proof to the jury in confirmation of the *prima facie* case and deepen their conviction of his guilt. *Turner v. Power Co.*, 154 N. C., 131. The *Haynes case, supra,* also decides that an electric company must use the highest degree of care in protecting persons against the deadly agency which they handle in their business. But this proposition is more fully stated in *Mitchell v. Electric Co.*, 129 N. C., 166: "The defendant company was engaged in the business of manufacturing, producing, leasing, and selling light made from the use of electricity, which is the most deadly and dangerous power recognized as a necessary agency in developing our civilization and promoting our comfort and business affairs. It differs from all other dangerous utilities. Its association is with the most inoffensive and harmless piece of mechanism, if wire can be classified as such, in common use. In adhering to the wire, it gives no warning or knowledge of its deadly presence; vision cannot detect it; it is without color, motion, or body; latently and without sound it exists, and being odorless, the only means of its discovery lies in the sense of feeling, communicated through the touch, of a per- (618) son, which as soon as done, he becomes its victim. In behalf of human life and the safety of mankind, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition." This was approved by us in *Hicks v. Tel. Co.*, 157 N. C., 519. See, also, *Turner v. Power Co., supra;*

Fisher v. New Bern, 140 N. C., 506; *Houston v. Traction Co.,* 155 N. C., 4; *Harrington v. Wadesboro,* 153 N. C., 437; *Starr v. Telephone Co.,* 156 N. C., 435; *Benton v. Public-Service Corporation,* 165 N. C., 354.

The maxim *res ipsa loquitur* applies in many cases, for the affair speaks for itself. It is not that in any case negligence can be assumed from the mere fact of an accident and an injury, but in these cases the surrounding circumstances which are necessarily brought into view, by showing how the accident occurred, contain without further proof sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof that the injured person is able to offer or that it is necessary to offer." Sh. and Redf. on Neg., sec. 59. The case of *Turner v. Power Co., supra,* seems to be "on all-fours" with this one, as the facts of the two cases are strikingly alike. It was there held, approving *Electric Co. v. Lawrence,* 31 Col., 308, that while a corporation furnishing electric light to others for private gain may not be regarded as an insurer, it owes its patrons the duty to protect them from injury by exercising the highest skill, most consummate care and caution, and utmost diligence and foresight in the construction, maintenance, and inspection of its plant and appliances which is attainable, consistent with the practical operation of its plant. This doctrine is well sustained, not only by our own cases, but by many in other jurisdictions. What the Court said in *Electric Co. v. Letson,* 68 C. C. A., 453, quoted and approved by this Court in *Houston v. Traction Co., supra,* is a full and complete answer to defendant's contention, although we are not required to assent to the whole of it in order to use it as an authority: "The contention of the company amounts to this: That if the wires were properly installed, it cannot be held responsible for their being out of repair, unless it is proved that they got out of repair through its own fault. But this loses sight of the duty of the company not only to make the wires safe at the start, but to keep them so. They must not only be put in order, but kept in order. The obligation is a continuing one. The safety of patrons and the public permits no intermission. Constant oversight and repair are required and must be furnished. Customers who contract for a harmless current to light their houses are entitled to rely upon such inspection and repairs as will effectually guard
(619) them against a dangerous current. They cannot guard themselves. Any attempt to do so would expose them to immediate peril. They must take and use the current on trust, relying upon the protection of the company. In view of this, when a deadly current enters a customer's house and kills him, it is not too much to call the company to explain the existence of the defect which caused the tragedy." We see from these

references, and they might be greatly multiplied, that those who use and control so dangerous and subtle an agency as electricity in their commercial pursuits must not be permitted to theorize in regard to its probable effects or speculate upon chances as to results, when the danger to human life is so great and may be so disastrous. It is not too much to require of them the highest practicable degree of care and vigilance in the management of their appliances which carry and conduct this deadly current, for no ordinarily prudent man would bestow less in such circumstances. If it raises expenses to be more watchful and cautious than in ordinary cases where there is no such dangerous agency employed, and thereby profits are reduced, it is far better that it be so than that the toll of human life be alarmingly increased.

While the dealer in electricity may not be an insurer of safety in its use by customers, and other persons coming in contact with it, the care exacted by the law is raised to the highest degree in order to be commensurate with the great danger involved and to safeguard the public. All authorities agree that there must be frequent, if not constant, inspection, and unremitting vigilance, and in this case there is evidence from which the jury could infer that, in this respect, the defendant had failed in its duty; and if it really had not, it should have come forward with the proof that the defect in the transformer (for the jury have evidently found that *it* was defective, and not the socket or cord of the lamp) was not discovered in time to repair it after having made the inspection which the law required, or that it was not discoverable and that the accident occurred without its fault, or was unavoidable by the exercise of the highest degree of care. This was not shown, and in its absence the defendant cannot complain of the verdict, for it was warranted by the evidence as it stood.

The defendant had contracted to furnish a current not exceeding in power 119 volts, and as plaintiff had no control or supervision of the transformer, he could not be expected to know whether it was in order or not. It was in the sole charge of the defendant, upon whom alone rested the duty of inspection and to whom only was it accessible for such purpose. Proper care would, ordinarily, have kept it in good condition and prevented the injury, and defendant alone knew whether that care had been used or whether the injury was due to something beyond its control, a latent or undiscoverable defect, or inevitable accident. The situation surely called for some rational explanation.

The questions to the expert were correctly framed upon the (620) facts in evidence, and properly submitted. *Summerlin v. R. R.*, 133 N. C., 551; *Parrish v. R. R.*, 146 N. C., 125. The question put to defendant's witness, C. E. Scott, was competent for the purpose of con-

tradiction or to impeach his credibility, even if not to show a change in the appliance, as substantive evidence of negligence, under the rule stated in *Lowe v. Elliott,* 109 N. C., 581; *Myers v. Lumber Co.,* 129 N. C., 252; *Aiken v. Mfg. Co.,* 146 N. C., 324. The evidence of the declaration of Scott was competent for the same reason, and does not come within the rule excluding the statements of agents made after the fact.

The court distinctly instructed the jury in its general charge, and also in response to defendant's prayer, using its own language, that defendant would not be liable if the injuries were caused by a defective cord or defective socket, and if they found that to be the case, they should answer the first issue, as to negligence, "No," and that they could only answer it "Yes" if they were caused by the transformer, which defendant negligently permitted to be defective or out of order.

While we have stated that defendant cannot complain of the charge, so far as it assumed that, if the plaintiff's injuries were caused wholly or in part by a defective cord or socket attached to the incandescent lamp, the defendant would not be liable, because if that assumption was correct, the charge in respect thereto was without error, we do not wish to be understood as passing upon the question of defendant's liability, if there was a defect in the lamp, but leave that open for future consideration. As the charge was in favor of defendant, so far as the defect in the lamp is concerned, if the assumption was erroneous there was no resultant harm to the defendant, and when we have referred to the charge in this respect as being in accordance with our former decisions, we mean merely that it was correct in so far as it dealt with the general principles of negligence, as declared in previous decisions of this Court. Our conclusion in this case is based entirely upon the defect in the transformer. Besides, the jury have evidently found, under the charge, that there was no defect in the lamp. The charge as to the measure of damages was correct.

No error.

Cited: Cochran v. Mills Co., 169 N. C., 63; *Collins v. Casualty Co.,* 172 N. C., 546; *West v. R. R.,* 174 N. C., 131; *Holt v. Mfg. Co.,* 177 N. C., 179; *Page v. Mfg. Co.,* 180 N. C., 334; *McAllister v. Pryor,* 187 N. C., 837; *Michaux v. Rubber Co.,* 190 N. C., 619; *Helms v. Power Co.,* 192 N. C., 787; *S. v. Dowell,* 195 N. C., 528; *Ramsey v. Power Co.,* 195 N. C., 791; *Peters v. Woolen Mills,* 199 N. C., 754; *Small v. Utilities Co.,* 200 N. C., 721; *Dempster v. Fite,* 203 N. C., 708; *Lynch v. Tel. Co.,* 204 N. C., 260; *In re Will of Wilder,* 205 N. C., 432.

(621)

D. F. KING v. DONALD MCRACKAN ET AL.

(Filed 14 April, 1915.)

1. Deeds and Conveyances—Defective Probates—Husband and Wife—Color of Title—Purchasers for Value—Statutes.

Where the husband has failed, as required, to join in a deed to his wife's lands, and the privy examination of the wife has not been taken according to law, the deed may be relied on as color of title.

2. Deeds and Conveyances—Defective Probate—Registration—Purchasers for Value.

The registration of a deed to lands having a defective probate will be dealt with and treated as if unregistered, to the extent that the same may affect registered deeds made to the same lands to purchasers for value, since 1885. Revisal, sec. 979.

3. Same—Recitations—Consideration—Third Persons—Evidence.

One relying upon a registered deed to show title as against a third person claiming the lands by adverse possession under "color" is required to allege and prove that he is a purchaser for value, of which the recital of consideration in his deed is no evidence either as to the amount or that it had been paid, such matter being regarded as *res inter alios acta.*

4. Deeds and Conveyances—Color—Adverse Possession—Added Possession.

Under claim of land under color, the statutory period of possession may be shown by continuity thereof of two or more of those under whom the party claims, so that added together they will be sufficient.

5. Estoppel—Judgments—Parties.

The doctrine of estoppel by judgment will not be applied to one not a party to the action wherein it was rendered.

6. Pleadings—Amendments—Description of Lands—Court's Discretion—Appeal and Error.

An amendment of the complaint, in an action to recover lands, to make the description therein conform to that of the deed under which the plaintiff claims, is not reviewable in this case, there being no evidence that the trial judge had therein abused the discretion reposed in him.

APPEAL by defendants from *O. H. Allen, J.,* at November Term, 1914, of COLUMBUS.

Action to recover land, in which the plaintiff claims title under the following chain of title:

1. Deed from Shade Wooten to his wife, Sarah E. Wooten, dated 4 August, 1880, registered 7 June, 1882.

It was admitted that the defendants claimed title under a deed from Sarah E. Wooten and her husband, Shade Wooten.

2. Deed from Sarah E. Wooten to Jessie D. Wooten, dated 20 June, 1893, registered 30 December, 1893.

The defendants objected to this deed on the ground that it is insufficient to pass the title to the land therein described.

(622) Shade Wooten, the husband of Sarah E. Wooten, did not join in the execution of this deed, nor was the private examination of Sarah E. Wooten ever taken.

3. Deed from Jessie D. Wooten to O. L. Clark, dated 15 December, 1898, registered 1 September, 1906. The defendants objected to this deed.

4. Deed from O. L. Clark and wife, dated 6 February, 1901, to P. Lennon. This deed was registered 4 October, 1906.

The defendants objected to this deed.

5. Deed from P. Lennon and wife to D. F. King, plaintiff, dated 3 October, 1903, registered 30 January, 1905.

The defendants objected to the introduction of this deed.

6. Deed from P. Lennon and wife, dated 6 September, 1904, to D. F. King, registered 30 January, 1905.

The defendants objected to the introduction of this deed.

7. Deed from P. Lennon and wife to D. F. King, dated 31 March, 1905, registered 3 July, 1905.

The defendants claim title under the following conveyances:

1. Deed from Shade Wooten and wife, Sarah E. Wooten, to Arthur Council, dated ..... August, 1906; filed for registration 18 August, 1906, and registered 20 August, 1906.

When this deed was registered the conveyance from Jessie D. Wooten to O. L. Clark, registered 1 September, 1906, Exhibit C, and the deed from O. L. Clark and wife, registered 1 October, 1906, Exhibit D, two links in the plaintiff's chain of title, were not on record.

2. Deed from Arthur Council and wife to J. B. Schulken for an undivided one-third interest in said land, registered 23 September, 1906.

3. Deed from Arthur Council and wife and J. B. Schulken and wife to defendant Donald McRackan, registered 16 February, 1911.

The defendant contends that the deed from Jessie D. Wooten to O. L. Clark and the deed from O. L. Clark to P. Lennon and the three deeds from P. Lennon to D. F. King, while not registered, were not color of title, and the plaintiff D. F. King cannot tack onto his possession, if he had any from the date of registration of his deeds, the possession of his grantor whose deed was not on record, and make up the necessary seven years possession under color of title.

After the execution of the deed by Jessie D. Wooten to O. L. Clark, said Jessie D. Wooten intermarried with Arthur Council, and the deed

from Shade Wooten and wife to the said Council was thereafter executed.

The deed from Jessie D. Wooten to the said Clark was registered prior to the registration of the deed from Arthur Council and wife to J. B. Schulken and prior to the registration of the deed from (623) Council and wife and J. B. Schulken and wife to the defendant McRackan.

The defendants, in addition to denying the title of the plaintiff, relied upon an estoppel by judgment in an action by Arthur Council against Ray and Pridgen, tenants of the plaintiff, to which action the plaintiff was not a party.

There was evidence of seven years adverse possession by Jessie D. Wooten, Clark, and Lennon.

His Honor charged the jury that the deed from Sarah E. Wooten to Jessie D. Wooten was color of title, and the defendant excepted.

His Honor also charged the jury that the possession of Clark and Lennon could be added to the possession of Jessie D. Wooten to make out a seven years adverse possession, and the defendants excepted.

He also charged the jury that the plaintiff was not estopped, and the defendants excepted.

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

Irvin B. Tucker and Manning & Kitchin for plaintiff.

Schulken, Toon & Schulken, Jackson Greer, and Walter Clark, Jr., for defendants.

ALLEN, J. The deed from Sarah E. Wooten to Jessie D. Wooten was considered in *Council v. Pridgen,* 153 N. C., 444, and it was then held that it was not a valid conveyance, on account of the failure of the husband of the grantor to join in its execution and because the private examination of the grantor, a married woman, had not been taken, and as this deed is a necessary link in the plaintiff's title, he must rely on adverse possession under color.

The defendants objected to the introduction of this deed upon the ground that it was neither valid as a conveyance nor as color of title, and to the deeds from Jessie D. Wooten to Clark, and from Clark to Lennon, because they were not registered until after the conveyance to Council, contending that they could not be relied on as color of title until registered.

The deed of a married woman without private examination, if otherwise sufficient, is color of title (*Norwood v. Totten,* 166 N. C., 648), but the rule prevails as to all deeds that if they are placed upon the registry

upon a defective probate they are to be dealt with and treated as if unregistered. *DeCourcy v. Barr,* 45 N. C., 181; *Todd v. Outlaw,* 79 N. C., 235; *Johnson v. Lumber Co.,* 147 N. C., 250; *Smith v. Fuller,* 152 N. C., 7.

We must, therefore, treat the deeds upon which the plaintiff relies as color of title as unregistered.

(624) Prior to the Connor Act of 1885 an unregistered deed was in all cases color of title if sufficient in form (*Hunter v. Kelly,* 92 N. C., 285), but after the passage of that act it was held in *Austin v. Staten,* 126 N. C., 783, that an unregistered deed was not color of title.

The question was again considered in *Collins v. Davis,* 132 N. C., 106, and the ruling in the case of *Austin v. Staten, supra,* was modified so that it only applied in favor of the holder of a subsequent deed executed upon a valuable consideration, and the Court has since then consistently adhered to the latter decision. *Janney v. Robbins,* 141 N. C., 400; *Burwell v. Chapman,* 159 N. C., 209; *Gore v. McPherson,* 161 N. C., 638.

In the *Collins case, supra, Justice Connor,* the author of the Connor Act, says: "The learned counsel for the plaintiff, in an able and interesting argument, asks us to reverse the decision in *Austin v. Staten, supra.* It is not clear that the Legislature intended or contemplated this radical change of the law in this respect. The Court recognizes the fact that the question presented was 'new and important.' We would not be disposed to give to that decision any other or further effect than was necessary in that and other cases coming clearly within the same principle. The proposition as stated by the *Chief Justice* may be broader than was necessary to the disposition of that case, and while we are not disposed to disturb it in so far as we have suggested, we think it well to restate that principle as confined to its application to the case before us.

"We therefore hold that where one makes a deed for land for a valuable consideration and the grantee fails to register it, but enters into possession thereunder and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee in a subsequent deed for a valuable consideration who has duly registered his deed. We use the term 'purchaser for a valuable consideration' in the sense in which it is defined by this Court in *Fullenwider v. Roberts,* 20 N. C., 420, 'A fair and reasonable price according to the common mode of dealing between buyers and sellers,' or, as said by *Pearson, C. J.,* in *Worthy v. Caddell,* 76 N. C., 82, 'The party assuming to be a purchaser for valuable consideration must prove a fair consideration, not up to the full price, but a price paid which would not cause surprise or make any one exclaim, "He got the land for nothing! There must have been some fraud or contrivance about it."'

"Except in cases coming within this rule, the rights acquired by adverse possession for seven years under color of title are not disturbed or affected by the act of 1885."

In other words, the Connor Act has substantially the same legal effect upon deeds that the act of 1819 had upon mortgages and deeds in trust (*Robinson v. Willoughby,* 70 N. C., 358), leaving them, although unregistered, valid as between the parties and as to all others except purchasers for value, and creditors.

It follows, therefore, that the unregistered deeds—and in this (625) class we include the deed of Jessie D. Wooten—were properly admitted in evidence, and could be relied on as color of title, unless it was made to appear that Council, under whom the defendant claims, was a purchaser for value.

We find in the record no allegation that he was a purchaser for value, nor was there any evidence tending to establish this fact, and there was no request for instruction predicated upon the idea that he was such purchaser.

It is true that the deed to Council recites a consideration of $400, but this is only evidence of payment as between the parties, and would not be competent as to the plaintiff. *Tredwell v. Graham,* 88 N. C., 208, in which the Court, speaking of the recital of a consideration as paid, said: "The deed itself, though evidence conclusive as to all matters between the parties, furnishes no evidence of the matters contained in its recitals, as against strangers; for as to them it is strictly *res inter alios acta.*"

There are also facts appearing upon the face of the record which indicate very clearly that Council was not a purchaser for value.

It appears that Jessie D. Wooten intermarried with Council after she had executed her deed to Clark, and that thereafter Shade Wooten and wife conveyed the land to Council, presumably for the purpose of avoiding the doctrine of feeding an estoppel, which might have arisen if the conveyance had been executed to the daughter. The consideration recited in the deed is only $400, which is less than the consideration recited in any other deed appearing in the record, and there is no evidence that that amount has been paid. It also appears that within five years after Council received his deed reciting a consideration of $400 the defendant McRackan sold the land conveyed therein for $8,000, and this discrepancy in value would lead to the conclusion that Council got the land for nothing, and that the payment of the purchase price recited would not have made him a purchaser for value.

It follows that the deeds were properly admitted in evidence, and that they constitute color of title against the defendants, and for the same reason the possession of Clark and Lennon can be added to the possession

of Jessie D. Wooten to make up the period of seven years, and this period was complete before the defendant McRackan acquired his title.

The charge of his Honor as to the estoppel is sustained by the authorities, as the plaintiff King was not a party to the former action. *Falls v. Gamble,* 66 N. C., 455; *LeRoy v. Steamboat Co.,* 165 N. C., 109.

The order of his Honor in permitting an amendment of the complaint so that the description of the land might be made to conform to the deeds is not reviewable, as we find no abuse of the discretion (626) vested in him by law, nor do we think the remarks made by the presiding judge constitute prejudicial error.

There was evidence of an adverse possession for seven years under the deeds, which we have held to be color.

We have considered all of the exceptions raised upon the record, but have not thought it necessary to discuss them *seriatim,* as they are all involved in the questions we have decided.

We find

No error.

Cited: Buchanan v. Hedden, 169 N. C., 224; *Kluttz v. Kluttz,* 172 N. C., 623; *Sanford v. Junior Order,* 176 N. C., 448; *Clendenin v. Clendenin,* 181 N. C., 470; *Bradford v. Bank,* 182 N. C., 229; *Whitten v. Peace,* 188 N. C., 303; *Eaton v. Doub,* 190 N. C., 18; *Rook v. Horton,* 190 N. C., 183; *Anderson v. Walker,* 190 N. C., 829; *Woodlief v. Woodlief,* 192 N. C., 637; *Johnson v. Fry,* 195 N. C., 837, 838; *McClure v. Crow,* 196 N. C., 660, 662; *Capps v. Massey,* 199 N. C., 199.

J. F. HARGRAVE ET AL. V. BOARD OF COMMISSIONERS OF DAVIDSON COUNTY.

(Filed 14 April, 1915.)

1. Counties—Roads and Highways—Necessary Expenses—Constitutional Law—Taxation—Bond Issues.

The construction and maintenance of public roads are a necessary public expense, for which the General Assembly may provide, and create a board therefor distinct from the county commissioners, and fix and authorize a levy of tax therefor, without causing the proposition to be submitted to the vote of the people.

2. Same—Statutes—Power of Courts.

The question as to whether a legislative act, providing for an issuance of bonds, passed in accordance with Art. II, sec. 14, of the State Constitution, sufficiently safeguards the rights of the citizen as to the assess-

ment of damages for land to be taken by the road commission in improveing the roads of a county will not be considered in an action brought by the taxpayer to restrain the commissioners from exercising the authority given them, and can only be raised by the landowner when the occasion occurs.

3. Same—Injunction.

The courts cannot enjoin road commissioners in the performance of their duties in the maintenance, construction, and management of the public roads of the county, under legislative authority, imposed by a statute passed in accordance with Art. VII, sec. 7, of the State Constitution; and the objections to the statute in question that the board is a self-perpetuating body because the members are to fill vacancies, etc., without limitation as to the duration, or responsibility to the people for their acts, etc., or that the members are not subject to removal except upon indictment for misfeasance, and then only for the willful failure or refusal to perform a duty, should be addressed to the lawmaking power, and not to the courts.

4. Courts, Power of—Official Acts—Mandamus—Injunction.

The power of the courts over officials acting under authority of a valid statute cannot extend to enforce disobedience to the act. It is only to enforce their faithful performance of their duties that the courts can supervise them by *mandamus* or injunction.

5. Supreme Court—Decisions—Estoppel—Statutes.

The Supreme Court having by numerous decisions held that an act of the Legislature authorizing a bond issue for public roads is valid if conforming to Art. II, sec. 14, of the State Constitution, without submitting the proposition to a vote of the people, and in construing acts involving proportionately to population and property value no greater amount of bonds than are here in controversy, is estopped to apply a different rule to the facts on this appeal.

BROWN, J., dissenting.

APPEAL by plaintiffs from the refusal by *Lyon, J.*, of an injunc- (627) tion to the hearing at Chambers, in Greensboro, 20 March, 1915. From DAVIDSON.

Manning & Kitchin, S. E. Williams, W. O. Burgin, and McCrary & McCrary for plaintiffs.

E. E. Raper, Phillips & Bower, and Walser & Walser for defendant.

CLARK, C. J. The plaintiffs, residents and taxpayers of Davidson County, brought this action to test the validity of an act ratified 27 February, 1915, creating the board of road commissioners of Davidson County, and authorizing the issue of $300,000 of bonds to construct and maintain the roads of said county. The act confers on said board sole control over the roads of said county and other powers set out in said

act. The complaint does not allege that the act was not regularly passed nor that the requirements of the Constitution, Art. II, sec. 14, were not in all respects complied with. Indeed, the regularity of the passage of the act is shown by the certificate of the Secretary of State to copies of the act and the entries on the Journals of the General Assembly relating to the enactment thereof.

The questions presented in this case are almost identical with those considered in *Comrs. v. Comrs.*, 165 N. C., 632, in which a similar act was upheld. In that case, and also in *Trustees v. Webb*, 155 N. C., 379; *Pritchard v. Comrs.*, 159 N. C., 636, affirmed on rehearing, 160 N. C., 476; *Tate v. Comrs.*, 122 N. C., 812; *Herring v. Dixon, ibid*, 420, and in other cases, this Court has held that the construction and maintenance of public roads are a necessary public expense, and that the General Assembly may provide for construction and working the same and may create a board to do this, distinct from the county commissioners, and fix and authorize the levy of taxes for that purpose, as in this act, without a vote of the people. We know of no reason to question the correctness of those decisions.

(628) It is objected by the plaintiffs:

(1) That the act takes the entire management of the public roads from the county commissioners.

(2) That it abolishes the existing township road boards and turns the property of such boards over to a county board created by this act.

(3) That it provides for the election of successors, at expiration of term of office of the board named in the act, by the surviving members.

(4) That there is no limit of time for continuance of the act.

(5) That nobody is given authority to supervise the acts of the board.

(6) That the provisions of the act for condemning land are not sufficient, and are illegal.

All the propositions thus relied upon have been held insufficient to invalidate the action of the General Assembly in the cases above cited.

The plaintiffs, in their brief, concede that the working and construction of public roads are necessary expenses, and that the creation of debt by the issuance of bonds for that purpose is not required to be submitted to a vote of the people under the provisions of the Constitution, Art. VII, sec. 7, citing *Vaughn v. Comrs.*, 117 N. C., 434; *Comrs. v. Comrs., supra*, and cases therein cited, and the still later case, *Highway Commission v. Malone*, 166 N. C., 1.

The plaintiffs, however, contend that the act now before us does not sufficiently safeguard the rights of the citizen as to the assessment of damages for land taken by the road commission in improving the roads. That question cannot be raised in this case, but objection should be made

by the party in interest, the landowner, when the occasion occurs, and should the objection be sustained it would in no wise affect the validity of the statute as a whole, nor would it justify this injunction sought against the issuance of the bonds or to restrain the road commission from discharging the duties imposed on them by the act of the General Assembly.

The plaintiffs further contend that the statute, by authorizing the board to fill vacancies in its own body from time to time, makes it a self-perpetuating body, because though two of them are elected for two years, two for four years, and two for six years, the terms of the expiring members are filled by their associates. They further object that the existence of the board is unlimited in duration and that it is not made responsible to the people for its acts, nor to any constitutional authority; that the act contains no provision for the removal of any member of the board except upon indictment for a misfeasance, and then only where the neglect or refusal to perform a duty is willful or corrupt; and, in short, that the Legislature has given the board too much power.

All these matters are within the control of the legislative department of the Government, and it is not in the power of this Court to correct them, nor to review or criticize the action of the General (629) Assembly within the scope of its powers. The act is within the constitutional power of the Legislature, and if there are any defects found therein of the nature complained of, they can be corrected by the General Assembly, should it so wish, at its next session.

After full and careful review of the reasons presented by the able counsel for the plaintiffs, and with due regard to the amount involved and the importance of the act to the people of Davidson County, we do not find that we have any power to issue any writ to interfere with the execution of the act, which has been duly passed and within the constitutional authority and power of the General Assembly.

In *Comrs. v. Comrs., supra,* we said, quoting from *Pearson, C. J.,* in *Broadnax v. Groom,* 64 N. C., 244: "The Court has no power, and is not capable, if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the Government, or upon the county authorities." In the same case, *Comrs. v. Comrs., supra,* this Court further said: "This is not a matter over which this coördinate department of the Government has any control. If the result is bad, the remedy is to be found in the power of public opinion, either in controlling the conduct of such members or in electing successors who will cause the objectionable legislation to be repealed or modified. The courts do not have supervisory power over the General Assembly, or over the county officials when acting within the authority

lawfully conferred upon them by the Legislature. If there were allegation and proof that the defendants, or any other public officials, were acting dishonestly, or so extravagantly or so recklessly as to amount to an abuse of the authority conferred upon them, the courts might, by injunction in such case, restrain the alleged illegal acts until a jury could pass upon the issues of fact; but the courts cannot interfere with such powers as are conferred upon the defendants by the statute in this case, which, as we have held, were within the power of the General Assembly." The courts can compel officials to comply with a lawful statute. They cannot direct them to disobey it. The courts can supervise by mandamus or injunction the action of officials only to insure their faithful execution of the duties imposed upon them by the statute.

The case last cited, *Comrs. v. Comrs., supra,* was a decision upon a statute very similar in purpose and purport to this, applicable to the county of Yancey, and further legislation in regard thereto, as desired by the people of that county, has been enacted by the General Assembly since held. The recourse of the plaintiffs herein must be had to the same body, and not to the courts.

This Court can review the conduct of the judges below us, even in matters within their discretion, if there is clear abuse of such
(630) discretion; but the Constitution gives no such powers to the five lawyers, who compose this Court, over the conduct of the General Assembly when acting within the constitutional scope of their authority. This Court has repeatedly held, in cases above cited, that the construction and maintenance of public roads, being a necessary expense, the General Assembly has authority to authorize the creation of debt for that purpose without a vote of the people. It may be urged that the General Assembly ought not to be intrusted with such authority; but that is a matter for the people themselves in enacting the State Constitution. It may be said that though the General Assembly has such power, it ought not to exercise it. But that is a matter for them, and not for this Court. While the General Assembly enacted this statute, it is probably true, as contended by the plaintiffs, that the act would not have been passed if opposed by the Member and Senator from the county of Davidson; but that is a matter for the people of that county, and should have been considered by them in selecting their representatives in the General Assembly.

But even if we could review and reverse the action of the General Assembly, should we think they may have acted indiscreetly in passing this act, this Court would be estopped by our previous unanimous decisions to say that there was abuse of discretion on the part of the General Assembly in authorizing Davidson County to issue $300,000 for road

purposes without a vote of the people. In *Comrs. v. Comrs., supra,* we held a similar act as to Yancey County valid when the population was 12,072 and the taxable property $1,753,036, and the amount of bonds for road purposes, held valid by a unanimous opinion of this Court, was $125,000.

In *Pritchard v. Comrs.,* 159 N. C., 636, we held valid, by a unanimous Court, an issue of $250,000 by Orange County, where the population was 15,066 and the taxable property was $5,167,820; and that case was reaffirmed on rehearing, 160 N. C., 476.

In the present case the issue authorized for Davidson County is $300,000, but the population is nearly double that of Orange, to wit, 29,404, and the taxable property is $9,378,008.

If this Court has power to pass upon the action of the Legislature, when, as we have held, such action is within the constitutional power of the General Assembly, merely because we may think that such action is improvident, we would be estopped by the above and other cases where the amount of bonds authorized for road purposes is proportionately much greater in proportion to population and taxable value than in this case. Besides, if we possessed such power, this State would practically have a commission form of government. The Constitution would have to clearly confer such unusual authority, which it has not done, either expressly or by any implication.

The people of North Carolina have long since declared that (631) they were competent to govern themselves, and they have proved it. When their representatives in the General Assembly procure an act within its powers, which is not agreeable to their constituents, the members of the General Assembly are responsible to the sovereign, the people themselves, and not to this Court, which is simply a coördinate department of the Government, and not authorized to go beyond the powers conferred on us by the Constitution.

The judgment of the court below is

Affirmed.

BROWN, J., dissenting: Under the facts set out in the complaint in this case, which are practically admitted to be true, I cannot agree that a bonded debt of $300,000 shall be fastened upon the taxpayers of the county of Davidson, not only without their consent, but against it.

I admit that the decision of the majority of this Court is strictly in accordance with the principles laid down in *Comrs. v. Comrs.,* 165 N. C., 632, in which an act somewhat similar to this was sustained. I admit that there are other cases cited in the opinion of the Court in which this Court has held that the public roads of a county are a necessary

public expense, and that the General Assembly may provide the method for their upkeep and maintenance.

I have come to the conclusion that this Court has gone entirely too far in defining what are the necessary expenses of a county within the meaning of Art. VII, sec. 7, of the Constitution. At the time when the Constitution of 1868 was adopted, in which this section first occurs, we had a system of public roads throughout the State, maintained without special taxation, and although keeping them up by taxation may result in much better roads, yet I have no idea that the thought ever occurred to any member of the Convention of 1868, or to any of the voters of the State, that under that section it would ever be possible to fasten a debt of $300,000 upon a county for the purpose of constructing and keeping up its public roads, without the consent of its citizens.

I have come to the conclusion that this Court should reverse itself upon that proposition. No one can tell to what extent this doctrine may be carried in the future. The proposition here is to issue $300,000 in bonds. What will the limit be? Suppose, instead of $300,000, the author of the bill had provided for the issue of a million dollars in bonds: this Court, according to the principles announced, would be compelled to sustain it, and the groaning taxpayers of Davidson County would have no remedy. This is inconsistent with all theories of local self-government and is antagonistic to the best interest of the State.

The plaintiffs in this case show that this proposition to issue $300,000 in bonds was voted upon by the people of Davidson County not (632) two years ago, under the act of 1913. They voted it down by a large majority. The act of 1915 was passed, without the knowledge of the people of Davidson County, at the instance of their representative. They had no opportunity to oppose it, and if they had, so-called "senatorial courtesy" would have required the passage of the act.

According to the allegations contained in the pleadings in this case, the people in Davidson County are not opposed to good roads, nor are they opposed to taxing themselves for this purpose. On the contrary, all except four of the seventeen townships in the county are levying and collecting taxes for special road purposes. The money was carefully expended by trustees responsible to the people, and while they were willing to pay this annual tribute for the purpose of keeping up their roads, they were not willing to mortgage the future of their county and burden it in the years to come with such immense debt.

Cited: Wilson v. Holding, 170 N. C., 356; *Bramham v. Durham,* 171 N. C., 199; *Moose v. Comrs. of Alexander,* 172 N. C., 422; *Comrs. of Johnston v. State Treasurer,* 174 N. C., 162; *Woodall v. Highway Com.,*

176 N. C., 383; *Parvin v. Comrs. of Beaufort,* 177 N. C., 509; *Guire v. Comrs. of Caldwell,* 177 N. C., 518; *R. R. v. Comrs. of Bladen,* 178 N. C., 456; *Davis v. Lenoir,* 178 N. C., 669; *Comrs. of Ashe v. Bank,* 181 N. C., 351; *Huneycutt v. Road Comrs.,* 182 N. C., 321; *Kinston v. R. R.,* 183 N. C., 21; *Road Com. v. Comrs. of Franklin,* 188 N. C., 365; *Lassiter v. Comrs. of Wake,* 188 N. C., 382; *Board of Education v. Comrs. of Yancey,* 189 N. C., 653; *Young v. Highway Com.,* 190 N. C., 55; *Ellis v. Greene,* 191 N. C., 764; *Glenn v. Comrs. of Durham,* 201 N. C., 237.

POWELL & POWELL v. KING LUMBER COMPANY AND CHISHOLM & CLARK, ET AL.

(Filed 14 April, 1915.)

1. Principal and Agent—General Agent—Restrictions—Notice.

A general agent is one who is authorized to act for his principal in all matters concerning a particular business or employment of a particular nature, and he may usually bind his principal as to all acts within the scope of such agency; and as to third persons dealing with the agent, this real and apparent authority are the same and not subject to restrictions of a private nature placed thereon by the principal, unless they are known to such person, or the act or power in question is of such unusual character as to put a man of reasonable business prudence upon inquiry as to the existence of the particular authority claimed.

2. Liens—Principal and Agent—General Agent—Scope of Authority—Ratification.

The scope of the implied authority of a general agency may be extended by reason of acts indicating authority which the principal has approved or knowingly or, at times, negligently permitted the agent to do in the course of his employment.

3. Principal and Agent—Acts of Agent—Evidence of Agency.

While ordinarily the existence or extent of an agency may not alone be shown either by the declarations or acts of a supposed agent, it is otherwise where his acts, in the course of his employment, and indicative of his authority, are of such character and circumstance, or so often repeated, as to permit a fair and reasonable inference that they were approved or knowingly permitted by the principal; for in such way they become relevant on the question of authority expressly conferred.

4. Same—General Agency.

In an action brought by a materialman against the contractor to recover the price for goods furnished to a subcontractor for the building on the credit alone of the former, alleged to have been authorized by his agent, which authority was denied, there was evidence tending to show that the alleged agent was the superintendent in charge of the work with

authority to hire, pay, or discharge the workmen of both the contractor and subcontractor; that two payments had been made the plaintiff by the contractor, one on the order of the subcontractor and the other by the contractor's agent. *Held:* Evidence sufficient for the consideration of the jury to ascertain the fact of agency of the superintendent, though also spoken of as the foreman, to bind the contractor, his alleged principal, to the payment of the materialman, as coming within his implied authority to do so as a general agent, and as a ratification of his acts by the alleged principal, notwithstanding the principal's explanation of the circumstances under which the payments were made.

5. Statute of Frauds—Direct Obligation—Interest.

The statute of frauds has no application where the one sought to be charged has credit extended to him as an original obligation, and on a transaction in which he has a pecuniary interest.

6. Liens—Materialmen—Notice to Owner—Subcontractor—Contractor—Status With Owner.

Where the furnisher of material to a subcontractor has notified the owner and perfected his lien as required by the statute, secs. 2019, 2020, 2021, and it appears by admission in the pleadings in an action to enforce the lien that the owner of the building is still indebted to the principal contractor in a sufficient sum, this sum is applicable to the plaintiff's demand regardless of the State of accounts between the contractor and the subcontractor. *Brick Co. v. Pulley, ante,* 371.

(633) APPEAL by defendants from *Whedbee, J.,* at October Term, 1914, of WAKE.

Civil action to recover $428.58, balance due for material furnished for plastering work on Y. M. C. A. building in Raleigh.

It was proved that, in 1912, the Y. M. C. A. of the city of Raleigh had contracted with defendant the King Lumber Company for the erection of its building in the city of Raleigh, and that the said company had sublet the plastering to defendants Chisholm & Clark, and that the agreement between the King Lumber Company and Chisholm & Clark in form constituted these last subcontractors for this portion of the work.

There was evidence on the part of plaintiff tending to show that, owing to the fact that Chisholm & Clark owed plaintiff a balance on other accounts and were regarded as irresponsible, plaintiff had declined to supply any material for this work, and did not do so until the King Lumber Company became responsible therefor, this being done primarily under the direct promise and guarantee of J. R. Wood, agent of the company, in charge of this work here in Raleigh; that said Wood
(634) had authority from the company to make the contract, or same was ratified by it, and, after making two payments under this arrangement, as stated, the company had refused to pay further, and the balance was $428.58.

There was evidence for defendant tending to show that J. R. Wood had not made the agreement as claimed by plaintiff, and, further, that he had no authority to make it; that he was only a foreman in charge of the work here in Raleigh, chiefly of that portion which was being done by the company itself; that he was supplied with a definite amount, subject to his check, which he could not exceed, and from which he was to pay freights, wages for men under him, and material bought by him, but that he had no authority to bind the company by a contract of this kind, and had been positively instructed not to make any such agreements; that as to the two payments referred to in plaintiff's evidence, one was on the written order of Chisholm & Clark and the other was made by reason of representations of J. R. Wood that certain material on the yard for the purpose would be attached by creditors of Chisholm & Clark unless paid for, and, owing to that, the money was sent, but with no intent to ratify any agreement of Wood's; that the company had no knowledge of any such agreement, and had done nothing to approve or ratify it.

It was further shown that Chisholm & Clark, after doing part of the work, had abandoned the job, and J. R. Wood had completed the same for the company, and there was only a small sum due from the company to them, under their contract, etc.

On issues submitted, the jury rendered the following verdict:

1. Did the defendant King Lumber Company agree to pay the plaintiff company for materials furnished, with which to plaster the Y. M. C. A. building, as alleged? Answer: "Yes."

2. If so, what amount was so furnished by plaintiff, which still remains unpaid by defendant King Lumber Company? Answer: "$428.58, without interest."

3. If "No" to first issue, what amount is due Chisholm & Clark by defendant King Lumber Company on account of contract for plastering said Y. M. C. A.? Answer: "$74.32."

It was admitted in the pleadings that there was the sum of $428.58 due from the Y. M. C. A. to the lumber company, the principal contractor, and that plaintiff had given the notices required to perfect his lien for material, as provided under the statute, Revisal, secs. 2019, 2020, and 2021.

Judgment on the verdict for $428.58, and applying amount due from owner to lumber company in payment of same.

Defendant lumber company excepted and appealed.

Clark & Broughton for plaintiff. (635)

J. W. Hinsdale and Winston & Biggs for defendant.

HOKE, J. It was chiefly objected to the validity of the verdict that there were no facts in evidence tending to show authority on the part of J. R. Wood to bind the defendant company to payment of plaintiff's claim; but, on the record, we are of opinion that the position cannot be maintained. A general agent is said to be one who is authorized to act for his principal in all matters concerning a particular business or employment of a particular nature. Tiffany on Agency, p. 191. And it is the recognized rule that such an agent may usually bind his principal as to all acts within the scope of his agency, including not only the authority actually conferred, but such as is usually "confided to an agent employed to transact the business which is given him to do," and it is held that, as to third persons, this real and apparent authority is one and the same, and may not be restricted by special or private instructions of the principal unless the limitations sought to be placed upon it are known to such persons or the act or power in question is of such an unusual character as to put a man of reasonable business prudence upon inquiry as to the existence of the particular authority claimed. *Latham v. Field,* 163 N. C., 356; *Stephens v. Lumber Co.,* 160 N. C., 107; *Gooding v. Moore,* 150 N. C., 195; Tiffany on Agency, pp. 180-184-191 *et seq.*

The power of an agent, then, to bind his principal may include not only the authority actually conferred, but the authority implied as usual and necessary to the proper performance of the work intrusted to him, and it may be further extended by reason of acts indicating authority which the principal has approved or knowingly or, at times, even negligently permitted the agent to do in the course of his employment. *Law Reporting Co. v. Grain Co.,* 135 Mo. App. Rep., pp. 10-15; 31 Cyc., pp. 1326-1331.

In the Missouri case, *Broaddus, P. J.,* delivering the opinion, quotes from Mechem on Agency, sec. 282, to the effect that the authority of agents consists:

"First, and primarily, of the powers directly and intentionally conferred by the voluntary act of the principal.

"Second, of those incidental powers which are reasonably necessary and proper to carry into effect the main powers conferred and which are not known to be prohibited.

"Third, of those powers which usage and custom have added to the main powers, and which the parties are to be deemed to have had in contemplation at the time of the creation of the agency, and which are not known to have been forbidden.

(636) "Fourth, of all such other powers as the principal has, by his direct act or by negligent omission or acquiescence, caused or per-

mitted persons dealing with the agent reasonably to believe that the principal had conferred.

"Fifth, of all those other powers whose exercise by the agent the principal has subsequently, with full knowledge of the facts, ratified and confirmed."

And further cites, with approval, *Kingsley v. Fitts,* 51 Vt., 414, to the effect that: "The scope of an agency is to be determined not alone from what the principal may have told the agent to do, but from what he knows or ought to know, in the exercise of ordinary care and prudence, the agent is doing in the premises." And, while it is true, as held in *Daniel v. R. R.,* 136 N. C., 517, and *Francis v. Edwards,* 77 N. C., 271, and other well considered cases, that neither the existence nor the extent of an agency may be shown by either the declarations or acts of an agent, and by them alone, it is also established that the acts of an agent, in the course of his employment and indicative of authority, may be of such character and circumstance or so often repeated as to permit a fair and reasonable inference that they were approved or knowingly permitted by the principal, and, in this way, may, of themselves, become relevant on the question of authority expressly conferred. *Newbury v. R. R.,* 167 N. C., 50; *R. R. v. Dickinson,* 78 Ark., 783; *Lytle v. Bank,* 121 Ala., 215; *Harvester Co. v. Campbell,* 43 Tex. Civ. App., 421; *Doan v. Duncan,* 17 Ill., 272; 31 Cyc., p. 1662. In this last citation the principle is thus stated: "As a general rule, the fact of agency cannot be established by proof of the acts of the pretended agent, in the absence of evidence tending to show the principal's knowledge of such acts, or assent to them. Yet when the acts are of such a character, and so continued, as to justify an inference that the principal knew of them, and would not have permitted the same if unauthorized, the acts themselves are competent evidence of agency."

Applying these principles, as stated, there was not only some evidence tending to show authority in J. R. Wood to make the contract, as stated, but, in our opinion, it clearly justifies the verdict rendered by the jury.

True, there was evidence for the defendant tending to show that Wood had no actual authority to make the agreement or to bind the company under it; both Wood and McNeill, the secretary and treasurer of the company, so testify, and the payments by Wood are explained by the statement of these witnesses that the company kept as much as $500 in a bank here in Raleigh, subject to his check, and beyond this he was not allowed to go, and, as to the two payments by the company on the present account, defendant's evidence tends to show that one was made on the written order of Chisholm & Clark and the other on the representations of Wood that it was necessary to make it (637)

to protect material already on the ground and presently required for the construction of the building. Much stress was laid, too, on the fact that several of the witnesses spoke of Wood as foreman, and, certainly, an ordinary foreman, in the sense of a leader of a squad of hands, would not, from his position alone, have the right to bind his principal in a contract of this character.

A perusal of the testimony, however, will disclose that this man was not merely a foreman, in the ordinary meaning of the term, but he had entire charge of the work here in Raleigh. Thus, Mr. Carey J. Hunter, one of the directors, after saying that Wood was the local man of the King Lumber Company in charge of the building as "foreman," states further: "Mr. Wood was the company's representative, and we dealt with him in regard to the construction of the building. Of course, I don't know whether the dealings had to be approved by the lumber company afterwards or whether there was an understanding with them or not. Our dealings were with Mr. Wood."

J. R. Wood speaks of himself, in one place in his testimony, as supervisor or superintendent, and McNeill, the secretary and treasurer, says of him: "He had been our superintendent for six years." True, this witness said, also, that "Not only had Wood no authority to make the contract, as alleged, but he was instructed positively not to do so"; but, from the evidence of this witness and from others, testifying for plaintiff, it appears that J. R. Wood was in charge and control of the work here for the entire time; that he bought material from plaintiff and others and paid for it in cash and by check; that he hired hands and paid them off, not only those directly under him, but the hands of Chisholm & Clark, and after these men had abandoned the job, he took it up and had the same completed; and it was made to appear, further, as heretofore stated, that, after the promise relied upon by plaintiffs, there were two substantial payments on this account made by defendant company, and from this and other facts in evidence we think that it is clearly the permissible inference that the contract and agreement made by Wood was within the scope of his agency, and, this being true, that the binding effect of it could not be destroyed or sensibly impaired by reason of special and private restrictions put upon his powers by his principal, unknown to plaintiff and others who dealt with him; and we are of opinion, further, that the acts of Wood in the course of his agency were of a kind and character and so continued and repeated as to permit the inference that they were known to and approved by the company, and, in themselves, afforded evidence of authority in the premises.

There is nothing in our present decision that militates or is intended to militate against the cases of *Bank v. Hay,* 143 N. C., 326, or

of *Swindell v. Latham,* 145 N. C., 144, or *Stephens v. Lumber* (638) *Co., supra,* or the more recent case of *Wynn v. Grant,* 166 N. C., 39, in all of which the acts of the agent were disallowed.

In *Hay's* and in *Swindell's cases, supra,* the contracts in question were held to have been beyond the scope of agents' authority, real or apparent, the first being a draft by a local insurance agent, of restricted power, on the general agent of the company, and the second where the agent, intrusted with the power to run a certain business on a cash basis, had signed the note of his principal for borrowed money, and to these the Court applied the wholesome principle that one who deals with an agent must "ascertain correctly the scope and extent of his authority"; but this, as stated, was on the ground that the acts of the agent were beyond the scope of his apparent authority, for, in ordinary instances, it is only to this that a third person is required to look. In *Wynn's case, supra,* there were facts in evidence, *ultra,* tending to show notice of limitations on the agent's powers, and in *Stephens' case, supra,* the character of the contract was so out of the ordinary as to put the claimant on inquiry and, in itself, to afford notice of lack of authority.

The objection raised, on the trial below, that recovery was barred under the statute of frauds and because the obligation of Wood, if made, was not in writing, was very properly abandoned here, the facts in evidence, which were accepted by the jury, tending to show that the credit was extended to the company as an original obligation and on a transaction in which it had a pecuniary interest. *Peele v. Powell,* 156 N. C., 554, citing *Dale v. Lumber Co.,* 152 N. C., 653; *Sheppard v. Newton,* 139 N. C., 533.

While we have dealt with the objections made to the validity of the verdict by reason of their general importance and because they are directly presented in the record, the questions are not of practical moment in this case because of the admissions in the pleadings that the owners of the building are still indebted to defendant company, the principal contractor, to an amount sufficient to pay the claim sued for, and the plaintiffs have given the notices and perfected their lien as provided by our statute. Revisal, ch. 48, secs. 2019, 2020, 2021.

In such case, under *Brick Co. v. Pulley, ante,* 371, the debt due from the owners to the defendant, the principal contractor, is applicable to plaintiff's demand, and this, regardless of the state of the account between defendant and the subcontractors, Chisholm & Clark.

There is no error, and the judgment below must be affirmed.

No error.

Cited: Furniture Co. v. Bussell, 171 N. C., 485; *Ferguson v. Amusement Co.,* 171 N. C., 666; *Brimmer v. Brimmer,* 174 N. C., 439; *Powder*

Co. v. Denton, 176 N. C., 433; *Lumber Co. v. Johnson,* 177 N. C., 51; *Lane v. Engineering Co.,* 183 N. C., 309; *Fisher v. Lumber Co.,* 183 N. C., 490; *Strickland v. Kress,* 183 N. C., 537; *Crutchfield v. Rowe,* 184 N. C., 213; *Beck v. Wilkins-Ricks Co.,* 186 N. C., 214; *Hunsucker v. Corbitt,* 187 N. C., 503; *Bobbitt v. Land Co.,* 191 N. C., 328; *Coxe v. Dillard,* 197 N. C., 346; *Bank v. Sklut,* 198 N. C., 592; *Maxwell v. Distributing Co.,* 204 N. C., 317; *Dixson v. Realty Co.,* 204 N. C., 525; *White v. Johnson & Sons, Inc.,* 205 N. C., 775; *R. R. v. Lassiter & Co.,* 207 N. C., 414; *Belk's Department Store v. Ins. Co.,* 208 N. C., 270.

(639)

M. T. CHILTON v. T. S. GROOME.

(Filed 14 April, 1915.)

1. Mortgages—Bills and Notes—Stipulations by Mortgagor—Acceptance by Mortgagee—Estoppel.

Where the seller of lands has drafted and sent to the purchaser a note secured by a mortgage thereon, who by interlineation in both excludes personal liability and returns them to the seller, who keeps them without objection, forecloses the mortgage, applies the proceeds of sale to the note, and then sues for the balance due, he will not be permitted to retain the benefits of the transaction and repudiate the contract in part; for having accepted the papers with the material change therein, he will be estopped, in the absence of fraud, by his own acts of acquiescence.

2. Partnership—Trusts and Trustees—Deeds and Conveyances—Misrepresentation by Partner—Fraud—Intent—Evidence.

Where two persons enter into a partnership for the purchase of lands, and one of them, acting for both, purchases at a less price than he had represented to the other, who in ignorance thereof pays his part, the acts of the purchasing partner are fraudulent upon the other and entitled him to recover the amount in excess of his obligation which he has been called upon to pay; and testimony as to a fraudulent intent is immaterial.

APPEAL by both parties from *Devin, J.,* at May Term, 1914, of FORSYTH.

Civil action tried upon these issues:

1. Did the defendant, with intent to cheat and defraud the plaintiff, falsely and fraudulently misrepresent to the plaintiff the purchase price of the "Freeman Mill" property, as alleged in the complaint? Answer: "Yes."

2. Did the defendant, by such false and fraudulent misrepresentation, obtain from the plaintiff any money, and if so, what amount? Answer: "$750, with interest from date of sale."

3. Is the defendant indebted to the plaintiff on account of the note and deed of trust signed by him, as alleged in the complaint, and if so, in what amount? Answer: "No."

From the judgment rendered, the plaintiff and defendant both appealed.

N. O. Petree, A. E. Holton, Watson, Buxton & Watson, Winston & Biggs for plaintiff.

Barringer & Jones, T. H. Calvert for defendant.

PLAINTIFF'S APPEAL

BROWN, J. It appears to be undisputed that the plaintiff and defendant were equal copartners in the purchase of certain lands. Defendant transacted the business and stated to plaintiff that the land cost $6,500. Plaintiff furnished the said sum, and title was made to plaintiff and defendant.

The latter gave plaintiff a note secured by a deed in trust on (640) defendant's half interest in the land to secure his half of the purchase money, $3,250. There was default in payment, and the trustee foreclosed. The plaintiff purchased defendant's interest at the sale for $1,600.

The plaintiff sues in this action to recover balance due on the note.

Plaintiff also alleges that defendant misrepresented the original cost of the land, stating that he paid $6,500 for it, whereas he paid only $5,750. Plaintiff seeks to recover the said sum in this action. Plaintiff appeals and assigns error because the court instructed the jury to answer the third issue "No."

The basis of the ruling is the following clause in the note and deed in trust: "This note is given for the purchase money for the one-half interest in the Freeman Mill property, described in the deed of trust hereto attached, and it is agreed that the land and property therein conveyed shall be the sole security for the $3,250 above mentioned, without further or other liability on my part or any recourse on me for or on account of the indebtedness secured hereby or any part thereof."

The note and deed in trust were prepared by plaintiff, who sent them to defendant for execution. The defendant inserted the above clause in the papers and had the trust deed recorded and returned them by mail to the plaintiff.

There is evidence introduced tending to prove that defendant, under the agreement between him and plaintiff, should not have inserted the above clause, which it is unnecessary to consider. There is no evidence that defendant inserted the clause surreptiously or fraudulently, and

it is admitted that the plaintiff discovered it at once on receipt of the papers, and that plaintiff and defendant had correspondence on the subject, dated 15 February, 1909, the note and deed being dated 30 January, 1909.

The plaintiff took no action to repudiate the contract as executed or to reform and correct the note and deed in trust. On the contrary, he retained them until 28 January, 1911, when he acted under the deed in trust, which contains the same stipulation as the note, and caused the trustee to foreclose the same, and at the sale plaintiff became the purchaser at $1,600.

Such conduct constitutes an unequivocal acceptance and ratification of the terms and stipulations of the note and deed, as executed and returned to plaintiff by defendant. It was the plaintiff's duty at once on receipt of the papers to repudiate them by some overt act, such as returning them or bringing action to reform them and compelling defendant to specifically perform the original contract. Instead of that, he retained them, accepted them and acted under them.

(641) He is, therefore, estopped by the stipulation recited in the note and deed from recovering the balance due after exhausting the security conveyed in the deed. Such stipulation is of the essence of the agreement as embodied in the written instrument and cannot now be denied. The plaintiff cannot be permitted to occupy inconsistent positions. He cannot enforce some of the provisions of the deed and repudiate others. 16 Cyc., 699-721; 2 Hermon on Estoppel, 741; *Brinegar v. Chaffin,* 14 N. C., 108; 17 Cyc., 596; Bigelow on Estoppel (6 Ed.), 744; 2 Hermon on Estoppel, 1156; *Field v. Eaton,* 16 N. C., 284; *Machine Co. v. Owings,* 140 N. C., 503; *Maynard v. Moore,* 76 N. C., 158; *Rich v. Morisey,* 149 N. C., 37; *Austin v. Stewart,* 126 N. C., 525.

The case cited in the plaintiff's brief, *Armstrong v. Lonon,* 149 N. C., 434, had reference to the effect of a receipt "in full"; but in *Rawls v. White,* 127 N. C., 17, it was held that stipulations of a contractual nature, even in a receipt, are binding on the parties, and in that case the Court said: "As she introduced this receipt in evidence, and claims benefit under it, she was bound by the provisions that were against her. She could not accept part and reject part."

No error.

DEFENDANT'S APPEAL

There are several assignments of error by the defendant. We think they are all without merit, and deem it necessary to discuss only two.

The defendant moved to nonsuit upon the ground that there is no evidence of fraud and that in no view of the evidence is the plaintiff entitled to recover the $750.

The defendant testifies: "I went in as a partner in the purchase of this property with Mr. Chilton." There is evidence that the price the partners agreed on was $5,500, and that defendant solely conducted the negotiations; that he told the plaintiff the land could not be purchased for less than $6,500; that it was a bargain and that others were after it. Plaintiff acquiesced in his partner's views and paid the entire $6,500.

There is evidence that defendant paid only $5,750 for the land and retained the $750. This is evidence of fraud, and the jury seem to have believed it.

The defendant, introduced as a witness in his own behalf, was asked, "Did you intend to cheat and defraud plaintiff?" Upon objection, the court excluded the question.

There are cases supporting the view that such questions asked of a party to an action when he is charged with fraud are sometimes permissible. *Phifer v. Erwin,* 100 N. C., 59; *Autry v. Floyd,* 127 N. C., 186.

In this case it could not help the defendant to testify that he (642) did not intend to defraud the plaintiff. His acts speak louder than words. He was the trusted partner of the plaintiff, who furnished all the money for the investment. According to the findings of the jury, upon representations he must have known were untrue, defendant obtained $6,500 from his partner to pay for the land, and paid only $5,750 and retained the remainder ($750) for himself.

On account of the relation of trust and confidence defendant bore to plaintiff, his partner, the law stamps the transaction as fraudulent, and will not permit the defendant to retain the fruits of his misconduct, but will compel him to return them. *Stewart v. Realty Co.,* 159 N. C., 230.

No error.

RICHARD GAMBIER v. A. B. KIMBALL.

(Filed 22 April, 1915.)

Trials—Instructions — Contracts — Counterclaim — Appeal and Error — Harmless Error.

In an action brought by an architect to recover the contract price for plans and specifications furnished for a building, alleged to be due him, which the defendant denies and alleges that certain moneys advanced the plaintiff thereon were agreed to be repaid in the event of his failure to perform the contract, under conflicting evidence a charge of the court, in response to a request from the jury for further instruction, that they had the physical power to divide the amount claimed by the plaintiff is not reversible error, it appearing that the court immediately and correctly

charged upon the burden of proof of each of the parties upon the respective issues, and how they should regard the evidence in reaching their conclusions; and it further appearing that the plaintiff's damages had been assessed at a smaller amount than he was entitled to under the evidence, it is error of which the defendant cannot complain on appeal.

APPEAL by defendant from *Devin, J.*, at September Term, 1914, of GUILFORD.

Action to recover an amount alleged to be due on a special contract to prepare plans and specifications for a house which the defendant intended to build.

The defendant alleged that the plaintiff had failed to perform his contract, and pleaded a counterclaim in the sum of $200 for money advanced to the plaintiff, which he alleges the plaintiff promised to repay.

The plaintiff offered evidence tending to prove that he entered into a contract with the defendant to prepare plans and specifications for a house estimated to cost about $9,000, and that the defendant (643) agreed to pay him therefor $240; that he prepared the plans and specifications and that they were accepted by the defendant, and that the defendant paid him $100; that thereafter the defendant decided to build a different house and applied to the plaintiff to prepare other plans and specifications, which the plaintiff agreed to do, it being agreed in the second contract that the balance due on the first contract would be canceled and a new price agreed upon for the second plans and specifications; that these plans and specifications were accepted by the defendant, and he paid $50 on the amount due; that thereafter the defendant decided he would not build according to these last plans and specifications, and applied to the plaintiff again to prepare plans and specifications for a bungalow, saying that he would certainly build this time; that the plaintiff agreed to prepare the plans and specifications as desired by the defendant and satisfy the balance due on the other contract for a commission of 3½ per cent on the estimated cost of the building, which was $12,000; that he prepared these plans and specifications and that they were presented to and accepted by the defendant.

The defendant offered evidence tending to prove that the plaintiff approached him and told him that he understood that he was going to build, and asked permission to prepare plans and specifications; that he told the plaintiff the kind of house he wished to build and that he would not spend more than $5,000 on the building, and that he desired plans and specifications for a house costing no more than that sum, which the plaintiff agreed to prepare, saying that he could build the house which the plaintiff desired for $5,000 and would guarantee that it could be done; that he told the plaintiff that he did not care to incur any unneces-

sary expenses, and that he would agree to pay him 3½ per cent of the cost on the assumption that the house would not cost more than $5,000; that the plaintiff prepared plans and specifications for a house which could not be built for less than $8,900, and that he thereupon declined to accept the plans and specifications; that the plaintiff prepared a second set of plans and specifications which did not comply with his agreement and which were not accepted; that the defendant then agreed that the cost of the house to be built should be advanced to $7,500 and the plaintiff then agreed to prepare plans and specifications for a house, the size and character of which was agreed on, which could be built for a sum not exceeding that amount; that the plaintiff then prepared other plans and specifications for a house which could not be built for less than $12,000, which the defendant refused to accept; that while negotiating with the plaintiff he advanced to him $200 as a loan under a promise to repay the amount if the plans and specifications were not satisfactory.

The jury in response to the issue submitted to them found that the defendant was indebted to the plaintiff in the sum of $220.

The defendant excepted to the refusal to give the following (644) charge to the jury: "The court charges you that if you find from the evidence and by its greater weight that the plaintiff contracted with the defendant to design and furnish plans and specifications for a residence to cost not exceeding a limited amount, and failed to furnish such design or plans and specifications for a residence that could be built within the amount limited, and abandoned any effort to do so, the court charges you that the plaintiff admits that the defendant has paid him on account of said work the sum of at least $200, then your answer to the second issue would be '$200 and interest.'"

After the jury had deliberated some time they asked for further instructions as follows:

The Court: Do you gentlemen desire some further instructions?

Juror: We want to know if we could answer that first issue the full amount, and give Mr. Kimball a counterclaim.

The Court: No; if you answer the first issue the full amount, that is, finding that the contract is as contended by the plaintiff, then the defendant would not be entitled to anything back. If you answer the first issue $370, you will not answer the second issue; but if you answer the first issue "Nothing," you will then consider the second issue. If you find that the contract was as contended by the defendant, by the greater weight of the evidence, you would answer that such amount as you find he paid, under these issues; but if you are not satisfied as to that, you

would answer it "Nothing," the burden being upon the defendant under the second issue.

The jury thereupon retired, and returned a second time for further instructions.

The Court: Is there any matter I can aid you about?

Juror: It might be. If you would charge us again, it might be we could get together.

The Court: If it is a question of fact, I have no right or power nor do I desire to express any opinion upon the facts.

Juror: Could we answer both issues "No?"

The Court: Yes. If you answer the first issue "No," you can answer the second issue "No"—you can answer both "No" if you find the facts so to be. If you find the first issue "Yes," the amount claimed by plaintiff, you would not answer the second issue; but if you answer the first issue "No" you can answer the second issue the amount claimed by defendant, or you can answer that "No."

Juror: If we answer the first issue "Yes," that means $370?

The Court: Yes; that is the amount claimed by him, $370—that is, if you are satisfied that it is correct.

Juror: We cannot split that, or anything?

(645) The Court: That is within the physical power of the jury. If you find that the contract between them was that the plaintiff was to make out plans and specifications for 3½ per cent for a building upon the estimated cost, and the cost was $12,000, and that was complied with, he would be entitled to recover $370, and you are the judges of whether he has shown that. If he has shown that by the greater weight of the evidence, it would be your duty to answer it $370. If you are not so satisfied you will answer it "No." Of course, the jury has the power to pass upon these matters. You are the sole judges of the evidence and the weight you will give to it. If you answer the first issue "Yes," you would not consider the second issue; but if you answer it "No," you will answer the second, and the burden of that is upon the defendant. If you find he is entitled to recover back the $200 or $225, you will say so, and if you do not think he is, you will answer "Nothing."

There was a judgment in favor of the plaintiff for $220, and the defendant appealed.

No counsel for plaintiff.
R. R. King and Thomas S. Beall for defendant.

ALLEN, J. The prayer for instruction requested by the defendant was substantially given in the charge.

In addition to telling the jury several times that the plaintiff was not entitled to recover anything unless he proved performance on his part, he instructed the jury as follows: "If the jury shall find from the evidence and by its greater weight that the contract was that the plaintiff should furnish plans for a house not to exceed $5,000, and the plaintiff failed to comply with the terms of his contract, and that while negotiations were going on and before the defendant learned that the contract would not be complied with, the plaintiff induced the defendant to advance him various sums from time to time, amounting to $200 or $225, or whatever the jury should find it to be, upon the assurance and warranty that he would comply with the terms of the agreement, and the plaintiff has failed to return said sums, and he failed and refused to comply with his contract, the defendant would be entitled to recover back the sum so paid." And again: "If you answer the first issue $370, you will not answer the second issue; but if you answer the first issue 'Nothing' you will then consider the second issue. If you find that the contract was as contended by the defendant by the greater weight of the evidence, you will answer that such amount as you find that he paid under these issues; but if you are not satisfied as to that, you will answer it 'Nothing,' the burden being upon the defendant upon the second issue."

The part of his Honor's charge excepted to when the jury returned for further instructions is in telling the jury in substance that it was within the physical power of the jury to divide the amount (646) claimed by the plaintiff and the defendant, respectively, and this, standing alone, would be erroneous, but when read in connection with the context it does not reasonably bear the construction of a direction that the jury had the right to compromise the matters in controversy.

The juror asked the presiding judge if the jury could split the amount claimed by the parties, and his Honor said, it is true, "That is within the physical power of the jury," but he immediately followed this statement with a clear and full instruction as to the duties of the jury in considering the evidence and in determining what their answers to the issues should be.

If, however, it should be held that the charge was erroneous, it was not only not prejudicial to the defendant, but in his favor, and had the effect of reducing the claim of the plaintiff $150.

The jury could not find any amount due the plaintiff under the instructions of the court without finding that the contract was as the plaintiff claimed it to be, and if so he was entitled to recover $370, and the jury has reduced this sum to $220.

No error.

JAMES M. LLOYD v. THE SOUTHERN RAILWAY COMPANY.

(Filed 22 April, 1915.)

Railroads—Master and Servant—Accident—Damnum Absque Injuria.

The plaintiff being employed by the defendant railroad company in a gang to replace the crossties under the rails of the road, relied upon evidence in his action for damages which only tended to show the manner in which the work was done, *i.e.*, the crossties would be placed on the rail on one side of the track, pushed until the end reached the inside line of the other rail, depressed by the plaintiff in the middle of the track, so that it would go under the rail, and shoved into position by the men at the end of the tie, assisted by himself; that while thus being depressed into position his hand was caught between the end of the tie and the rail, causing the injury complained of; that the plaintiff had no explanation to make of the occurrence, except "he had his hand on the tie to bear it down, and it went over and the end flew up and caught his hand." *Held:* The injury was the result of an accident in doing work of a simple nature, not requiring more than ordinary skill and experience, with an unusual effect, almost impossible for the defendant to have guarded against, and a recovery should have been denied as a matter of law.

CLARK, C. J., dissenting.

(647) APPEAL by defendant from *Rountree, J.*, at December Term, 1914, of ORANGE.

Civil action tried upon these issues:

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? Answer: "Yes."

3. What damages, if any, is the plaintiff entitled to recover? Answer: "$500."

In apt time the defendant moved to nonsuit, which motion was overruled. From the judgment rendered, the defendant appealed.

John W. Graham, A. H. Graham for plaintiff.
E. S. Parker, Jr., for defendant.

BROWN, J. The plaintiff introduced evidence tending to prove that on 26 September, 1913, he had been in the employ of the railway company about nineteen months, doing work of the kind he was engaged in on that day; that he and four other men were engaged in the work of taking out old ties and putting in new ones under the rails on the trestle across Haw River; that the ties were about 11 feet long, and that they

were thrown down across both rails. There were two men on the scaffold on the west side of the rails and two men on the east side, and that plaintiff was in the center of the track. The tie was first pulled back west until the east end dropped down just inside the east rail. Then the plaintiff, putting his hands on the tie, the two men west joined together in pushing the tie east under the east rail until the western end of the tie would drop down just inside the western rail, when the tie would be pushed back west by the joint effort of the plaintiff and the two men to the east of the east rail until it was in position.

The plaintiff testified: "I have no explanation to make other than I had my hand on the tie to bear it down, and it went over and the end flew up and caught my hand."

On cross-examination he testified: That two men, named Mitchell and Watson, were on the west side of the track and that he was in the middle, and that all three caught hold of the tie and shoved it across, and that it went too far and caught his hand and mashed his fingers. He testified that he was shoving the tie, but that the real strength that pushed the tie came from the men to the west.

We are of opinion that the injury received by the plaintiff was the result of an accident, pure and simple; it was an unusual effect of a known cause, and, therefore, not expected, and almost impossible to guard against. In work of that kind the amount of human strength expended in pushing the ties cannot be regulated with (648) mathematical accuracy. The work was simple and required no more than ordinary skill and experience. It is such an accident as might happen to one engaged in many different kinds of labor; it may happen to the farm laborer, to the house builder, as well as to the railroad employee.

This case is governed by the principles laid down in *Brookshire v. Electric Co.*, 152 N. C., 669; *Simpson v. R. R.*, 154 N. C., 51. It is very much like *Lassiter v. R. R.*, 150 N. C., 483, in which the plaintiff in that case was injured while unloading rails from a flat car, caused by a rail bounding back in an unusual and unexplained way and striking him. As said by *Mr. Justice Douglas* in *Bryan v. R. R.*, 128 N. C., 387: "The employer is not responsible for an accident simply because it happens, but only when he has contributed to it by some act or omission of duty."

We see nothing in this case upon which to base the charge of negligence.

The motion to nonsuit is allowed.

Reversed.

CLARK, C. J., dissenting: The plaintiff was not intentionally injured, of course, by his fellow servants, but there is evidence that his injury was due to their negligence and not "purely an accident." The evidence shows that he was not injured by any unforeseen circumstance, but because his coemployees, though looking at him and knowing that his hand was on top of the tie to depress it so that the end might go under the rail, negligently and carelessly shoved the tie with unnecessary and sudden force, so that he did not take his hand off in time to prevent the injury. The jury found that he was guilty of contributory negligence doubtless because he might have been quicker in taking his hand off the tie. But the jury found, as authorized by the act of 1913 and the charge of the court, that the greater negligence was on the part of his coemployees.

On the motion of nonsuit the evidence must be taken more strongly in favor of the plaintiff. But in any aspect of the evidence, if there is any to make it an accident, this was a matter for the jury, and they have found by the preponderance of the evidence and under a correct charge by the judge that the injury was not an accident, but that it was due to the negligence of plaintiff and his fellow servants, and in the larger degree to the latter.

In *Rushing v. R. R.*, 149 N. C., 158, this Court held: "Motion for nonsuit was properly denied; the case was properly one for the jury," and added: "The court correctly charged, though excepted to, if the jury should find by the greater weight of the evidence that while the plaintiff was carrying the log he stumbled and fell, and while down his fellow servants, who could have prevented the injury by holding
(649) the log, negligently and carelessly threw down their end of the log when by the exercise of ordinary prudence they could have held it and prevented the injury, then it would be chargeable to the negligence of the defendant's employees, and if this neglignce of his fellow servants was the proximate cause of the injury, the jury would answer the first issue Yes." The present case is stronger for the plaintiff, because he did not fall, but was in his proper place with his hand on top of the tie in the discharge of the duty assigned him to depress it so that the tie might pass under the rail, and he was injured by the sudden, unexpected, and unnecessary exertion of too much strength by his coemployees in pushing the tie in a manner to prevent his taking his hand out of the way, which assuredly he would have done if notified. Otherwise, he would have been injured solely by his own negligence, which the jury negatived.

In *Buchanan v. Lbr. Co., ante,* 40, *Hoke, J.,* says: "In *Russell v. R. R.,* 118 N. C., 1098, and in cases before that time it was declared to

be the correct principle that if, on a given state of facts, two men of fair minds could come to different conclusions as to the existence of negligence, the question must be determined by the jury."

In *Forsyth v. Oil Mill,* 167 N. C., 179, *Brown, J.,* says: "It is well settled that the Court cannot direct a nonsuit and give judgment in favor of defendants, 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 to sustain the plaintiff's contention." In the case at bar a jury of twelve impartial men found not only a scintilla, but by the preponderance, of evidence that this was not an accident, and that the injury was due to the negligence of the defendant, and the learned judge who tried the case drew the deduction, as "a reasonable person," that there was evidence of negligence, submitted the case to the jury on the issue of negligence, and refused to set aside the verdict on an allegation that it was against the weight of the evidence. The thirteen men who heard this cause and saw the bearing of the witnesses on the stand and who were charged with the duty of passing upon the weight to be given their testimony must be presumed to be "reasonable persons."

In *Hodges v. Wilson,* 165 N. C., 323, *Walker, J.,* says: "The court properly refused to nonsuit the plaintiffs. There was evidence to support their contention, which upon such motion must be viewed most favorably to them," citing *Snider v. Newell,* 132 N. C., 614; *Bivings v. Gosnell,* 133 N. C., 574; *Boddie v. Bond,* 154 N. C., 359; *Ball-Thrash v. McCormick,* 162 N. C., 471. The same judge, in *Walters v. Lumber Co.,* 165 N. C., 388, said: "Upon the motion to nonsuit, which was refused, there was evidence of defendant's negligence, which should be construed most favorably for the plaintiff." The jury here found that both the plaintiff and defendant were negligent. There was no accident.

The fellow-servant act (Rev., 2646) is discussed and its history (650) given in *Coley v. R. R.,* 129 N. C., 407. In *Sigman v. R. R.,* 135 N. C., 181, the Court said: "The fellow-servant law applies to all railroad employees, whether injured in running trains or rendering any other service"; and on page 184 said: "The plaintiff was injured by the negligence of a fellow servant while working upon and repairing a bridge of the defendant." That case was approved in *Nicholson v. R. R.,* 138 N. C., 516, where it is said: "Such business is a distinct, well known business, with many risks peculiar to itself, and all the employees in such business, whether running trains, building or repairing bridges, laying tracks, working in the shops, or doing any other work in the

service of an 'operating railroad,' are classified and exempted from the rule which requires employees to assume the risk of all injuries which may be caused by the negligence of a fellow servant."

The doctrine of assumption of risk has been eliminated by the fellow-servant act, *Coley v. R. R.*, 128 N. C., 534; *Cogdell v. R. R.*, 129 N. C., 398; *Mott v. R. R.*, 131 N. C., 234, in which it is held that it is "error to submit an issue as to assumption of risk when the cause of action is injury to railroad employees."

Laws 1913, ch. 6, sec. 3, provides that "In actions for damages against the common carrier to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of its employees contributed to the injury or death of such employee, or the death or *injury was caused by negligence.*"

This action is not brought under the Federal act, but under the above State statute. The plaintiff put his hand on the crosstie in the regular course of his employment and as he was instructed to do, to bear it down and guide it so that the end would go under the rail, and the force which shoved it too far came entirely from the two men at the west end of the crosstie. It was not an accident merely because the injury "was unusual, and unexpected," because almost all injuries from negligence are thus caused. It is rarely indeed that an injury is caused intentionally by a fellow servant.

His Honor charged the jury, and he is sustained by the evidence, that the plaintiff contended from the evidence that the jury should find that usually and ordinarily in shoving the ties they are only shoved in far enough to go by one rail, so that the tie could drop down and be pulled back under the other rail, but that on this occasion careless and negligent employees, without regard to the possible injury to the plaintiff, shoved the tie so far that it went too far and tilted over and mashed his hand, and that the ordinarily prudent man situated as the fellow
(651) workmen on the west side of the plaintiff ought to have apprehended, and would have apprehended, as reasonable men, that the injury would result from shoving that tie in the manner in which they did. The judge then gave the contention of the defendant, and the jury found with the contention of the plaintiff.

The evidence was submitted to twelve impartial jurors, who found by preponderance of the evidence that the plaintiff was injured by the negligence of his fellow servants in the manner described, whose negligence was greater than his, and there must have been sufficient evidence to

justify "a reasonable person" in so thinking, as the learned judge submitted the issue to them, and also refused to set aside the verdict on the alleged ground that it was against the weight of the evidence.

Cited: Thomas v. Lawrence, 189 N. C., 525; *Luttrell v. Hardin,* 193 N. C., 273; *Poole v. R. R.,* 202 N. C., 839.

SADIE MILLS v. W. E. HANSEL.

(Filed 22 April, 1915.)

1. Attachment—Summons—Returnable Thirty Days—Justices' Courts—Interpretation of Statutes.

In attachment and publication on a nonresident defendant before a justice of the peace, where defendant's property within the jurisdiction of the court has been levied on, a summons is not required; and therefore the requirements of Revisal, sec. 1445, that the summons must be made returnable not more than thirty days after its issuance is inapplicable.

2. Same—Court's Jurisdiction—Republication.

The court acquires jurisdiction of an action by attachment upon the property of a nonresident defendant within its jurisdiction, and the action should not be dismissed because summons by publication was not ordered within thirty days after the issuance of the warrant, it being within the authority of the court, having acquired jurisdiction, to order a republication, which should be done in order that the plaintiff may not be deprived of his remedy should the defendant remove his property from the State.

3. Same—After Thirty Days.

When personal service of summons in attachment cannot be made for the absence from the court's jurisdiction of a nonresident defendant having property therein, publication of summons is sufficient if made after the expiration of thirty days after service of attachment—in this case, one day thereafter—computed from the time of granting the attachment. Revisal, sec. 762.

4. Waiver—Special Appearance—Grounds Stated.

Where a defendant enters a special appearance for the purpose of moving to dismiss an action, and states his ground therefor, and upon his motion being denied appears and answers to the merits of the cause, he will be deemed to have waived all other objections than those set out in his special appearance.

APPEAL by plaintiff from *Lane, J.,* at November Term, 1914, (652) of ANSON.

Walter E. Brock and Lockhart & Dunlap for plaintiff.
Coxe & Taylor for defendant.

CLARK, C. J. This is an action by plaintiff for $50 due her for services as stenographer to the defendant and $5 in stamps used on his correspondence. The summons was issued by a justice of the peace 10 July, 1911, returnable 9 September. The defendant having left the State, service was had by attaching property of the defendant ($75 in money) and publication of notice. At the trial before the justice the defendant entered a special appearance and moved to dismiss the action because it appeared the summons was returnable more than thirty days from the issuance of the same. Rev., 1445. This was overruled. The defendant then moved that the attachment be dismissed because the affidavit did not set forth grounds of belief that defendant had left the State in order to defraud the plaintiff. Motion overruled. The defendant then denied the debt, but upon the evidence the justice rendered judgment in favor of the plaintiff for $55 and interest from 28 June, 1911, and for costs. The defendant appealed.

On the trial in the Superior Court the defendant entered a special appearance and moved to dismiss the action because the summons issued by the justice was made returnable more than thirty days thereafter, to wit, on 9 September, 1911, and further because the warrant of attachment was issued 10 July, 1911, but the order of publication of summons was not obtained till 10 August, 1911, being more than thirty days after the warrant of attachment was obtained. The motion to dismiss was allowed, and the plaintiff appealed.

The motion to dismiss because the summons was made returnable more than thirty days after its issue (Rev., 1445), should have been denied, because where the service is by attachment of property and publication no summons is required. *Best v. Mortgage Co.*, 128 N. C., 352, cited and affirmed by *Walker, J.; Grocery Co. v. Bag Co.*, 142 N. C., 174; and by *Allen, J., Currie v. Mining Co.*, 157 N. C., 209.

The defendant further moved to dismiss because the summons by publication was ordered 10 August, being one day more than thirty days after the issuance of the warrant of attachment on 10 July. This motion should have been denied. (1) The court acquired jurisdiction of the action by the service of the attachment upon the property of the defendant. If the notice was not duly served by the publication, it was "error to discharge an attachment granted as ancillary to an action because of the insufficiency of the affidavit to obtain service of the summons by publication, for it is possible that the defect may be cured by

amendments." *Branch v. Frank,* 81 N. C., 180. The remedy is not to dismiss the attachment, but by ordering a republication, for as the defendant is a nonresident, to dismiss the attachment may (653) deprive the plaintiff of all remedy by the removal of the property before a new proceeding and attachment can be had. *Price v. Cox,* 83 N. C., 261; *Penniman v. Daniel,* 90 N. C., 154; *S. c.,* 93 N. C., 332. In *Finch v. Slater,* 152 N. C., 156, it is held that where the court has acquired jurisdiction by attachment of property, the time for serving summons by publication, when it has not been properly made, can be extended, in the discretion of the court.

(2) Revisal, 762, requires that personal service of the summons must be made "within thirty days after the attachment granted"; but when personal service cannot be had, the same section provides: "Upon the expiration of the same time, service of summons by publication must be commenced pursuant to an order obtained therefor, and if publication has been or is thereafter commenced, the service must be made complete by the continuance thereof." It will thus be seen that publication is not required to be made, like personal service of summons, "*within* thirty days after the attachment granted," but *upon expiration* of the thirty days; that means "after" the expiration of the thirty days, and this publication was begun on 10 August, the day after the expiration of the thirty days, and strictly conforms to the statute. Indeed, in *Currie v. Mining Co., supra,* the point seems to have been made that it was error to make the publication within the thirty days.

(3) At the return day of the summons and trial before the justice of the peace the defendant entered a special appearance on the two grounds which are above set out, but neither of them was upon this proposition that the publication of the summons was not begun in proper time. The objections made on the special appearance being overruled, the defendant then defended upon the merits. In doing so he waived all objections except those set out in the special appearance. The objection as to the publication of the summons not being one of them, that was waived, therefore, by the defense on the merits. *Cape Lookout Co. v. Gold,* 167 N. C., 63. Had the defendant made the point, at that time, of insufficient publication, the justice of the peace would doubtless have extended the time and ordered the republication, as he had authority to do. *Price v. Cox, supra,* and other cases above cited.

Of the two grounds urged before the justice of the peace only one was presented in the trial in the Superior Court, to wit, that the summons was returnable more than thirty days after its issuance, which ground was properly overruled, as above stated. The only other ground pre-

sented in the Superior Court is that the publication of the summons was not begun within thirty days after the issuance of the warrant of attachment. This ground, also, for the reasons above stated, can-
(654) not be sustained. It was made for the first time in the Superior Court at November Term, 1914, more than three years after the beginning of the action, when it should have been made, if at all, at the trial before the justice, with opportunity for him to order a republication, if indeed it was necessary to begin such publication "within" thirty days, instead of "after the expiration" of said time. Rev., 762.

In dismissing the action and rendering judgment against the plaintiff there was error. The case must be tried on its merits.

Reversed.

Cited: Jenette v. Hovey, 182 N. C., 32; *Mohn v. Cressey,* 193 N. C., 571; *Casualty Co. v. Green,* 200 N. C., 538; *Bethell v. Lee,* 200 N. C., 759.

FRICK CO. v. BOLES.

(Filed 14 April, 1915.)

1. Contracts—Breach of Warranty—Conditions—Compliance.

Where the seller of certain machinery sues upon notes given for the balance of its purchase prices, and the defendant alleges a counterclaim for damages upon a breach of warranty, expressly providing that notice of a failure to satisfy the warranty should be given the plaintiff in five days, affording him opportunity to make necessary changes and allowing the defendant to return the machinery if not made to conform to the warranty; and it appears that the defects complained of were apparent and discovered by the defendant, within the five days specified, and he did not notify the plaintiff thereof, which he had ample opportunity to do, but kept the machinery and did not complain until action brought, the defendant cannot successfully rely upon the breach of the warranty, and judgment thereon should be rendered in the plaintiff's favor.

2. Contracts—Breach of Warranty — Conditions — Pleadings — Proof — Issues.

Where a warranty in a contract for the sale of goods requires that notice of a failure of the goods to satisfy the warranty be given the seller in five days, etc., an issue as to the reasonableness of the notice should not be submitted to the jury, in an action on the warranty, in the absence of allegation and proof thereof, and when defendant knew of the breach within the five days.

APPEAL by plaintiff from *Lyon, J.,* at August Term, 1914, of SURRY.

FRICK *v.* BOLES.

Action to recover the balance due on notes executed for the purchase price of certain machinery and to subject certain property conveyed to the payment thereof.

On 25 June, 1908, the plaintiff through its agent, Dellinger of Salisbury, together with E. A. Griffith of Winston-Salem, sold to the defendant Boles a portable engine and thresher, the purchase price to be $875. The machine was delivered on 6 July, 1908, and the defendant paid cash $100 at the time of the delivery, and executed three notes of $194, all dated 6 July, 1908, and due as follows: 1 November, 1909, 1 November, 1910, and one note for $193 due 1 November, (655) 1911, and also a deed of trust in which the defendant secured said notes by the conveyance of the engine and attachments and the thresher and attachments for which the notes were executed as purchase money. It was admitted by the plaintiff that in addition to the $100 cash, that the defendant Boles had paid all of the purchase-money notes except $194 due 1 November, 1910, and on this note he had paid 13 April, 1911, $27.92, and on 22 May, 1911, he had also paid $38.96, and also a further unpaid note for $193 due 1 November, 1911.

The material parts of the contract of sale are as follows:

Frick Company makes the following warranty with respect to machinery above mentioned, to wit:

1. That it is well built, of good material, and when properly operated will, under like conditions, perform as well as any other machinery of the same size and rated capacity.

2. If after notice as hereinafter provided, and opportunity given to make machinery fulfill terms of warranty, it fails to make said machine or attachment, or defective part thereof, perform according to contract, it agrees to take back such machine or attachment, or defective part, and at its option refund the money, notes, etc., received therefor, or replace the same.

3. If any part of the machinery proves to be defective within six months after being put into operation, it will furnish a duplicate thereof free, except freight, if said part is properly presented to agent through whom purchased, or at factory, and such defect clearly appears to be due to workmanship or material.

The purchaser agrees as follows, to wit:

(*a*) If machinery does not fulfill terms of warranty, to give notice in writing to the agent through whom purchased, and by registered letter to Frick Company, Waynesboro, Pa., within five days from first putting same in operation, stating in what respect said machinery fails to perform. If defects reported are such as can be remedied by purchaser, Frick Company may, by letter, suggest remedy. If such purchaser still

fails to make same perform, he will immediately notify Frick Company again, at Waynesboro, Pa., by telegram or registered letter, and allow reasonable time to remedy defects, rendering at all times friendly assistance.

(*b*) To return machinery to place where received, if Frick Company fails, after notice as above, to make same fulfill terms of warranty.

(*c*) If machinery is used longer than five days from first putting same in operation, without notice of failure to fulfill warranty as required in paragraph (*a*) above, or if used at all after Frick Company is alleged to have failed to remedy defects, it shall operate as an acceptance of same and as a fulfillment of the terms of warranty.

(656) The jury returned the following verdict:

1. In what amount is the defendant indebted to the plaintiff? Answer: "$160.61, with interest on same from 22 May, 1911, and $193, with interest on same from 6 July, 1908."

2. Is the plaintiff entitled to the possession of the property? Answer: "Yes."

3. Did the defendants give notice in writing to the agent through whom he purchased the machinery and by registered letter to the plaintiff at Waynesboro, Pa., within five days from first putting same in operation, stating that the machinery was defective, and in what respect it was defective, and asking the plaintiff to remedy the defect? Answer: "No."

4. If so, did plaintiff, after such notice from defendant, induce the defendant to keep and operate the machinery and try to remedy such defects? Answer: "No."

5. Was five days a reasonable time in which to test the machinery delivered to defendant? Answer: "No."

6. Did the machinery delivered by the plaintiff to defendant come up to the specifications and requirements of the written contract? Answer: "No."

7. What was the difference between the value of the machinery as delivered to defendant and its value, had it come up to contract? Answer: "$200."

The plaintiff excepted to the submission to the jury of the fifth, sixth, and seventh issues.

The plaintiff moved for judgment on the first, second, third, and fourth issues, which was refused, and it excepted.

Judgment was entered upon the verdict, and the plaintiff appealed.

Watson, Buxton & Watson, and Winston & Biggs for plaintiff.

J. H. Folger for defendant.

ALLEN, J. There was error in submitting the fifth issue to the jury, because there is neither allegation nor proof that the time provided in the contract was not a reasonable time for the examination of the machinery purchased, and the question as to whether five days is a reasonable time in contracts like the one before us does not arise.

On the contrary, the evidence introduced by the defendant shows that he knew of the defects of which he now complains, if they existed, on the first day the machinery was operated, and that instead of its condition improving, it grew worse.

The defendant himself testified "that Dellinger, the agent, was present when the machinery was set up; that the machine cut the grain of the wheat as it threshed, and defendant told him about it; Dellinger said he would remedy that; he took out one of the concaves, and after this was done he discovered that the wheat was left in the straw (657) and it would go out of the gin with the straw and chaff to some extent; that he ran the machine, but it got worse; the engine would not pump; it was hard to make it steam; the center crank was always bending; the pump would not force water into the boiler"; and the brother of the defendant testified "that the machine did not do good work at the start; that he heard his brother tell Dellinger that it did not work, and he saw him take out the concave and tell him that it would get better; but in the opinion of the witness, it got worse, and never threshed more than half of the wheat a machine should thresh; it would get hot and stop, and a good deal of time was wasted; it didn't have the power; that he threshed his wheat the second season and he could see no difference; it wasted the wheat."

If, therefore, the defendant knew within the five days provided for in the contract that the machinery did not fulfill the terms of the warranty of the plaintiff, it became his duty to notify the plaintiff, as he had agreed to do, in order that the plaintiff might make repairs or supply him with new machinery, and upon failure of the plaintiff to perform this duty, he agreed that he would return the machinery.

The jury has found without objection upon the part of the defendant that he failed to give this notice, and if so he cannot under the authorities have relief upon his alleged breach of warranty. *Moore v. Piercy,* 46 N. C., 131; *Main v. Field,* 144 N. C., 307; *Piano Co. v. Kennedy,* 152 N. C., 196; *Robinson v. Huffstetler,* 165 N. C., 459; *Oltman v. Williams,* 167 N. C., 312.

In *Robinson v. Huffstetler, supra,* the Court, after citing with approval 35 Cyc., 437, and *Mfg. Co. v. Lumber Co.,* 159 N. C., 507, says: "It seems, therefore, to be settled that when there is an express warranty

in the sale or exchange of personal property, and it is a part of the contract of sale that the property is to be returned within a specified time, if not as warranted to be, that the complaining party can have no redress by reason of the warranty, in the absence of fraud, without offering to return the property within the time named"; and in the later case of *Oltman v. Williams, supra,* "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."

Not only did the defendant fail to give notice to the plaintiff, but it appears from the record that fifty-seven letters passed between them, beginning in November, 1908, and ending in September, 1911, and that in no letter written by the defendant did he make complaint that the machinery did not satisfy the terms of the warranty. He repeatedly
(658) requested indulgence upon his notes, made frequent promises to pay, and represented the machinery to be in good condition. He wrote the plaintiff on 25 November, 1908: "I will certainly pay you if you can wait on me; if not, you will have to take the machine. It is in good condition." On 9 January, 1909: "I hope the company will wait on me a while longer. The machine is in good shape and was not used but a short time." On 22 January, 1909: "I am not in shape to pay out now, but if you will give me a chance I will certainly pay you; and if you can't wait, here is the machine in good shape, well cared for, nothing broken in any way." On 1 November, 1909: "Do the best you can for me, for I am in a very close place for money. The machine is in good condition, well cared for." On 3 January, 1910: "Hope you can wait on me a little while longer. The machine is in nice shape, in good condition."

It also appears from the evidence of the defendant that the thresher was burned in 1910 and that he collected the insurance money of $150, and he only claims to have paid $100 of the insurance to the plaintiff, and that since the commencement of this action he sold the engine and recommended it "good of its kind" to the purchaser.

If, therefore, the machinery did not satisfy the terms of the warranty, and the defendant knew of the defects within the five days stipulated in the contract, and if he failed to give notice to the plaintiff in order that it might make such changes as were necessary, and if the contract required the defendant to return the machinery if such changes were not made, the defendant cannot now, after retaining the machinery three or four years, without complaint, rely upon a breach of the warranty; and

it was therefore error to submit the sixth and seventh issues to the jury and the plaintiff was entitled to judgment upon the first, second, third, and fourth issues.

Reversed.

Cited: Fairbanks v. Supply Co., 170 N. C., 323; *Farquhar Co. v. Hardware Co.*, 174 N. C., 375; *Fay v. Crowell*, 182 N. C., 535.

H. W. LITTLE & CO. v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 22 April, 1915.)

Carriers of Goods—Negligence—Damage to Shipment Repaired—Measure of Damages.

Where a shipment of buggies has been damaged by the negligence of the carrier, and it appears that the manufacturer has repaired the damage as a personal matter between it and the consignee, it is error for the trial judge in the latter's action to confine the measure of damages to the difference between the market value of the buggies at the time they were delivered to the defendant for shipment and their market value when the repairs had been made; for the plaintiff is entitled to recover the reasonable cost of repairing the buggies had the manufacturer charged therefor, interest on the purchase price, together with such other damage as he may have proximately sustained by reason of the defendant's negligence; the difference between the value of the buggies when received by the carrier for shipment and their value when tendered to the consignee upon his demand for them being the rule of damages.

APPEAL by plaintiff from *Lane, J.*, at October Term, 1914, of (659) ANSON.

Plaintiffs ordered twenty-three buggies, shafts, and wheels, from Henderson-Hull Company at Valdosta, Ga., in July, 1907, and they were delivered to defendant to be shipped to the plaintiffs at Wadesboro, N. C. When they arrived at the latter place they were in a badly damaged condition, caused by defendant's negligence. The only question presented is the one relating to the measure of damages. The buggies were repaired by the Valdosta company, the cost of repair being $50, but that company made no charge against plaintiff for the same, releasing that amount to the plaintiffs. The court charged the jury that as the injury to the buggies was admitted, and the receipt of the same for shipment by the defendant, as carrier, to the plaintiff, "the (defendant) company would be liable for the damage sustained while it was transporting the property, and the measure of damages would be the difference in the

market value of the buggies at the time they were delivered to the defendant for shipment and their market value when the repairs had been made on them by the plaintiffs," but that they were not entitled to have the $50, cost of repairing by the Valdosta company, considered in making the estimate of the damages, and the jury would disregard that part of the evidence and confine themselves to the rule already stated. The jury returned this verdict: "Is the defendant indebted to plaintiffs, and if so, in what amount? Answer: Nothing." Judgment was entered upon the verdict in favor of defendant, and plaintiff appealed.

Robinson, Caudle & Pruette for plaintiff.
Coxe & Taylor for defendant.

WALKER, J., after stating the case: There was some evidence as to the amount of damages agreed upon between the plaintiff and the local agent of the defendant at Wadesboro, but we have discovered no evidence of authority in him to make any such agreement, and we lay that matter out of the case. There was error in the charge as to damages. The court should have given the ordinary rule as to damages in such cases. It is thus stated in Hutchison on Carriers (3 Ed.), sec. 1362: "Where the goods have not been lost or destroyed during the transportation, but are delivered in a depreciated condition attributable to causes for which the carrier is responsible, the measure of damages is the difference, after deducting the cost of transportation, between their value as (660) actually delivered, and as they should have been delivered, and with such other damages as have naturally and proximately resulted from the injury. Under the latter head, the owner would be entitled to recover for reasonable expenses in seeking to reclaim the goods, or in restoring them to their former condition, or endeavoring to reduce the loss to its lowest amount." And interest could be allowed by the jury. If the goods had been restored to their original value by the repairs, the measure of damages would, of course, be the reasonable cost of the repairs; if not fully restored, then the reasonable cost of repairs plus the difference in value of the buggies as restored and their original value. But the usual rule is the one laid down by Hutchison on Carriers, sec. 1362. It can make no difference to the defendant how the repairs were made. If the Valdosta company saw fit to repair the buggies, cost free to plaintiffs, it is no concern of defendant, as it was not done for its benefit and it does not lessen its liability. It must make good the loss sustained by its negligence in any event. Where the damaged goods are fully restored, so that there is no loss in value, the reasonable cost of repair may be the measure of damages. The fact that it

cost $50 to repair the goods would be some evidence upon the question of damages, as going to show the loss in value, provided the charge for repairs was a reasonable one. The court erred in not stating the correct rule upon the measure of damages, and for this error another jury will be called.

New trial.

J. M. HEDGECOCK v. A. E. TATE ET AL.

(Filed 22 April, 1915.)

1. **Executors and Administrators—Lands of Testator—Options—Unauthorized Acts—Specific Performance.**

   Executors have not the power to contract with reference to a sale of the lands of their testator without special authority to do so, and especially does this apply to options of purchase given thereon; therefore specific performance of their contracts to convey such lands given as an option is not enforcible.

2. **Executors and Administrators—Implied Authority—Liability of Agent—Knowledge of Purchaser.**

   While an unauthorized person assuming to act as agent of another is liable in damages to the one dealing with him in good faith, as upon an implied warranty of authority, the doctrine does not obtain when the third person deals with knowledge of the want of authority of the supposed agent; and where damages are sought personally against an executor for his failure to perform a contract or option to convey lands of his testator, signed by him as executor, and purporting to assume no personal liability, the proposed purchaser takes with knowledge that the law implies no agency, and recovery will be denied.

APPEAL by plaintiff from *Devin, J.*, at November Term, 1914, (661) of GUILFORD.

Civil action, brought by the plaintiff J. M. Hedgecock against the defendants A. E. Tate *et al.*, to recover damages for failure of the defendants to comply with the terms of an option.

The following is a copy of the option:

This agreement, made this 1st day of March, 1913, between A. E. Tate *et al.*, administrators of Rev. J. B. Richardson, deceased, of Guilford County and State of North Carolina, parties of the first part, and J. M. Hedgecock, party of the second part:

Witnesseth, that in consideration of the sum of $1 paid by the party of the second part to the parties of the first part, the receipt of which is hereby acknowledged, the said parties of the first part hereby agree,

upon receipt of the sum of $100 per acre, under survey to be made on or before the 1st day of January, 1914, to sell and confirm to the said party of the second part at an option, and execute to him a deed in fee simple with the usual covenants of warranty, the following described property, to wit: All of the land lying west of the city of High Point, adjoining the lands of J. M. Hedgecock, E. T. Corbett, the Jones heirs, Frank Proctor, and W. P. Hedgecock and others. This tract is known as the Jones tract, and contains about 25 acres. This option is to be taken up on the 1st of August, provided J. M. Hedgecock sells his present farm. Otherwise, option to remain in full force until January 1, 1914.

It is understood and agreed that in case the party of the second part does not pay or tender to the parties of the first part the purchase price, $100 per acre aforesaid, on or before the date above limited, then this agreement shall be void.

In witness whereof said parties of the first part hath hereunto set their hands and seals the day and year first above written.

(Signed) A. E. TATE, Admr. [SEAL]
J. B. RICHARDSON ESTATE. [SEAL]

From a judgment of nonsuit, plaintiff appealed.

John A. Barringer, T. H. Calvert for plaintiff.
W. P. Bynum, Robeson & Barnhart for defendants.

BROWN, J. This case embraces two causes of action, one for specific performance against all the defendants, the other for damages for breach of contract against A. E. Tate individually, both causes being based upon a certain option given to the plaintiff by A. E. Tate as administrator of J. B. Richardson, deceased.

(662) The plaintiff cannot enforce specific performance of the option, because there is nothing to show, in the first place, that the executors to the will of J. B. Richardson are given power to sell land. Even if they were vested with the power to sell land, it has been held that that does not give the executors any power to give an option to purchase. *Trogden v. Williams,* 144 N. C., 194.

The plaintiff is not entitled to recover on the other cause of action against the defendant Tate for damages, for the reason that it appears upon the face of the written contract that the defendant Tate did not contract personally.

But the plaintiff seeks to avoid this by contending that the defendant Tate undertook to act as an agent for others, without authority. It is true that a person who assumes to act as agent for another impliedly

warrants that he has authority to do so. If it turns out that he lacks such authority, he may be held personally liable to the one with whom he deals, in good faith, relying on such implied warranty. But this rule, which renders the agent personally liable who acts without authority, is based upon the supposition that the want of such authority is unknown to the person with whom he deals.

If such person has actual knowledge of the lack of authority, he cannot hold the agent liable. As is said in Cyc., 31, p. 1550: "Thus, where all the facts touching the agent's authority, or its source, are equally within the knowledge of both parties, who act thereupon under a mutual mistake of law as to the liability of the principal, the agent cannot be held."

In this case the evidence shows that the plaintiff had full knowledge of the capacity in which the defendant Tate acted, which knowledge rebuts any presumption of an implied warranty of authority.

The plaintiff testifies that he drew up the option, and further says: "I am a lawyer; have had a license for eighteen or twenty years. I knew that Mr. Tate was one of three executors of the will, the other two being the widow, Mrs. Richardson, and the son, O. N. Richardson."

The plaintiff further testified: "I do not recall positively whether he said they would have to sign the deed or whether they would sign it or would not sign it. There was something said about the heirs. He never told me he had any power of attorney. I did not ask him if he had power of attorney. He said that he had been handling the estate; it might not have been exclusive."

Again the plaintiff says: "I knew then I was to get my deed not from Mr. Tate, but from the heirs at law of J. B. Richardson."

These statements and admissions of the plaintiff show conclusively that the contract was not and was not intended to be the personal obligation of the defendant Tate, and further that the plaintiff had full knowledge of all the facts and circumstances connected with (663) the transaction, and showing that Tate was acting not for himself, but for the heirs at law or devisees of his testator.

Affirmed.

Cited: Harris v. Trust Co., 205 N. C., 529.

W. H. EDWARDS v. ADOLPHUS H. YEARBY.

(Filed 22 April, 1915.)

1. Descent and Distribution—Adopted Father—Natural Father—Interpretation of Statutes.

Revisal, sec. 177, providing for the adoption of infant children for life or a lesser term, in dealing with the question of devolution and transfer of real property by descent and distribution, confers the hereditable qualities on the child only, and not on the adopting parent; and where such child by adoption dies seized of realty, without leaving brother or sister, and the property is claimed by both the adopted and natural father, the law confers it upon the latter under our general statutes of descents, Revisal, ch. 30, rule 6.

2. Descent and Distribution—Suggested Changes—Legislative Power.

The rules of devolution and transfer of property by descent and distribution come entirely within the province of the Legislature, to which must be addressed any suggested changes.

APPEAL by defendant from *Daniels, J.*, at November Term, 1914, of DURHAM.

Civil action heard on case agreed. From the facts presented, it appeared that W. Y. Edwards, an infant of 5 years, died in Durham seized and possessed of one-third interest in a certain lot in said city, without leaving brother or sister, and the property is claimed by plaintiff, W. H. Edwards, the legitimate and natural father of the deceased child, and by the defendant, who was the adopted father and also the natural uncle of the child.

In reference to the title to this one-third interest and how the same was acquired by the deceased child, the facts further show that "Sarah Yearby, a widow, owned the land in controversy in fee, and died intestate, leaving as her sole heirs at law W. M. Yearby, Ora Yearby, and A. H. Yearby, the defendant. Ora Yearby married the plaintiff W. H. Edwards, in 1901. Of this union two children were born, to wit, William Y. Edwards and Ruth L. Edwards. In March, 1907, the plaintiff W. H. Edwards and his wife, finding that they could not live together happily as man and wife, entered into a contract of separation. The plaintiff W. H. Edwards conveyed certain property to W. M. Yearby,

trustee, for the support of his wife, Ora Y. Edwards, and his two
(664) infant children, William Y. Edwards and Ruth L. Edwards.

Soon thereafter Ora Y. Edwards died intestate, leaving as her sole heirs at law her two children, William Y. Edwards and Ruth L. Edwards; that shortly after this Ruth L. Edwards died. In May, 1907, W. M. Yearby duly adopted William Y. Edwards with the consent of

the plaintiff, who was duly made a party to said proceedings, and William Y. Edwards was taken to the home of W. M. Yearby and cared for by him and was thereafter known as William Yearby; that on 20 May, 1907, the same day of the adoption, W. H. Edwards conveyed to William Y. Edwards all of his interest in the land in controversy. Some time after the adoption of said William Y. Edwards the said child died seized of a one-third undivided interest in the land in controversy, leaving his adopted father, W. M. Yearby, and his natural father, W. H. Edwards, the plaintiff. The question, therefore, to be determined is whether the one-third undivided interest in said lands descends to the adopted father, W. M. Yearby, or to the natural father, W. H. Edwards."

There was judgment for plaintiff, and defendant excepted and appealed.

Baggett & Baggett and Sykes & Sheppard for plaintiff.
Bryant & Brogden for defendant.

HOKE, J., after stating the case: Our statute, Rev., ch. 2, provides for the adoption of infant children for life or a lesser term and, in section 177, the effect of such adoption is stated as follows: "Such order of adoption when made shall have the effect forthwith to establish the relation of parent and child between the petitioner and the child during the minority or for the life of such child, according to the prayer of the petition, with all the duties, powers, and rights belonging to the relationship of parent and child; and in case the adoption be for the life of the child, and the petitioner die intestate, such order shall have the further effect to enable such child to inherit the real estate and entitle it to the personal property of the petitioner in the same manner and to the same extent such child would have been entitled if such child had been the actual child of the person adopting it: *Provided,* such child shall not so inherit and be so entitled to the personal estate if the petitioner specially sets forth in his petition such to be his desire and intention: *Provided further,* for proper cause shown in said petition the court may decree that the name of such child may be changed to that of the petitioner."

From a perusal of the section, it appears that while the proceedings, during the minority or for the life of the child, "establish the relation of parent and child between the two, with all the duties, powers, and rights belonging to such relationship," when the statute professes and undertakes to deal with the question of the devolution and (665) transfer of property by descent or distribution, it confers the hereditable qualities on the child only, and not on the adopted parent.

"It shall enable the child to inherit the real estate and to take the personal property" as if the actual child of the person adopting it.

Our general statute on descents of real property, founded on and, to a great extent, embodying the principles of the common law, would give this property to the natural father (Revisal, ch. 30, rule 6), and this present law of adoption, having in express terms conferred the right of inheritance only on the child, it should, by correct interpretation, be confined to that, and create no other interference with the general law that the statute itself declares. Black on Interpretation of Laws, p. 146; Lewis' Southerland (2 Ed.), sec. 491.

Speaking to the position and the general policy upon which it is properly made to rest, Rodgers on Domestic Relations, sec. 463, says: "As statutes conferring the rights, duties, and liabilities of natural children upon those adopted thereunder are in derogation of the common law, they must not be construed to enlarge or confer any rights not clearly given. Upon the principle, therefore, it is clear that an adopting parent could not inherit from an adopted child unless this be clearly authorized by the statute. Indeed, out of an abundance of caution the statutes on the subject in some States expressly provide that the adopting parent shall not inherit from the child adopted. This is done to prevent designing persons from getting the estate of the child through the process of adoption. It would be to the interest, from a financial standpoint, of a *quasi*-parent who has adopted a child being an heir to a fortune, large or small, and who has no descendants who could take the inheritance in preference to a parent, to bring about the death of the child for the purpose of succeeding to the inheritance. Under such a condition of things the *quasi*-parent might neglect the child in sickness or otherwise be the means, directly or indirectly, of bringing about the death of the adopted child. For these and like reasons the doctrine of ascent of property from an adopted child to its new parent is not, and should not be, favored in law."

The question does not seem to have been hitherto presented to this Court, and there is some variety of ruling on the subject in other jurisdictions, owing largely to differing phraseology of their statutes; but the view we adopt is supported, we think, by correct principles of interpretation and is in accord with many authoritative decisions elsewhere construing laws which more nearly resemble our own, many of them expressed in terms much more favorable than ours towards the rights of the adopted father. *Heidicamp v. Ry.,* 69 N. J. L., 284; *Reindus v. Koppleman,* 68 Mo., 482; *Upson v. Noble,* 35 Ohio St., 655; *White v. Dotter,* 73 Ark., 130; *Hole v. Robbins,* 53 Wis., 514; 20 Cent. L. Journal, p. 343; *In Es. T. Naman,* 3 Hawaii, p. 484.

In the State of Massachusetts, while the adopted father is (666) allowed to inherit to a certain extent, their statute, amended for the purpose in 1876, explicitly provides that "the adopted parents and their kindred in blood may now inherit from the adopted child such property as the child has acquired by gift or inheritance from the adopted parent or kindred of such parent." And the same principle which now prevails, by decision, in Indiana, has been thus far confined to such property as the child acquired from the adopted parent or the kindred of such parent. *Humphries v. Davis,* 100 Ind., p. 237. In the case of *In re Jobson,* 164 Cal., 312, holding that the natural father does not inherit, the California statute provides that "on adoption the child shall be regarded and treated, in all respects, as the child of the parent adopting him, and, thereafter, the adopting parent and the child shall sustain towards each other the legal relationship of parent and child and have all the rights of that relation." This without further or specific provision on the right of inheriting property, and, in that case, two of the judges dissented in favor of the natural father. And in *Warren v. Prescott,* 84 Me., 483, the statute provided that, in adoption, "the child becomes, to all intents and purposes, the child of his adopters, the same as if born in lawful wedlock," with two exceptions which were held not to make in favor of the natural parent.

But we do not consider it necessary or desirable to pursue the many and various cases bearing directly or indirectly on the question presented. Much of the apparent conflict, as stated, will be found to arise from the differing laws applicable, and we think it safe to rest our decision on the provisions of our own statute, which, by correct interpretation, confers the right of inheritance on the adopted child and not on the adopted father.

For the reasons suggested in the citation from Rodgers, *supra,* there is doubt if any change in our law on the subject is to be desired; certainly not beyond the modification as it prevails in the legislation of Massachusetts and in the State of Indiana, as construed by the later decisions. But if it is otherwise, the changes required must be referred to the General Assembly, for this question of the devolution of property by descent and distribution is one coming entirely within its province. *In re Garland Will,* 160 N. C., 555; *Hodges v. Lipscomb,* 128 N. C., 57.

There is no error, and the judgment in plaintiff's favor must be Affirmed.

Cited: Love v. Love, 179 N. C., 118; *Grimes v. Grimes,* 207 N. C., 781.

(667)

A. T. BARNES v. SOUTHERN RAILWAY COMPANY.

(Filed 14 April, 1915.)

1. Carriers of Passengers—Freight Trains — Negligence — Contributory Negligence—Trials—Evidence.

Evidence that a passenger on a freight train seated himself upon a seat provided for passengers and was violently thrown from his seat by the sudden and unexpected movement of the train is insufficient upon the issue of contributory negligence; and as the defendant is held to a high degree of care consistent with the operation of trains of this character, the fact that the injury occurred in the manner stated affords sufficient evidence of defendant's actionable negligence to sustain a verdict in plaintiff's favor on that issue.

2. Negligence—Proximate Cause—Trials—Instructions.

In an action to recover damages arising from the defendant's negligence, and the questions in dispute involve only those of whether the act complained of was negligently done, and if it caused the injury, the judge charged the jury that they must find that the defendant was negligent and that the negligence caused the injury, in order to answer the issue in plaintiff's favor. *Held:* The charge was not objectionable as leaving out the element of proximate cause.

APPEAL by defendants from *Ferguson, J.*, at November Term, 1914, of WILSON.

Action to recover damages for personal injury, caused, as the plaintiff alleges, by the negligence of the defendant while he was a passenger in a caboose attached to a freight train of the defendant.

The defendant denied that it was negligent and pleaded that the injury to the plaintiff was caused by his own contributory negligence.

It was admitted that the plaintiff was a passenger on the train of the defendant at the time of his injury.

The plaintiff testified in part as follows: That he was 61 years of age, and lived near Lucama, Wilson County, all his life; was a farmer and fertilizer inspector, and was employed by the Commissioner of Agriculture of North Carolina in the latter capacity on or about 25 March, 1913. That his duties required him to go about in certain territory and take samples of fertilizer and other products; see that they were branded and taxes paid, etc. That he was paid for these services $3 per day and expenses. That he was at Rural Hall on 25 March, 1913, on his regular trip, and was going from there to Pilot Mountain. That between 3 and 4 o'clock on that day he purchased a ticket from Rural Hall to Pilot Mountain from the agent of the defendant company, paying 30 cents for

it, and got aboard the train of the defendant company, which was a mixed train, that is, consisting of a caboose attached to said car in which passengers were allowed to ride by the company. The caboose had cushioned seats running on each side, and a partition, and (668) there was a stove in it. It had no fire in it. That when he got on the car there were two gentlemen in it, one named Hoover, one named Swanson. That Mr. Hoover was sitting in a chair and Mr. Swanson was sitting on one of the seats running on the side of the car, and he took the seat between Mr. Swanson and the stove. That when he got on the train some one said it was a little late, and it stayed in Rural Hall about twenty or thirty minutes. That when he got on the train it pulled out about 30 or 40 yards and stopped a little to the left of the station. That the first thing he knew was a jolt which threw him off the seat and against the stove; that there was a rod running around the stove, and his chin struck this rod, and his whole weight went across his neck. When the train stopped, Mr. Hoover and Mr. Swanson asked if he was hurt. The witness said that he was hurt so bad that he could not see, and that he did not know but what a train had run in and there had been a collision. That either Mr. Swanson or Mr. Hoover asked him if he was hurt, and the other one said, "Don't you see he is hurt? There is blood running out of his face." That after they helped him up, he turned sick and asked for water; that he was nauseated. That two or three persons came in the car and wanted to know who was hurt. That the conductor came in and said he would have to make a report, and asked the witness his name, his residence, and his age. That before the jolt came he was sitting on the seat, and that he did not hear any warning prior to the jerk; that there was a clash all at once; that he fell toward the engine, and that some one fell on him, and he thought it was Mr. Swanson. That he stopped work about 11 or 12 April and went home and consulted Dr. I. W. Lamm. That before he came home he went to work four or five days, and as he did not get any better, he stopped. That about 12 April, finding that he could not continue his work, he saw the Commissioner, Major Graham, and told him that he would have to stop. This was about 12 April. That he was hurt in his neck and leg and suffered a great deal of pain, and has never been able to use his neck since, and his neck is still stiff, and when he tried to work his neck hurts a great deal. That his arm is affected and he cannot do as much as he could before the injury; that he could not carry a bucket of water.

The defendant offered evidence tending to prove that the movement of the train of which the plaintiff complained was not unusual or ex-

traordinary, and was such as might be expected upon freight trains, but offered no evidence contradicting the plaintiff as to what he was doing at the time he was injured.

The jury returned the following verdict:

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

(669) 2. Did the plaintiff, by his own negligence, contribute to his injuries, as alleged in the answer? Answer: "No."

3. What damages has the plaintiff sustained? Answer: "$1,770."

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

W. A. Finch and H. G. Connor, Jr., for plaintiff.

Woodard & Hassell for defendant.

ALLEN, J. The principal exceptions relied on by the defendant are to the refusal to enter judgment of nonsuit at the conclusion of the evidence and for failure to give proper instructions on the issue of contributory negligence.

It is not necessary to set out and review the instructions given and refused on the second issue, as we find no evidence of contributory negligence. According to all the evidence of the plaintiff and the defendant, the plaintiff entered the car and took a seat prepared by the defendant for passengers and was injured by the sudden movement of the train while sitting quietly talking to other passengers, and in this we find no evidence of negligent or wrongful conduct on his part.

We are also of opinion that there was evidence of negligence, as proof that the plaintiff was injured in the manner described while a passenger on the train of the defendant is itself some evidence of negligence. 5 R. C. L., 74; *Marable v. R. R.*, 142 N. C., 557; *Gleeson v. R. R.*, 140 U. S., 435.

In the *Marable case, supra,* the plaintiff was injured while a passenger in a caboose of a freight train by a sudden movement of the train, and the instruction was approved that "If there was such a sudden and violent stopping of the train that plaintiff was thrown from his seat, it would require explanation from the defendant, and the inquiry naturally arises, Why was the train so suddenly stopped? The answer would naturally come from the defendant, as the plaintiff was in the caboose and the defendant's servants were in charge of the train"; and in the *Gleeson case, supra,* the Court said: "Since the decisions in *Stokes v. Salstontall,* 38 U. S. (13 Pet.), 181, and *New Jersey R. and Transp.*

Co. v. Pollard, 89 U. S. (22 Wall.), 341, it has been settled law in this Court that the happening of an injurious accident is, in passenger cases, *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance, and was followed at the present term in *Inland and Seaboard Coasting Co. v. Tolson,* 139 U. S., 551."

The reasons for the application of this principle are stated in 5 (670) R. C. L., 77, to be: "(1) The contractual relation between the carrier and passenger, by which it is incumbent on the carrier to transport with safety; hence the burden of explaining failure of performance should be on the carrier. (2) The cause of the accident, if not exclusively within the knowledge of the carrier, is usually better known to the carrier, and this superior knowledge makes it just that the carrier should explain. (3) Injury to a passenger by a carrier is something that does not usually happen when the carrier is exercising due care; hence the fact of injury affords a presumption that such care is wanting"; and the exceptions to the rule as stated on page 82 are when the evidence shows that the cause of the injury is outside the control of the carrier, and has no connection with the machinery or appliances of transportation and so disconnected from the operation of the business of the carrier as not to involve the safety or sufficiency of the instrumentalities of transportation or the negligence of its servants.

The fact that the plaintiff was injured while riding on a freight train does not absolve the defendant from liability for negligence.

A carrier of passengers on freight trains owes to them the same high degree of care which it owes to passengers on regular passenger trains, although it is not liable for injuries resulting from such sudden starts and stops as are necessary for the operation of such trains. Moore on Carriers, 1264.

The other exceptions relied on in the brief are to parts of his Honor's charge in which, after telling the jury that they must find that the defendant was negligent, added: "And that that negligence caused the injury, before answering the first issue 'Yes,'" the objection being that this portion of the charge did not take into consideration proximate cause.

In some instances it is desirable to instruct the jury carefully and accurately as to proximate cause, but in this case the jury could not have been misled, as on all the evidence the plaintiff was injured by a

sudden movement of the train, and the only matter in controversy was whether this movement was one that was ordinary and usual or extraordinary and unusual.

The instructions on the first and second issues were more favorable to the defendant than it was entitled to, and we find no error on the third issue.

No error.

Cited: Needham v. R. R., 171 N. C., 766.

PRESENTATION OF THE PORTRAIT

OF

HON. THOMAS S. KENAN

TO THE

SUPREME COURT OF NORTH CAROLINA

BY

HON. THEODORE F. DAVIDSON

15 DECEMBER, 1914

Colonel DAVIDSON said:

THOMAS STEPHEN KENAN was born on the 12th day of February, 1838, in the home of his father at Kenansville, Duplin County, North Carolina, and the home of his ancestors since Colonial times, and died at his residence in Raleigh, on the 23d day of December, 1911.

Measured by true standards, his life was singularly happy and fortunate—blessings which his virtues and conduct well merited. He was the embodiment, I venture to say, in the highest expression, of that fascinating and inspiring social and political *status* that prevailed throughout the South in the years preceding the War Between the States—a condition which, despite many defects that envious criticism has not failed to exaggerate, had for its standard of public and private conduct the most elevated ideals. It especially developed that most valuable quality in any social state, the *individualism* of the citizen—that consciousness of *personal* responsibility to God, country, and mankind, which, so long as they are appreciated, will give a community courageous and strong leaders. With many thoughtful men the modern tendency to submerge the individual in the flood of the masses, while it may increase the power of the whole up to a certain point, is pregnant with danger in those great crises which come to every people and which demand the qualities of personal devotion and commanding influence.

The span of his life embraced the most eventful years in our National annals, involving radical revolutions in our political, social, and economic conditions. Standing at the side of his new-made grave, and looking backward to the day of his birth, it is almost impossible to comprehend that we are the same people, or that the same ideals and principles of governmental policies and individual conduct are recognized; and yet, let us hope that deep down in the hearts of the people, especially among those of the "original thirteen States," there are embedded those eternal fundamental principles which underlie and can only maintain the conception of true republican government, such as

found expression in those inspired writings, our original State and National Constitutions. It is a pleasant belief with some of us that in this reflection North Carolina is entitled to the first place.

While we are too near his death to be free from the influence of universal and individual grief, it is a delightful consolation to reflect upon his career and character. Descended from an ancient and illustrious ancestry, his youthful days were in that golden period of our State's history when lineage, social position, talents, and worth were recognized at their proper value. A long, peaceful, and prosperous period had been the blessing of our people, and under its benign influence civilization in its various and best forms flourished. Surrounded in his infancy and boyhood by the atmosphere of a Southern gentleman's home, he easily developed those noble principles of manhood which he had inherited. When he entered the University he found congenial companionship, a companionship well calculated to enlarge and mature his lofty preconceptions of his duties as a man and citizen. From the University, and glowing with the inspiration of its opportunities and associations, he began the study of law, under the personal supervision of one of the greatest lawyers this State has produced, Chief Justice Pearson, and with a class remarkable for its intellectual brilliancy, whose subsequent careers have made the annals of the legal profession in our State famous.

But before he had opportunity to exhibit in active practice the talents which undoubtedly would soon have won for him a high place at the bar, the "call to arms" resounded throughout the South, and to one of his training and belief there could be and was not a moment's hesitation. His ardor, courage, and conscientious devotion at once distinguished him, and he rose with extraordinary, though not unmerited, rapidity to the rank of colonel of his regiment, and gallantly leading it, after many other "well foughten fields," he was desperately wounded at Gettysburg, and, falling into the hands of the enemy, was kept prisoner of war until the close of hostilities. This period of enforced inactivity was always regarded by him as the great misfortune of his life; but even under these unhappy conditions he was not idle nor depressed. He devoted his energies and employed his powers in devising and executing ways to ameliorate the miserable gloom and wretchedness of his companions in the horrors—it is not too much to say *horrors*—of prison life on Johnson's Island. His diary of that portion of his life is one of the most interesting and inspiring records of those tragic days.

At the close of the War Between the States he was released from prison and returned to his home, intending to devote himself to his chosen profession; but it was not to be. The conflict of rifle and cannon had ended, but there at once began a more stupendous conflict of ideas

and policies in which the very foundations of the political and social existence of the Southern people were imperiled. When the future historian shall consider that epoch he will undoubtedly record that in all the elements of courage, self-denial, patriotism, and brilliant intellectual effort, it was the most honorable period in the history of our State. Colonel Kenan threw himself into this convulsion with the same courage, energy, and spirit of self-sacrifice that had distinguished him when war was rampant; and these qualities at once put him among the leaders of those who were striving to hold on to what was left in the South.

In the General Assemblies of 1865-6 and 1866-7 he was an influential member, and took an active part in the framing of that difficult and imperative legislation demanded by the radically changed conditions of our people resulting from the termination of the war. Those were great and perplexing problems, and how well they were solved is evidenced by the fact that the legislation of that period has survived longer and become a more fixed policy in our legislative history than that of any other period, except possibly that immediately following the Revolutionary War.

Twice in those momentous days he was called upon to make the race for Congress, in which he and every one knew there was no possible chance of election; but it was vital that the questions at issue should be discussed and our people encouraged to stand fast for the brighter days which were to come, and which, thank God! have come; and no one is more entitled to the gratitude of the people of North Carolina for this result than Colonel Kenan.

Peaceful days were coming once more. Colonel Kenan again resumed his profession, and, cheerfully performing all the duties and meeting all demands of his fellow citizens for public service, no matter how small or large, he was steadily advancing in his practice, when, in 1876, he was called to the office of Attorney-General, a position he filled with great credit to himself, to the honor of the bar, and benefit of the State, for eight years.

Soon after the expiration of his second term as Attorney-General he was appointed clerk of this Court, and continued to be its clerk until his death.

For more than thirty years he was one of the most active and influential trustees of the University of North Carolina, and for the greater portion of that time a member of its executive committee and president of the General Alumni Association. His devotion to and unalterable confidence in this institution were conspicuous; he was absorbed with the conviction that the reputation of the State and its general welfare were largely dependent upon the influence of the University. He was

often called upon to perform duties and assume obligations in other, but not less important, functions of current civic life; as president of the North Carolina Bar Association; in the Grand Lodge of Masons; as director and always the deeply interested friend of our State charitable institutions; and that which was nearest to his heart, every movement to aid the Confederate soldier, either by measures for his material relief or the far more essential purpose of preserving for the generations to come the record of his patriotism and valor, he was indefatigable and preëminently useful, and his labors have not been in vain.

It is in his official connection with this Court that he was perhaps best known and will be remembered by the public. For more than a quarter of a century he so discharged the duties of the responsible office of your clerk that its members and the legal profession throughout the State came to regard him as an indispensable member of the Court, and his death an irreparable loss. During this period he reported sixteen volumes of the opinions of this Court, a work in which he took much pleasure and pride, and which increased his reputation with the bar. His inborn reverence for the law, his pride in the profession, and his veneration for this tribunal not only made his labors congenial, but exercised a powerful influence with the bar, especially with the younger members who were examined and admitted during his incumbency, and for whom he ever maintained great interest.

He believed thoroughly in the old ethical rules and traditions of the bar, and in his peculiarly happy way never lost the opportunity to urge upon the younger and coming members their preservation. He sometimes was much concerned by certain tendencies, which we all detected, calculated to lower the professional standards, and by admonition and conduct strove to resist those demoralizing influences and to keep the bar on its ancient elevated plane. His work has not been in vain.

It is especially appropriate that some enduring memorial of this lawyer, public official, and representative gentleman shall be placed in this Chamber, whose traditions and associations were so dear to him; and I now, in the name and on behalf of his beloved wife, who survives him, present to the Court this portrait of our departed and beloved colleague and distinguished fellow citizen. It is a wonderfully faithful and striking representation of Colonel Kenan's features and expression, obviously a work of high artistic rank. It is a cause of much pride that the artist, Mr. Jacques Busbee, is a North Carolinian.

It is, however, in the recollection of his social, private, and domestic relations those who knew him intimately have the most happiness. The lofty standards of conduct he observed in public affairs were carried into his home and his family, sweetened by a gentle, joyous, and generous

heart. Who of us will ever forget his handsome face and form; his cordial, gracious manner, and modest dignity? It has been said that men, while they have the faculty of exciting the respect and confidence of men, rarely evoke the love of men; but it was not so with Colonel Kenan; men loved him as women and children loved him. His very presence in social life, and at all public functions, was always welcomed with delight and pride; and his sound judgment and fine sense of propriety singled him out and imposed upon him—more, perhaps, than any other of his time—leadership in those occasions requiring the exercise of taste and tact. He was endowed by nature and developed by habit the unusual combination of administrative and executive talents; and to this may be attributed his uniform success in meeting every requirement and fulfilling every expectation of his friends and country.

I trust I shall be permitted, without impropriety, to refer to his domestic life. On 20 May, 1868, he was married to Miss Sallie Dortch—a perfect union of tastes, opinions, and aspirations, and full of happiness to both. There was no home in the land where unostentatious hospitality, taste, elegance, and refinement reigned more supremely, brightened and ennobled by perfect confidence and mutual affection and devotion. In his family, to the remotest circle, he was the trusted friend and universal benefactor. The world can never know the manifold forms in which his almost regal generosity found expression, but its recipients know and will never forget.

There is another aspect of his life and character which I am sure will not be without lasting influence. While special forms or creeds did not apparently interest him, he was profoundly impressed with, and convinced of, the truths and beauty of the Christian religion. A member, from his youth, of one of our oldest religious associations, and in his quiet way always deeply interested in and striving to promote its efficiency, he never sympathized with sectarian controversies or church rivalries. He *lived* the life of a sincere Christian. In these days of restless doubt and discussion, which are unsettling the foundations of religious opinion, it is comforting and encouraging to turn to the contemplation of the example of this cultured and upright man, who illustrated in his daily walk the influence of the Christian philosophy of life.

Among the brilliant men of his time, with possibly two or three exceptions, he was the best known and esteemed.

Colonel Kenan's life and character adorn the annals of North Carolina; and this portrait of him will, I hope and believe, keep fresh, in future generations, the memory of the appearance and honorable career of one of the most lovable and useful of men. In all essential qualities that constitute the ideal man he will find peers, but no superiors among

those illustrious men whose portraits already decorate these walls, or in that long list of equally eminent citizens whose portraits will in all probability be additional memorials of our love and esteem for high character and public service.

Were I asked to suggest to the youth of our land models for imitation in life, I would point to the late Chief Justice Smith and to Colonel Kenan, in whom were combined, in my estimation, those qualities which constitute the very highest excellence of manly and civic virtues.

ACCEPTANCE BY MR. CHIEF JUSTICE CLARK

The hall containing the records of this Court was singularly incomplete while its walls lacked the portrait of the efficient officer who so long served as clerk of the Supreme Court. His distinguished services to his State as a young and gallant officer, as a public-spirited citizen, and as a State official, have been admirably told by his friend and ours, and to that admirable and sympathetic summary nothing can be added.

It may well be said, however, that no reports issued by this Court have ever surpassed those edited by Colonel Kenan when Attorney-General and reporter, and as clerk of the Supreme Court it may also be said without fear of contradiction that there has been none better, not only in this State, but in any state of the Union. He had a natural talent for the position, and it would be impossible for any one to discharge its duties more faithfully or efficiently. It was a rule with him never to leave the office on any day when its work was not entirely completed. Work which should have been done on any day was never carried over till the next. As a result his office was always up with its work. There was never any arrearage.

In the conduct of his office he was not only efficient, but he knew how to discharge its various duties in a manner that made and retained as friends all with whom he came in contact. He was not only a personal friend to every member of the Court, but to every lawyer who had business in his office. The story of his work here may be summed up without flattery in saying that his portrait merits the inscription "The Model Clerk."

The marshal will hang his portrait in the hall of our records, where it will remain for all time as a testimonial of the deep impress he made upon the legal life of the State, and a memorial of the brave soldier, the distinguished reporter, and Attorney-General, and the well rounded, popular, and efficient executive officer of this Court, the friend of the bar of the State and our friend.

INDEX.

NOTE.—The reverse index will be found to embrace the distinctive subheads of the decided points, referring by number to the places where the decisions thereon are indicated, and the cases embracing them are cited. It is hoped that in this manner, and by the embodying of the sketch words in *italics* in this index, the practitioner may more readily find whether the point he is looking up has been decided in this volume, and if so, where.

ABANDONMENT.

1. *Abandonment—Indictment Found—Two Years—Renewal of Relationship.*—The crime of willful abandonment by the husband of his wife is not a continuing offense, day by day, and where there has been a complete act of abandonment and no renewal of the marital association, the act must have occurred within two years next before indictment found. Revisal, sec. 3355. *S. v. Hannon*, 215.

2. *Same—Evidence—Conviction.*—Upon this trial for willful abandonment by the husband of his wife, the evidence on behalf of the State tended to show that the defendant abandoned his wife something over three years next before bill found, and while they had not lived together since, she had had a warrant issued for this offense within the two years, whereupon he went to see her in South Carolina, gave her $5 for her support, and promised to come back here, get a house for her, and in pursuance of this promise she had the indictment withdrawn; that there were two children, both begotten by the defendant, the younger of which was not more than five months old. *Held:* Sufficient upon the question of a renewal of the marital obligation by the defendant within the two years to support a verdict of conviction. Revisal, sec. 3355. *Ibid.*

ABETTOR. See Homicide, 4; Criminal Law.

ACCORD AND SATISFACTION.

1. *Accord and Satisfaction—Disputed Accounts—Checks "in Full"—Acceptance—Rebuttal Evidence.*—A check given and received by the creditor which purports to be in full of account to date does not conclude the creditor, accepting it, from showing that in fact it was not in full, unless, under the principles of accord and satisfaction, there had been an acceptance of the check in settlement of a disputed account. *Rosser v. Bynum*, 340.

2. *Evidence—Checks "in Full"—Custom—Similar Transactions.*—Where in payment for lumber it is controverted that a check given and accepted therefor stated thereon, at the time of its acceptance, that it was in full, it is competent for the maker of the check to show by significant and similar entries made by him on other checks in transactions of like nature that it was his custom to do so, as bearing upon the disputed fact at issue. *Ibid.*

3. *Mortgages—Voidable Sales—Waste—Accord and Satisfaction—Trials—Questions for Jury.*—The question of accord and satisfaction by the mortgagor's accepting a reconveyance of the land by the mortgagee in possession, under the circumstances of this case, was properly submitted to the jury under conflicting evidence and a correct instruction from the court. *Owens v. Mfg. Co.*, 397.

ACTIONS. See Judicial Sales.

1. *Deeds and Conveyances—Conditions Subsequent—Actions—Heirs at Law.*—The grantor of lands upon a condition subsequent, during his life, and his heirs or privies in blood after his death, may take advantage of the breach of the condition and may bring suit to declare the estate forfeited, and to recover the lands. *Brittain v. Taylor*, 271.

2. *Fraternal Orders—Rules of Order—Appeal—Beneficiaries—Right of Action—Laches.*—Where the rules of a fraternal insurance association provide for an appeal to the National department of the order upon refusal of the secretary-manager to pay a death claim under its certificate, and the beneficiaries of the policy are given no right of appeal, they have immediate right of recourse to the courts, and are not responsible for the inaction of the local branch of the association or bound by its laches; and under the circumstances of this case *it is held* that, by the lapse of time, the local branch had lost its right of appeal to the National department. *Harris v. Jr. O. U. A. M.*, 357.

3. *Judgments—Motions—Excusable Neglect—Fraud—Independent Action.* A motion refused and not appealed from, having formerly been made in the original action, to set aside a judgment rendered therein for excusable neglect, the independent action is considered, in this appeal, one to set aside a judgment, taken according to the course and practice of the court, and in all respects regular, upon the ground of fraud. *Mutual Asso. v. Edwards*, 378.

4. *Judgments — Independent Action—Fraud—Proof—Sufficiency.*—To set aside, in an independent action, a judgment on the ground of fraud, the fraud alleged as the basis of the present action must be shown in the procuring or rendition of the judgment, and it is insufficient when it affects only the validity of the original demand unless the plaintiff in the judgment, or someone for whose conduct he is legally responsible, has wrongfully prevented the opposing party from setting up the defense, or the judgment has been rendered in a court where such defense was not available to him. *Ibid.*

ADJOURNMENT. See Contempt.

ADMISSIONS. See Appeal and Error, 7, 13.

ADVERSE POSSESSION. See Limitations of Actions.

AGREEMENTS. See Appeal and Error, 7.

AMENDMENT. See Pleadings.

ANIMALS. See Railroads.

APPEAL AND ERROR.

1. *Appeal and Error—Assignments of Error—Instructions—Court's Remarks—Harmless Error.*—While there is a discrepancy in this case on appeal between the defendant's requested prayer for instruction as set out in its assignments of error and in the record, it readily appears that the trial judge modified the instruction requested; and the exception to his statement that he gave the instruction requested is without merit, as it appears from his statement and the entire context that the court intended it for a modification, and the jury so understood it. *Buchanan v. Lumber Co.*, 40.

APPEAL AND ERROR—*Continued.*

2. *Trials—Instructions—Appeal and Error—Omission to Charge—Collateral Matters.*—In an action for wrongful death, where the allegations involve and the evidence chiefly relates to the question of negligence of the defendant in permitting an obstruction upon the right of way, knocking the intestate from the running board of the tender of the locomotive, and also involve the doctrines of contributory negligence and the last clear chance, the failure of the court, in his charge to the jury, to advert to a phase of the evidence from which it might be inferred that the intestate may have been inadvertently knocked from the running board by his companions, is not held erroneous especially when request for specific instructions thereon had not been preferred. *Ibid.*

3. *Appeal and Error—Objection and Exception—Elimination of Immaterial Exceptions—Duty of Appellant.*—Appellant's counsel should eliminate exceptions taken in the hurry of the trial from their case on appeal, which upon due deliberation in making up the case appear to them to be without merit, and retain only those upon which reliance is placed. *Bank v. McArthur*, 48.

4. *Evidence — Handwritings — Comparisons — Photographic Copies—Enlarged Copies—Testimony of Photographer—Appeal and Error.*—In an action against sureties on a note, the signatures of the sureties being denied, the court permitted the introduction of photographic-microscopic reproductions of the disputed signatures, greatly enlarged, for the purpose of comparison with the genuine signatures of the indorser, which were not so enlarged, by the defendants' expert witness, without testimony of the photographer to show that the reproductions of the disputed signatures were exact. *Held:* To be reversible error, under the evidence in this case. *Ibid.*

5. *Appeal and Error—Unsettled Case—Docketing Case—Motions—Certiorari—Agreements Extending Time for Service of Cases.*—Where the case and countercase or exceptions on appeal have been served within the time agreed upon in writing, it is the duty of the appellant to "immediately" request the judge to settle the case as required by Revisal, sec. 591; and should the judge not settle the case in time for filing in the Supreme Court, the appellant should docket the record proper and move for a *certiorari*, or the appellee, upon motion, may have the appeal dismissed under Rule 17. The practice among attorneys of extending by consent the time for service of the case on appeal beyond that allowed by the statute is not commended. *Trans. Co. v. Lumber Co.*, 60.

6. *Appeal and Error—Failure to File Record—Rules of Court.*—Where the record in cases on appeal to the Supreme Court has not been filed by the appellant in this Court under the requirements of Rule 4 (164 N. C., 540), it will be dismissed upon motion of the appellee, filed with proper certificates, made under Rule 17, and the party in default must abide the consequences unless unavoidable cause is shown. *Land Co. v. McKay*, 83.

7. *Appeal and Error—Several Causes—Agreement of Parties—Courts.*—Where there are several causes between the same parties, upon the same subject matter and involving the same exceptions, the parties

APPEAL AND ERROR—*Continued.*

may agree among themselves that one or more of them may be appealed from and the result control them all; but this rests solely upon the agreement of the parties, and is not subject to the control of the courts. *Ibid.*

8. *Appeal and Error—Insufficient Findings.*—In this case *it is held* that the findings of fact of the referee are not sufficiently explicit, and the case is remanded, that additional findings be made. *Hay v. Ins. Co.*, 88.

9. *Appeal and Error—Admissions.*—The parties on appeal are bound by the statement made by the trial judge appearing of record as to their admissions on the trial in the court below; and objection thereto comes too late after verdict. *Barefoot v. Lee*, 89.

10. *Appeal and Error—Indefinite Exceptions.*—An exception of appellant to three distinct instructions given by the trial judge to the jury is not sufficiently specific for consideration on appeal. *Ibid.*

11. *Trials—Evidence—Female Witnesses—Credibility—Appeal and Error.*—A statement made by the judge to the jury in this case, that a woman as a witness is not entitled "to more credit than a man," *is held* to be without error. *Ibid.*

12. *Appeal and Error—Fragmentary Appeals—Appeal Dismissed—Supreme Court—Discretionary Powers.*—In an action for breach of contract for failure to deliver goods sold, where upon issues raised as to a fraudulent change of the wording of the contract by the plaintiff, the jury has found for the defendant, and the court accordingly renders judgment and refers other matters of alleged damages arising out of the contract sued on to a referee, an appeal from the judgment is fragmentary, and will be dismissed; and while the Supreme Court may, in the exercise of its discretion, pass upon the points raised and dismiss the appeal, this will be done in rare and exceptional instances. *Waste Co. v. Mfg. Co.*, 92.

13. *Appeal and Error—Objections and Exceptions—Admissions—Immaterial Exceptions.*—Where in an action to recover land defendant has conceded upon the trial that the issues should be answered in plaintiff's favor if the jury should find the *locus in quo* to be contained within the description of the plaintiff's paper title, exceptions to the charge of the court upon the question of adverse possession become immaterial on defendant's appeal. *Pilkington v. Welch*, 94.

14. *Cities and Towns—Condemnation—Streets—Damages—Evidence—Appeal and Error.*—In condemnation proceedings to take lands of plaintiff by a town for street purposes, evidence as to the location of the road on certain lands of plaintiff and damages thereto was excluded by the trial judge, on defendant's objection that damages to this lot had not been claimed in the exceptions, and that the record did not show this land had been condemned. It appearing that the exceptions specifically demanded damages to this lot, a new trial is ordered. *Carpenter v. Rutherfordton*, 95.

15. *Supreme Court—Rehearing—Petition Dismissed.*—This petition to rehear having been fully and carefully considered, and it appearing that the errors assigned have already been passed upon in well con-

APPEAL AND ERROR—*Continued.*

sidered opinions of this Court, and no new fact has been called to the attention of the Court, or new case or authority cited, or new position assumed, the petition is dismissed. *Weston v. Lumber Co.*, 98.

16. *Criminal Law—Unlawful Burning—Questions—Identification—Appeal and Error.*—Upon a trial for setting fire to a certain ginhouse, etc., a witness testified that he knew the prisoner well, and saw the defendant running away from the ginhouse, which was ablaze, and recognized him in the light of the fire. The defendant objected to a question of the solicitor, asking if the witness had any doubt that the prisoner was the man whom he saw; the question with the answer *held* to be no error. *S. v. Rogers*, 112.

17. *Appeal and Error—Objections and Exceptions—Immaterial Evidence.*—Exceptions to the admissibility of evidence should be specific, nor will they be regarded on appeal when the evidence excepted to is merely irrelevant, but not prejudicial. *Ibid.*

18. *Trials—Speeches to Jury—Improper Argument—Appeal and Error.*—Upon his argument to the jury the counsel for the defendant, being tried for unlawful setting fire to a ginhouse, told of his having gone on the prosecutor's premises, and of his own knowledge, of facts and circumstances relating to the locality, which had not been testified to, and were at variance with the testimony of one of the State's witnesses. The prisoner's counsel excepted to certain language used by the solicitor in reply, and under the circumstances of this case *it is held* that the prisoner's counsel cannot be heard to complain; and the Supreme Court reminds counsel that from respect for the occasion they should abstain from controversies of this character; and the courts, that they should prohibit them. *Ibid.*

19. *Courts—Expression of Opinion—Speeches to Jury—Interpretation of Statutes—Appeal and Error.*—In this case *it is held* that the remarks of the trial judge made with reference to the argument of defendant's counsel in his address to the jury were not an intimation of opinion upon the facts, and not held for error. Revisal, sec. 535. *Ibid.*

20. *Appeal and Error—Indictment—Omission from Record—Presumptions—Duty of Appellant—Motion to Dismiss.*—Where an appeal is taken from the refusal of the trial court of the defendant's motion to quash an indictment, an inspection of the indictment is necessary for the Supreme Court to pass upon the question presented; and where it has not been sent up, the presumption being in favor of the correctness of the judgment appealed from, the burden is on the appellant to show error, and ordinarily the appeal will be dismissed upon motion of the appellee in the Supreme Court. *S. v. McDraughon*, 131.

21. *Appeal and Error — Indictment — Omission from Record — Power of Courts—Motion to Supply—Certiorari—Procedure.*—Where an appeal is taken to the refusal of the trial court to quash an indictment, it is the duty of the appellant to see that a transcript of the indictment appears in the record; and when it does not so appear he should apply to the Superior Court to supply it, if one convenes in time; and if not, he should send to the Supreme Court as much of the record as could be procured, and apply here for a *certiorari* to give him opportunity to move in the court below. *Ibid.*

APPEAL AND ERROR—*Continued.*

22. *Appeal and Error—Power of Courts—Indictment—Omissions.*—The Superior Court has power to supply, by copy, an indictment necessary to be set out in the record in a criminal case on appeal to the Supreme Court which has been lost accidentally or otherwise, upon motion of appellant, based upon affidavits. *Ibid.*

23. *Courts—Judgment Suspended—Appeal—Trial de Novo—Waiver.*—When it appears that a defendant convicted in a criminal action has consented that the judgment be suspended against him, it will be considered a waiver of his right of appeal on the principal issue of his guilt or innocence; and, where this has been done in a court inferior to the Superior Court, of his right to a trial *de novo*, under the statute. *S. v. Tripp*, 150.

24. *Same—Writ of Review—Procedure—Constitutional Law—Statutes.*—There being no appeal provided where a judgment in a criminal action has been suspended by the trial court with the defendant's consent, and sentence subsequently imposed, the Supreme Court has authority, under Article IV, sec. 8, of our Constitution, and the Superior Court under Revisal, sec. 584, in the exercise of its appellate jurisdiction, to review the judicial proceedings of courts of inferior jurisdiction by writs of *certiorari*, *recordari*, and *supersedeas*, in order to afford a litigant his legal right of redress; and except in rare instances, which do not obtain in the case at bar, the appellate courts are confined to the facts as they appear of record, and can only review the proceedings as to their regularity or on questions of law or legal inference, as where the lower court has refused to hear evidence on the subject before imposing the sentence or has committed manifest and gross abuse of the discretion reposed in them. *Ibid.*

25. *Appeal and Error—Objections and Exceptions—Brief—Answered Questions—Harmless Error.*—Exceptions in the record not set out in the appellant's brief are taken as abandoned under Supreme Court Rule 34 (164 N. C., 551), nor will such exceptions be sustained when it appears that they were made to questions which were in fact answered. *S. v. Heavener*, 156.

26. *Appeal and Error—Homicide—New Trials—Prejudicial Error—Immaterial Evidence.*—Upon a trial for homicide, when it appears that the prisoner and deceased became suddenly engaged in a fight, in the former's store, and that the prisoner shot and killed the deceased with a pistol which he drew from his pocket, testimony of a witness that the prisoner kept his pistol in a showcase near which the firing commenced will not be held as reversible error, as it cannot be considered that testimony of this slight character could have influenced the jury in deciding the main issue as to the guilt of the prisoner, or that a different result would follow upon another trial. *Semble:* The evidence admitted was competent under the circumstances of this case, and, furthermore, being objected to after it had been received and there being no ruling thereon by the trial court, its admission cannot be held as error on appeal. *Ibid.*

27. *Homicide—Trials—Instructions—Verdicts—Appeal and Error—Harmless Error.*—On a trial for homicide, where the verdict rendered by the jury convicts the defendant in a less degree, the refusal of the

APPEAL AND ERROR—*Continued.*

court to give special instructions upon the law, arising from the evidence, of murder in the second degree is harmless if erroneous. *Ibid.*

28. *Homicide — Trials — Instructions Given—Instructions Asked—Appeal and Error—Harmless Error.*—Where self-defense is relied on upon a trial for murder, the refusal of the defendant's prayers for instruction as to his reasonable belief that he was in danger, when sufficiently covered in the charge to the jury, is not erroneous. *Ibid.*

29. *Appeal and Error — Fragmentary Appeals — Directing Verdict "Not Guilty"—Order Striking Out Entry—Mistrial—Discretion of Court—Interpretation of Statutes.*—Where the judge has ordered the entry to be made by the clerk of a verdict of not guilty on the trial of a criminal case, for a variance between the offense charged in the indictment and the proof, but conceiving his action to be erroneous, he then, in the presence of the jury, still sitting on the case, directs the clerk to strike out the entry and, withdrawing a juror, directs a mistrial, *it is held* that the order of the judge striking out the verdict of not guilty left the case in exactly the same attitude it was before the entry of such verdict, and the withdrawal of a juror and order of mistrial, being in the discretion of the court, except in capital cases, are not reviewable. *S. v. Ford*, 165.

30. *Same—Fragmentary Appeals.*—An appeal is fragmentary from an order of the trial judge to the clerk to strike out a verdict of not guilty in a criminal case, which the judge had directed to be entered, but subsequently, when the jury is still sitting on the case, it is stricken out by the order of the court, and the appeal will be dismissed; for in such instances the acts of the court are analogous to his rulings upon evidence or like matters during the progress of the trial. *Ibid.*

31. *Criminal Law — Defendants' Character — Presumptions — Trials—Remarks of Counsel—Appeal and Error.*—Where the defendants in a criminal action have not testified as witnesses, it is correct for the trial judge to refuse to charge the jury, on their behalf, that the law presumed them to be men of good character; and where the prisoner's attorney in addressing the jury has urged upon them this erroneous proposition, it was not error to permit the solicitor, in reply, to argue that the defendants had not taken the witness stand and their attorney should not be permitted to claim that their character was good. *S. v. Knotts*, 173.

32. *Constitutional Law—Unusual Punishment—Secret Assault—Appeal and Error.*—The sentence of the court in this trial for secret assault is not objectionable as imposing an unusual or excessive punishment. *Ibid.*

33. *Appeal and Error—Instructions—Presumptions.*—The presumption is in favor of the correctness of the charge given to the jury by the trial judge, when his charge is not sent up in the record. *S. v. Williams*, 191.

34. *Appeal and Error—Objections and Exceptions—Unanswered and Leading Questions.*—Where the defendant is on trial for homicide, and a witness has given his testimony, stated by him upon examination of the court to be all he knew of the circumstances connected with the

APPEAL AND ERROR—*Continued.*

case, his statement will be taken as conclusive, nothing else appearing; and *it is further held* that the exceptions by defendant to the exclusion of unanswered questions in this case will not be held for reversible error, the questions being objectionable as leading and it not appearing what facts would have been elicited had they been answered. *Ibid.*

35. *Homicide—Trials—Evidence—Corroboration—Testimony Before Coroner—Appeal and Error—Harmless Error.*—The defendant upon a trial for murder introduced the written testimony of his witness given before the coroner to corroborate his evidence given on the trial, some of which was not admitted by the trial judge, who held that the part excluded had not been testified to on the trial, and upon a comparison made in the Supreme Court on appeal, *it is held* no reversible error was committed, it appearing that, if erroneous, the excluded evidence was insufficient to furnish grounds for a new trial of the case. *Ibid.*

36. *Criminal Law—Conspiracy to Raise Price—Common Law—Statutory Offense—Interpretation of Statutes—Appeal and Error—Harmless Error.*—A conspiracy among dealers to raise the price of a necessary article of food being indictable under the common law, it is not reversible error for the trial judge to exclusively so regard it in the conduct of the trial and erroneously instruct the jury that it was not a statutory offense, though in fact it was so made by chapter 41, Laws 1913, secs. 1, 2, and 3. *S. v. Craft*, 208.

37. *Appeal and Error—Trials—Instructions—Record.*—Objection that the court did not properly advert to the plaintiff's evidence upon a certain phase of this case under the principles declared in *S. v. Hopkins*, 130 N. C., 647, will not be considered on appeal, no special prayers for instruction thereon having been offered, and the charge of the court not appearing in full in the record so as to show that the court had not instructed properly thereon. *S. v. Hannon*, 215.

38. *Appeal and Error—Briefs—Exceptions Abandoned—Rules of Court.*—An exception mentioned only incidentally and without discussion in the brief, will be taken as abandoned, under Rule 34 of the Supreme Court. *Guano Co. v. Mercantile Co.*, 223.

39. *Trials—Instructions — Requests — Appeal and Error—Presumptions.*—Exceptions to the refusal of the trial judge to give prayers for instruction to the jury, asked, though appearing to be proper upon the evidence in the case, will not be held as error on appeal when the charge of the trial judge does not appear in the record and there are no exceptions thereto; for it will be presumed that the charge as given was a proper and correct one, and substantially covered the request for instruction, the exact language being immaterial. *Ibid.*

40. *Appeal and Error—Damages.*—Where the jury have assessed the plaintiff's actual damages for being unlawfully detained in a private insane asylum by its authorities, and the amount has been approved by the trial judge, it is not reviewable on appeal. *Cook v. Hospital*, 250.

41. *Appeal and Error—Jurors—Misconduct—Findings of Fact.*—The findings of fact by the trial judge in this case as to the alleged misconduct of a juror are not reviewable. *Lewis v. Fountain, post*, 277. *Ibid.*

APPEAL AND ERROR—*Continued.*

42. *Appeal and Error—Trials—Rejection of Evidence—Collateral Matters.* In an action for damages for injuries received in a personal assault, the evidence was conflicting as to whether the injury was inflicted in consequence of the plaintiff's endeavor to protect his sister, the defendant's wife, from the defendant's assault on her with a pistol, or whether the plaintiff and defendant engaged in an assault and the plaintiff was shot in self-defense. The rejection of defendant's evidence that the defendant's wife made a different statement on the trial as to her husband's conduct towards her from that she theretofor made is not erroneous, the evidence proposed being on a collateral matter. *Lewis v. Fountain*, 277.

43. *Jurors—Misconduct Inferential—Court's Discretion—Appeal and Error.* Where it appears that a juror placed himself in surroundings that gave him an opportunity or chance for misconduct in connection with the case, without any evidence that he had in fact been guilty of it, the determination of the trial judge is conclusive on appeal as a matter within his discretion. *Ibid.*

44. *Appeal and Error—Record—Immaterial Matter—Costs.*—No part of the record in this case is taxable against the plaintiff, the successful party on appeal. It does not contain matter unnecessary to the decision. *Ibid.*

45. *Appeal and Error—Evidence—Measure of Damages—Harmless Error.* Error committed on the trial which has worked no wrong or prejudice to the appellant will not constitute reversible error on appeal; and where it appears, by the verdict, in an action for damages for breach of contract for the delivery of goods sold, that the jury has accepted the figures testified to by the defendant upon the measure of damages, the plaintiff's evidence thereof, though incompetent, cannot be a sufficient ground for awarding a new trial on the defendant's appeal. *Ferebee v. Berry*, 281.

46. *Appeal and Error—Questions and Answers—Responsive Answers—Objections and Exceptions.*—The Supreme Court will not consider on appeal the responsiveness of answers to questions asked a witness, when not objected to by the appellant on the trial of the case. *Ibid.*

47. *Bond Issues—Equity—Injunction—Elections — Registrar — Appeal and Error.*—In this action to restrain the issuance of bonds for local public school purposes the exception of the plaintiff that no registrar acted therein as required by law is not sustained by the evidence, and though the trial judge overruled the exception, but made no finding on the matters raised thereby, the exception is not sustained on appeal. *Casey v. Dare County*, 285.

48. *Appeal and Error—Process—Parties.*—Where an action is commenced in the court of a justice of the peace and summons is erroneously served on one as agent for a certain corporation, and on appeal to the Superior Court an order is entered to make the corporation a party, but summons is not accordingly served, a judgment rendered against the corporation will be set aside on appeal unless the corporation defendant has entered an appearance, denied liability, or in some manner has waived the lack of proper service. *Hassell v. Steamboat Co.*, 296.

APPEAL AND ERROR—*Continued.*

49. *Same—Courts—Presumptions.*—Every intendment and presumption on appeal is in favor of the validity of the judgment of the Superior Court appealed from; and where it appears that summons had not been served on the defendant, and it entered a general as well as a special appearance for the purpose of dismissing the action, without showing which was done first, and judgment has been rendered against it, it will be presumed that by a general appearance first entered the right to dismiss upon the special appearance had been lost. *Ibid.*

50. *Courts—Clerks of Court—Trials—Instructions—Appeal and Error.*—Where, in accordance with an agreement previously entered into, the clerk receives the verdict of the jury in the absence of the court, it is his duty to do so without comment thereon and to keep it until the reconvening of the court; and where the clerk hands the answered issues back to them and tells them they should retire to their room and reconsider the issues to see if the answers were not in conflict with the charge, but refusing to say in what respects, he has exceeded his authority in assuming to instruct the jury, and a verdict differently rendered will be set aside and a new trial ordered. *Cullifer v. R. R.*, 309.

51. *Issues — Trials — Instruction, Correct in Part — Appeal and Error.*—Where the trial judge has submitted an erroneous issue upon the last clear chance, to the plaintiff's prejudice, the error is not cured by the charge of the court which lays down the correct principle applicable to the evidence, in one part, and in another part erroneously states it. *Ibid.*

52. *Executors and Administrators—Deeds and Conveyances—Recitals—Lost Records—Evidence—Parties—Statutes—Appeal and Error.*—When the court records are shown to have been lost or destroyed, the recitals in the deed of an administrator, executor, etc., are made "*prima facie* evidence of the existence, validity, and binding force of the decree, order, or judgment, or other record, referred to or recited in the deed," by Revisal, sec. 341; and the statute also makes the deed, record, and decree valid and binding as to all persons mentioned or described therein; and where the title to a party is made to depend upon a deed of this character, and the trial judge rules that the deed could not be considered in evidence, though the loss of the records therein recited could be shown, it erroneously deprives the party of his rights to develop his case, and an appeal to the Supreme Court will directly lie. *Pinnell v. Burroughs*, 315.

53. *Appeal and Error—Evidence Immaterial.*—The admission of evidence which, under the charge of the court, could not have been prejudicial to the appellant is not reversible error on appeal. *Zollicoffer v. Zollicoffer*, 326.

54. *Trials—Issues Sufficient—Appeal and Error.*—Where the issues submitted at the trial are sufficient to present all the matters involved in the controversy, the rejection of those tendered by the appellant will not be held as error. *Ibid.*

55. *Trials—Instructions—Appeal and Error—Harmless Error.*—An erroneous statement of a contention of a party corrected in the charge of the judge, is harmless error. *Lumber Co. v. Cedar Works*, 344.

APPEAL AND ERROR—*Continued.*

56. *Equity—Injunction—Agreement—Superior Court—Incorrect Theory—New Action—Appeal and Error—Costs.*—An agreement in a suit to enjoin the defendant from cutting trees on lands alleged to belong to the plaintiff, by which the defendant was to continue the cutting under a bond to pay damages, awaiting the final result of the action, renders it unnecessary for the original cause to be retained when a new action has since been brought to recover the damages; but the judge having dismissed the suit asking for injunctive relief upon the wrong theory, the costs of appeal are taxed against both parties to this appeal. *Mason v. Stephens*, 369.

57. *Judgments—Default and Inquiry—Nonsuit—Appeal and Error.*—Where a judgment by default and inquiry has been taken and at a subsequent term the inquiry is being duly made, it is erroneous for the trial judge to order a nonsuit. *Mason v. Stephens*, 370.

58. *Appeal and Error—Certiorari—Appeal Dismissed—Newly Discovered Evidence—Superior Courts—Jurisdiction.*—Where an appeal has been docketed and dismissed in the Supreme Court under Rule 17, for failure to prosecute it, the adjudication relates back to the final judgment appealed from, and the Superior Court judge is without jurisdiction to consider a motion for a new trial for newly discovered evidence. *Lancaster v. Bland*, 377.

59. *Appeal and Error—Newly Discovered Evidence—Superior Courts.*—An appeal will not lie from the refusal of the Superior Court judge, in his discretion, to grant a new trial for newly discovered evidence. *Ibid.*

60. *Judicial Sale—Commissioner's Deed—Correction by Court—Appeal and Error—Costs.*—A commissioner appointed by the court to sell land involved in the controversy is not a party to the action and has no interest in the subject of it which will give him the right of appeal; and where an appeal of this character has been taken, the costs are taxed against the commissioner personally. *Summerlin v. Morrisey*, 409.

61. *Appeal and Error—Unanswered Questions.*—The exception that witness for appellant was not permitted by the court to answer his question cannot be considered on appeal unless it is in some way made to appear of record that the answer would have been in appellant's favor. *Brinkley v. R. R.*, 428.

62. *Surface Water—Drainage—Negligence—Evidence—Appeal and Error—Harmless Error.*—Where damages to goods stored in a warehouse located in a basement, in a damp soggy place, are sought in an action alleging it was caused by a wrongful diversion of the flow of surface waters, it cannot be considered for error on appeal that a witness, not having qualified as an expert, was permitted to testify that the water would rise in a basement of this character unless built with concrete floor and walls, as such would naturally be inferred by an intelligent jury from their own knowledge of such conditions, and especially where the question was undisputed in the evidence of both parties at the trial. *Ibid.*

63. *Judgments—Excusable Neglect—Findings—Appeal and Error.*—On appeal from the refusal of a motion to set aside a judgment for excus-

APPEAL AND ERROR—*Continued.*

able neglect, the findings of fact by the trial judge are not reviewable, except in cases of gross abuse or where the findings are not supported by any evidence. *Allen v. McPherson*, 435.

64. *Same—Matters of Law.*—Upon motion to set aside a judgment for excusable neglect, where the findings of fact of the trial judge are supported by evidence, whether as a matter of law the neglect was excusable is reviewable on appeal. *Ibid.*

65. *Same—Court's Discretion—Interpretation of Statutes.*—Where under the findings of fact the trial judge correctly concludes that the neglect of a motion to set aside a judgment was not excusable, it concludes the matter; but where he correctly concludes that the neglect was excusable, the question of setting aside the judgment is a matter in his discretion, except in cases of gross abuse, and is not reviewable on appeal. Revisal, sec. 513. *Ibid.*

66. *Appeal and Error—Attorney and Client—Laches of Counsel—Duty of Client.*—The neglect of counsel, intrusted with the prosecution of an action, is chargeable to the client, for he must personally see that his appeal is regularly prosecuted within the time and in accordance with the rules prescribed. *Ibid.*

67. *Judgments—Excusable Neglect—Appeal and Error—Meritorious Defense—Findings of Trial Judge.*—Upon appeal from the refusal of the trial court to set aside a judgment against a defendant for excusable neglect, a finding is necessary that there is a meritorious defense which could be set up if the judgment is set aside. *Ibid.*

68. *Appeal and Error—Unanswered Questions.*—Unanswered questions, without anything appearing of record to show their materiality, will not be considered on appeal. *Timber Co. v. Lumber Co.*, 454.

69. *Appeal and Error—Trials—Damages—Evidence—Deeds and Conveyances—Tender of Deed.*—Where the plaintiff has tendered his deed under his contract to convey standing timber, and demands damages in his action for the burning of timber on the lands, the rejection of evidence upon the question of the damages, without showing that they occurred prior to the tender of the deed, is not erroneous. *Ibid.*

70. *Mortgages—Sales—Trusts — Equity — Election — Appeal and Error.*—Where a mortgagee has bid in the mortgaged property at his foreclosure sale, and in the mortgagor's action against him for the breach of his trust in so doing, the trial proceeds only upon the theory that a fair compensation or the value of the property can be recovered, with allegation and proof sufficient to sustain it, instead of the restoration of the property itself to the mortgagor, the Supreme Court, on appeal by the mortgagee from an adverse judgment, will pass upon the case as it was tried in the lower court. *Warren v. Susman*, 457.

71. *Appeal and Error—Exclusion of Evidence.*—Exception to the exclusion of evidence in the court below will not be considered on appeal unless its nature is made properly to appear, so that the appellate court can decide upon its competency. *Ibid.*

72. *Trials—Issues Sufficient—Appeal and Error.*—The refusal of the court to submit the issues tendered by the appellant will not be held as

APPEAL AND ERROR—*Continued.*

erroneous when the issues passed upon by the jury have afforded the parties opportunity to introduce all pertinent evidence to the matter in controversy arising under the pleadings. *Bank v. Roberts*, 473.

73. *Contracts—Mistake—Trials—Wrong Theory—Appeal and Error.*—In this action to recover damages for the breach of a contract to convey certain lands, known as the M. tract, the plaintiff asserted that the contract was one way, and the defendant another way, and prayed for specific performance; and the allegations and evidence being sufficiently broad for the Supreme Court on appeal to determine the matter upon the correct ground that no contract had in fact been made, the respective prayers for relief are not of the substance, and the decision is put upon the correct view of the case. *Lumber Co. v. Boushall*, 501.

74. *Contracts—Failure to Agree—Deeds and Conveyances—Timber—Part Payment—Damages—Offsets—Pleadings—Appeal and Error—Costs.*—Where it appears that the parties to the action have mistakenly supposed that they had entered into a valid contract to convey lands, the plaintiff claiming damages for the inability of the defendant to convey the title he was supposed to have contracted to convey and the defendant demanding specific performance; that the plaintiffs have paid a certain sum of money and had cut timber upon the lands. *Held:* The plaintiff is entitled to recover the sum he has paid, with interest, and on repleader by defendant the latter is entitled, as an offset, to the value of the timber cut as it stood on the ground; and in this case cost is taxed against defendant in the lower court, and cost on appeal is divided. *Ibid.*

75. *Municipal Corporations—Condemnation—Unauthorized Acts—Evidence—Value of Lands—Appeal and Error—Harmless Error.*—In this action to recover damages of a municipality for the unlawful appropriation of the plaintiff's lands for street purposes, testimony of a price offered by a witness for plaintiff's land, if not competent as substantive evidence, was only admitted for the purpose of contradicting him or impeaching his estimate of its value, and is not held as reversible error on defendant's appeal. *Lloyd v. Venable*, 531.

76. *Appeal and Error—Modified Judgment—Costs.*—It appearing on this appeal that the lower court erred only in part in applying the equitable doctrine of subrogation to the facts set out, the costs thereon are equally divided between the parties. *Fowle v. McLean*, 537.

77. *Trials—Immaterial Issues—Instructions—Appeal and Error.*—Where the answer by the jury to one of the issues submitted to them makes their answer to another immaterial, a charge of the judge upon the immaterial issue, if erroneous and applicable to that alone, will not be held for reversible error. *Bank v. Wilson*, 557.

78. *Trials—Instructions—Contentions—Objections and Exceptions—Appeal and Error.*—An exception to the charge of the court is not held for reversible error in this case, the portion objected to being susceptible of the interpretation that it was a statement of the contentions of the appellee. *Ibid.*

79. *Railroads — Negligence — Construction of Railroad Yards — Rules of Safety — Trials — Instructions — Appeal and Error.* — In an action

APPEAL AND ERROR—*Continued.*

brought against a railroad company for the negligent killing of plaintiff's intestate, alleged to have been caused by a horse becoming frightened at the noise and steam issuing from defendant's steam engine and running upon the intestate, there was further allegation that the defendant's railroad yard was not constructed or laid out properly for the safety of those having business there, and that proper rules for that purpose had not been made for or observed by the defendant's employees there, but without sufficient evidence tending to prove these further allegations. *Held:* A charge of the court interwoven with instructions bearing upon the negligent construction of the railroad yards and the question of proper rules, is misleading and constitutes reversible error. *Witte v. R. R.*, 566.

80. *Burning of Woods—Statutory Notice—Tenants in Common—Waiver—Verdict—Appeal and Error.*—Where contrary to the provisions of Revisal, sec. 3346, the owner sets fire to the woods on his own lands and injures the adjoining lands of tenants in common, without having given them prior written notice of two days required by the statute, and relies upon the waiver of one of the tenants, in possession and control, as binding upon them all. *Semble:* The waiver of notice by this tenant would be binding upon them all; but this question does not arise for decision in this case, the jury having found upon conflicting evidence that there had been no waiver of the notice by him. *Stanland v. Rourk*, 568.

81. *Appeal and Error—Unanswered Questions.*—An exception to the exclusion of an answer to a question asked a witness will not be considered on appeal unless it is made to appear that its exclusion was prejudicial to the appellant. *Morton v. Water Co.*, 582.

82. *Pleadings—Amendments—Description of Lands—Court's Discretion—Appeal and Error.*—An amendment of the complaint, in an action to recover lands, to make the description therein conform to that of the deed under which the plaintiff claims, is not reviewable in this case, there being no evidence that the trial judge had therein abused the discretion reposed in him. *King v. McRackan*, 621.

83. *Trials—Instructions — Contracts — Counterclaim—Appeal and Error—Harmless Error.*—In an action brought by an architect to recover the contract price for plans and specifications furnished for a building, alleged to be due him, which the defendant denies and alleges that certain moneys advanced the plaintiff thereon were agreed to be repaid in the event of his failure to perform the contract, under conflicting evidence a charge of the court, in response to a request from the jury for further instruction, that they had the physical power to divide the amount claimed by the plaintiff is not reversible error, it appearing that the court immediately and correctly charged upon the burden of proof of each of the parties upon the respective issues, and how they should regard the evidence in reaching their conclusions; and it further appearing that the plaintiff's damages had been assessed at a smaller amount than he was entitled to under the evidence, it is error of which the defendant cannot complain on appeal. *Gambier v. Kimball*, 642.

APPEARANCE. See Waiver, 10.

ARGUMENT. See Trials.

ASSAULT.

1. *Trials—Instructions—Special Request.*—Where the trial judge correctly instructs the jury upon every phase of the controversy, his refusal to give special prayers for instruction, covered in other language in the charge, is not error, though the prayers were correct and applicable propositions of law. *Lewis v. Fountain*, 277.

2. *Assault—Personal Injuries—Mutual Fight—Provocation—Diminution of Damages—Evidence.*—A recovery will not be denied in an action to recover damages for personal injuries received in a fight because the fight was mutually or willingly entered into, or was caused by the provocation of the plaintiff, the matter of provocation being only considered upon the question of diminution of the damages recoverable. *Ibid.*

3. *Assault—Personal Injuries—Self-defense—Trials — Evidence — Instructions.*—Where in an action to recover damages for a personal injury received by the plaintiff in a fight the defendant resisted recovery on the ground that he was acting in self-defense, that he fired upon the plaintiff and inflicted the injury to protect himself or his children from death or bodily harm, it is necessary for the defendant to show that he acted upon a reasonable apprehension; and the charge of the court in this case is held to have been favorable to the defendant, of which he cannot complain. *Ibid.*

ASSIGNMENT. See Mortgages; Attorney and Client; Judgments.

ATTACHMENT.

1. *Attachment—Damages to Property—Sheriff—Principal and Agent—Liability of Attaching Creditor.*—Where one wrongfully and without probable cause sues out an attachment on crops of another, the defendant in that action may, by an independent action, recover from the plaintiff therein, as a matter of law, such damages to the crops attached as may have been caused by the sheriff while it was in his possession, in executing the writ, the sheriff being regarded as his agent to execute the mandate issued at his instance. *Tyler v. Mahoney*, 237.

2. *Attachment—Summons—Returnable Thirty Days—Justices' Courts—Interpretation of Statutes.*—In attachment and publication on a nonresident defendant before a justice of the peace, where defendant's property within the jurisdiction of the court has been levied on, a summons is not required; and therefore the requirements of Revisal, sec. 1445, that the summons must be made returnable not more than thirty days after its issuance is inapplicable. *Mills v. Hansel*, 651.

3. *Same—Court's Jurisdiction—Republication.*—The court acquires jurisdiction of an action by attachment upon the property of a nonresident defendant within its jurisdiction, and the action should not be dismissed because summons by publication was not ordered within thirty days after the issuance of the warrant, it being within the authority of the court, having acquired jurisdiction, to order a republication, which should be done in order that the plaintiff may not be deprived of his remedy should the defendant remove his property from the State. *Ibid.*

ATTACHMENT—*Continued.*

4. *Same—After Thirty Days.*—When personal service of summons in attachment cannot be made for the absence from the court's jurisdiction of a nonresident defendant having property therein, publication of summons is sufficient if made after the expiration of thirty days after service of attachment—in this case, one day thereafter—computed from the time of granting the attachment. Revisal, sec. 762. *Ibid.*

ATTORNEY AND CLIENT.

1. *Attorney and Client—Contingent Fees—Contracts, Written.*—A written contract of employment, made with an attorney, that the attorney should prosecute, as such, litigation over lands and receive a part of the lands in compensation for his services upon the contingency of success, will be upheld in accordance to its written terms when there is no element of fraud or undue influence. *Dupree v. Bridgers*, 424.

2. *Same—Lands—Equitable Assignment.*—A valid written contract for the compensation of an attorney, that he is to receive a certain part of the lands in controversy for his fee in prosecuting the action, as such, is not revoked by the death of the client, when the compensation is earned by the attorney in accordance with its terms, but is binding upon the lands as an equitable assignment thereof *pro tanto*. *Ibid.*

3. *Attorney and Client—Contingent Fee—Lands—Compromise—Interpleas—Procedure.*—Where a valid written contract for compensating an attorney has been made, by which the attorney is to receive for his services a certain part of the lands, the subject of the litigation, contingent upon recovery; and the attorney starts the suit and continues to do what is necessary for its prosecution, but is stopped therein by a compromise effected by his client, without his knowledge, by which the client has obtained a part of the land, the attorney is entitled to receive the proportionate part of the land thus obtained, in accordance with his contract of employment, and an interplea in the original cause is the proper procedure for him to pursue in enforcing his demand. *Ibid.*

4. *Issues—Attorney and Client—Contingent Fee.*—The issues tendered by the plaintiffs in this action, relating to the value of the services of the interpleader rendered to the estate of the deceased, as attorney, are held not to be responsive to the inquiry, the proper issues being those relating to the value of such services rendered to one of the heirs at law of the deceased, as a party to the action. *Ibid.*

5. *Appeal and Error—Attorney and Client—Laches of Counsel—Duty of Client.*—The neglect of counsel, intrusted with the prosecution of an action, is chargeable to the client, for he must personally see that his appeal is regularly prosecuted within the time and in accordance with the rules prescribed. *Allen v. McPherson*, 435.

AUTOMOBILES. See Insurance.

BAILMENT.

1. *Vendor and Purchaser—Breach of Warranty—New Consideration—Bailment—Negligence.*—The purchaser of a sideboard received and paid for it, and thereafter, discovering defects therein, agreed with the seller that the latter should take the property back and make it

BAILMENT—*Continued.*

as warranted, and while the article was in the possession of the seller for that purpose it was destroyed by fire. *Held:* The title to the property remained in the purchaser, and its return to the seller made the latter a bailee for hire, upon a mutual consideration moving between the parties in adjustment of the matters in dispute arising from an alleged breach of the seller's warranty of the sideboard, making him liable to the purchaser for ordinary negligence in not taking care of the article, under the rule of the ordinarily prudent man. The law relating to the mutual rights of bailor and bailee, with respect to negligence, benefits received, and the care required by the latter under varying circumstances, discussed by WALKER, J. *Hanes v. Shapiro*, 24.

2. *Bailment—Destruction of Property—Negligence—Damages.*—Ordinarily the liability of a bailee depends upon the question of his negligence, where the property has been destroyed while in his possession; and when his negligence has been properly established, he is liable in damages to the bailor for the full amount thereof, when the latter is not in fault. *Ibid.*

3. *Bailment—Damages—Negligence—Proximate Cause.*—Negligence of a bailee, which makes him responsible in damages to the bailor for the loss or destruction of the property, is defined generally as a breach of his duty to exercise commensurate care under the surrounding circumstances, and to be actionable, it must proximately result in the injury for which damages are claimed. Slight, ordinary, and gross negligence discussed and defined by WALKER, J. *Ibid.*

4. *Bailment—Negligence—Trials—Evidence—Prima Facie Case—Burden of Proceeding—Burden of the Issue.*—A bailee of goods is required to deliver the goods to the bailor in the condition they were in when received, or in accordance with the terms of the bailment, and if he fails to do so, he is liable unless he can show that his inability arises without fault on his part; and while the burden of proof continues to rest on the bailor in his action to recover damages for injury to or the destruction of the property while in the bailee's possession, a *prima facie* case is made out against the latter by showing the fact of bailment and that the property had not been redelivered accordingly, which may be met by the defendant's showing he was not in default; whereupon the duty of going forward again shifts to the plaintiff; for this duty may rest first on one party and then on the other, while the burden of establishing the issue in his favor continues throughout with the plaintiff. *Ibid.*

BANKS AND BANKING. See Evidence, 62.

1. *Insurance, Fire—Principal and Agent—Insured—Private Advantage—Banks and Banking.*—Where the cashier of a bank also acts as agent of a fire insurance company, and charges the premiums for policies against the insured's account at the bank, and then remits them to the insurer, it does not come within the condemnation of *Folb. v. Insurance Co.*, 133 N. C., 180, which holds that the insured cannot pay his premiums by satisfying a private debt due him by the agent of the company. *Lea v. Ins. Co.*, 478.

2. *Banks and Banking—Bills and Notes—Forged Signatures—Payment by Drawer—Liability of Cashing Bank.*—The indorsement on a draft in

BANKS AND BANKING—*Continued.*

course of collection by corresponding banks, "All prior indorsements guaranteed," does not give the drawee bank a cause of action against the cashing bank when the name of the drawer has been forged and draft is paid by the cashing bank in good faith, and thereafter the draft is paid by the drawee bank, for the latter is presumed to know the signatures of its depositors and detect the forgery; therefore the drawee bank may not recover from the cashing bank the amount it has thus paid, upon the allegation that the latter has not acted with reasonable precaution in cashing the draft. *Bank v. Trust Co.*, 605.

BILLS AND NOTES.

1. *Corporations—Bills and Notes—Indorser—Notice of Dishonor.*—One who places his signature upon the back of a commercial paper without indication that he signed in any other capacity is deemed an indorser (Revisal, 2212), and is entitled to notice of dishonor; and the entity of a corporation being distinct, the rule applies when its directors indorse the corporate note for accommodation. *Houser v. Fayssoux*, 1.

2. *Bills and Notes—Payment by Maker—Indorser—Limitations of Actions.* Payments made by the maker of a commercial paper will not repel the bar of the statute of limitations as to an indorser. *Ibid.*

3. *Bills and Notes—Due Course—Presumptions—Interpretation of Statutes.*—One who acquires a negotiable instrument, regular upon its face, for value before maturity, is *prima facie* taken to be a holder in due course, nothing else appearing. Revisal, sec. 2201. *Smathers v. Hotel Co.*, 69.

4. *Bills and Notes—Infirmities in Instrument—Holder—Burden of Proof—Notice—Bad Faith—Interpretation of Statutes.*—When it is alleged and shown in an action upon a note brought by the holder, claiming to have acquired it in due course, that the instrument had been procured by fraud between the original parties, the burden is then upon him to show that he had acquired it *bona fide*, without notice of any infirmity in the instrument or defect in the title of the person who negotiated it to him (Revisal, sec. 2206), the notice required to invalidate his title being "actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Revisal, sec. 2205. *Ibid.*

5. *Same—Instructions — Trials — Questions for Jury.*—Where fraud between the original parties to a negotiable instrument has been alleged and shown, and one claiming to be a holder in due course brings his action thereon, it is not error for the trial judge to refuse to instruct the jury, when the plaintiff's evidence, uncontradicted, tends to show that he acquired it in due course without knowledge or notice of the defect, that there was no evidence of such knowledge or implicative facts, for the statute casts the burden, in such instances, on the plaintiff, and the jury, the triers of the facts, may not find them to be as testified; but the plaintiff is entitled to an instruction that the jury should answer the issue in his favor if they find the facts to be as testified, when, as in this case, no adverse inferences may be drawn from the testimony. *Ibid.*

BILLS AND NOTES—*Continued.*

6. *Bills and Notes—Collateral Notes—Value—Preëxisting Debt.*—Notes taken as collateral for a valid preëxisting debt are acquired for value within the meaning of the negotiable instrument law. *Ibid.*

7. *Bills and Notes—Solvent Credits—Payment of Taxes—Interpretation of Statutes.*—A possessory action to recover a horse secured by chattel mortgage, brought by the assignee of the mortgage note against one to whom the mortgagor had sold the horse, is not an action upon the note upon which the statute requires that the taxes be given in and paid before the owner may be permitted to sue thereon. Revenue Act, Laws of 1911 and 1913. *Hyatt v. Holloman*, 386.

8. *Same—Postponement of Action—Payment Into Court.*—Where the assignee of a note has failed to list or pay taxes thereon as a solvent credit, his right of recovery by appropriate action is only postponed until the taxes are paid; and his paying into court a sufficient amount for his taxes after the time fixed therefor by the statute has passed permits him to proceed to judgment. *Ibid.*

9. *Pleadings—Demurrer—Deeds and Conveyances—Collateral Agreements—Cancellation—Conditions—Bills and Notes.*—In an action to invalidate a transaction in the sale of land the complaint alleged that the defendant represented the entire tract to contain 5,000 acres, showing a plat thereto, and the deed was delivered and certain cash payments made to a third party and notes given in payment of the purchase price, to be held by him upon condition that the land should be found to contain the acreage represented and that the title should be found to be an indefeasible fee simple by investigation and certificate of a certain named attorney; that the tract was found to contain 3,315 acres, of which 2,109 acres were held and claimed by superior titles, and that the attorney reported the title to the whole tract defective. The plaintiffs offered to execute a reconveyance of the land and prayed an injunction against the negotiation and transfer of the note, alleging irreparable injury otherwise; that the money be repaid to them, and that the note be delivered for cancellation. *Held:* The complaint alleged a good cause of action, and a demurrer thereto was bad. *Foy v. Stephens*, 438.

10. *Bills and Notes—Mortgages—Registration—Void Notes.*—Where a note is delivered upon conditions which are not fulfilled, and the note is consequently void, a mortgage given upon lands securing the note is also void as between the original parties, and the fact that the mortgage was recorded cannot avail anything. *Ibid.*

11. *Bills and Notes—Delivery—Intent—Trials — Evidence — Questions for Jury.*—In order to make a valid delivery of a note, the act of delivery and the intent must concur, and where there are no intervening rights, the question of intent is ordinarily one for the jury. *Ibid.*

12. *Bills and Notes — Execution — Payment — Trials — Burden of Proof.*—Where the plaintiff proves the execution by the defendant of a note, the subject of the action, he is entitled to recover thereon unless payment is shown by the defendant, the burden of showing payment resting on the latter. *Swan v. Carawan*, 472.

BILLS AND NOTES—*Continued.*

13. *Bills and Notes—Blank Spaces—Interest—Legal Rate—Presumption.*—Where no stipulated rate of interest is named in a promissory note, the legal rate will apply, and where the note reads "at.....per cent per annum" it will be regarded as reading at 6 per cent per annum, the law thus filling, at the legal rate, the space left blank, and the negotiability of the instrument is not affected thereby. *Bank v. Roberts*, 473.

14. *Bills and Notes—Exchange of Notes—Consideration.*—In the exchange by two parties of their promissory notes, the giving of each note affords a sufficient consideration for the other. *Ibid.*

15. *Trials—Issues Sufficient—Appeal and Error.*—The refusal of the court to submit the issues tendered by the appellant will not be held as erroneous when the issues passed upon by the jury have afforded the parties opportunity to introduce all pertinent evidence to the matter in controversy arising under the pleadings. *Ibid.*

16. *Bills and Notes—Banks and Banking—Holder in Due Course—Deposits—Trials—Instructions—Verdict, Directing.*—Where all the evidence in an action brought on a note by a bank claiming to be a holder in due course of an instrument regular upon its face tends only to show that the note was indorsed to the bank by the payee, the money placed to his credit and drawn out by him before maturity; that there was no arrangement between the depositor and the bank by which this or other unpaid notes were charged back to him in event of nonpayment, it is proper for the trial judge to charge the jury that if they should find the facts to be as testified they should answer the issue in the plaintiff's favor. *Ibid.*

17. *Bills and Notes—Notice of Dishonor—Verdict—Indorser—Surety—Interpretation of Statutes.—Semble*, that one writing his name on the back of a negotiable instrument may not show by parol evidence that he signed otherwise than as an indorser, "unless he clearly indicates by appropriate words his intention to be bound in some other capacity" (Revisal, secs. 2112, 2113); but it having been found by the jury under the pleadings, evidence, and correct instructions from the court, that such person was given due notice of dishonor, on which grounds he alone seeks to avoid liability, the question is not necessary to decide. *Bank v. Wilson*, 557.

18. *Bills and Notes—Notice of Dishonor—Trials—Verdict—Interpretation—Instructions.*—A verdict of the jury may, in proper instances, be given significance by reference to the pleadings, evidence, and the charge of the court, and therefrom it appears that the jury necessarily found, in this case, that the requisite notice of dishonor for nonpayment or nonacceptance of the negotiable instrument sued on had been given, the charge being in accordance with the language of the statute, Revisal, 2254. *Ibid.*

19. *Bills and Notes—Notice of Dishonor—Banks and Banking—Customs—Evidence.*—Where want of notice of dishonor, etc., is relied upon as a defense in an action upon a negotiable instrument, it is competent, as corroborative evidence, for the bank to show that proper notices were mailed to the defendant's address, and its custom as to the character and time of sending such notices. *Ibid.*

BILLS AND NOTES—*Continued.*

20. *Banks and Banking—Bills and Notes—Forged Signatures—Payment by Drawer—Liability of Cashing Bank.*—The indorsement on a draft in course of collection by corresponding banks, "All prior indorsements guaranteed," does not give the drawee bank a cause of action against the cashing bank when the name of the drawer has been forged and draft is paid by the cashing bank in good faith, and thereafter the draft is paid by the drawee bank, for the latter is presumed to know the signatures of its depositors and detect the forgery; therefore the drawee bank may not recover from the cashing bank the amount it has thus paid, upon the allegation that the latter has not acted with reasonable precaution in cashing the draft. *Bank v. Trust Co.*, 605.

21. *Mortgages—Bills and Notes—Stipulations by Mortgagor—Acceptance by Mortgagee—Estoppel.*—Where the seller of lands has drafted and sent to the purchaser a note secured by a mortgage thereon, who by interlineation in both excludes personal liability and returns them to the seller, who keeps them without objection, forecloses the mortgage, applies the proceeds of sale to the note, and then sues for the balance due, he will not be permitted to retain the benefits of the transaction and repudiate the contract in part; for having accepted the papers with the material change therein, he will be estopped, in the absence of fraud, by his own acts of acquiescence. *Chilton v. Groome*, 639.

BONDS. See Municipal Corporations.

BOND ISSUES. See Schools; Counties.

BONDS FOR TITLE. See Deeds and Conveyances; Contracts.

BURDEN OF PROOF. See Trials, 1, 32, 51; Cocaine; Intoxicating Liquors; Judgments.

BURNING. See Fires.

CANCELLATION. See Contracts.

CARBON COPY. See Evidence.

CARRIERS. See Intoxicating Liquors.

CASE. See Appeal and Error, 5.

CARRIERS OF GOODS.

Carriers of Goods—Negligence—Damage to Shipment Repaired—Measure of Damages.—Where a shipment of buggies has been damaged by the negligence of the carrier, and it appears that the manufacturer has repaired the damage as a personal matter between it and the consignee, it is error for the trial judge in the latter's action to confine the measure of damages to the difference between the market value of the buggies at the time they were delivered to the defendant for shipment and their market value when the repairs had been made; for the plaintiff is entitled to recover the reasonable cost of repairing the buggies had the manufacturer charged therefor, interest on the purchase price, together with such other damage as he may have proxi-

CARRIERS OF GOODS—*Continued.*

mately sustained by reason of the defendant's negligence; the difference between the value of the buggies when received by the carrier for shipment and their value when tendered to the consignee upon his demand for them being the rule of damages. *Little v. R. R.*, 658.

CARRIERS OF PASSENGERS.

1. *Carriers of Passengers—Intention to Become a Passenger.*—One who has gone into a passenger station of a railroad company and is waiting for the coming of his train, in the room provided for the purpose, with the intent to become a passenger thereon, is entitled to the rights of a passenger. *Leggett v. R. R.*, 366.

2. *Carriers of Passengers—Negligence—Passenger Depots—Duty of Carrier—Safety of Passenger—Lights at Night.*—Common carriers are held to a high degree of care in providing, at their passenger stations, places and conditions by which passengers may board and alight from their trains in safety; and where a passenger received an injury at night, while attempting to board his train from an unguarded platform at a passenger depot, along which the track runs, the failure of the carrier to provide sufficient light is evidence of its actionable negligence. *Ibid.*

3. *Carriers of Passengers—Passenger Depots—Lights at Night—Contributory Negligence — Trials — Questions for Jury.* — Under the circumstances of this case, the mere fact that a passenger attempted to board defendant's train at night from an insufficiently lighted platform cannot be held to bar his recovery as a matter of law on the question of his contributory negligence. *Beard v. R. R.*, 143 N. C., 136; *Darden v. Plymouth*, 166 N. C., 492, cited and applied. *Ibid.*

4. *Carriers of Passengers — Freight Trains — Negligence — Contributory Negligence—Trials—Evidence.*—Evidence that a passenger on a freight train seated himself upon a seat provided for passengers and was violently thrown from his seat by the sudden and unexpected movement of the train is insufficient upon the issue of contributory negligence; and as the defendant is held to a high degree of care consistent with the operation of trains of this character, the fact that the injury occurred in the manner stated affords sufficient evidence of defendant's actionable negligence to sustain a verdict in plaintiff's favor on that issue. *Barnes v. R. R.*, 667.

5. *Negligence—Proximate Cause—Trials—Instructions.*—In an action to recover damages arising from the defendant's negligence, and the questions in dispute involving only those of whether the act complained of was negligently done, and if it caused the injury, the judge charged the jury that they must find that the defendant was negligent and that the negligence caused the injury, in order to answer the issue in plaintiff's favor. *Held:* The charge was not objectionable as leaving out the element of proximate cause. *Ibid.*

CAVEAT. See Wills.

CERTIORARI. See Appeal and Error.

CHATTELS. See Mortgages; Deeds and Conveyances.

CHILDREN. See Wills, 17; Estates; Negligence.

CITIES AND TOWNS. See Health; Municipal Corporations.

Cities and Towns—Condemnation—Streets—Damages—Evidence—Appeal and Error.—In condemnation proceedings to take lands of plaintiff by a town for street purposes, evidence as to the location of the road on certain lands of plaintiff and damages thereto was excluded by the trial judge, on defendant's objection that damages to this lot had not been claimed in the exceptions, and that the record did not show this land had been condemned. It appearing that the exceptions specifically demanded damages to this lot, a new trial is ordered. *Carpenter v. Rutherfordton*, 95.

CLERKS OF COURTS.

1. *Courts—Clerks of Courts—Trials—Instructions—Appeal and Error.*—Where, in accordance with an agreement previously entered into, the clerk receives the verdict of the jury in the absence of the court, it is his duty to do so without comment thereon and to keep it until the reconvening of the court; and where the clerk hands the answered issues back to them and tells them they should retire to their room and reconsider the issues to see if the answers were not in conflict with the charge, but refusing to say in what respects, he has exceeded his authority in assuming to instruct the jury, and a verdict differently rendered will be set aside and a new trial ordered. *Cullifer v. R. R.*, 309.

2. *Statutes—Inheritance Tax—Jurisdiction—Clerks of Courts—Courts.*—The inheritance tax law, by providing that the "clerk of the Superior Court shall determine whether any person to whom property is so devised or bequeathed stands in the relation of child to the decedent," refers and was intended to refer the question of such relationship to the courts; primarily to the sound legal discretion of the clerk, as a mixed question of law and fact. *In re Inheritance Tax*, 352.

COCAINE.

Cocaine—Possession, Actual or Constructive—Prima Facie—Burden of Proof—Reasonable Doubt.—The possession of cocaine, etc., with certain exceptions, is made a misdemeanor and punishable under chapter 81, sec. 2, Laws 1913, and where the evidence tends to show that cocaine was found in the house the defendant was renting and occupying, concealed in a hole over the kitchen door, over which a picture hung, such possession, not falling within the exceptions, if established, comes within the meaning and intent of the statute, and is *prima facie* evidence of its violation, with the burden of proof on the State to show the possession by the defendant of the forbidden article, beyond a reasonable doubt. *S. v. Ross*, 130.

COLOR. See Deeds and Conveyances, 9, 10, 40, 43; Reformation; Evidence, 34.

COLLUSION. See Frauds.

COMMISSIONER'S DEEDS. See Judicial Sales.

COMPROMISE. See Attorney and Client.

CONDEMNATION. See Waters; Cities and Towns, 1; Municipal Corporations.

CONDITIONAL SALES. See Contracts.

CONDITIONS. See Estates.

CONFLICT OF LAWS. See Courts.

CONSIDERATION. See Bills and Notes, 14; Mortgages.

CONSPIRACY. See Criminal Law, 15.

1. *Indictment—Conspiracy — Competition — Systematic Abuse — Common Law—Interpretation of Statutes.*—An indictment charging that the employees of a rival company in the sale of lawful commodities had combined together to break up their competitor's business by systematically following its salesmen from house to house and place to place as to so abuse, vilify, and harass them as to deter them in their lawful business and to break up their sales; that they falsely represented that their rival company was composed of a set of thieves and liars, endeavoring to cheat and defraud the people, etc., charges a conspiracy indictable at common law, which is not restricted or abridged by statute, 33 Edward I, or repealed by chapter 41, Laws 1913; and a motion to quash the indictment should not be granted. *S. v. Van Pelt*, 136 N. C., 633, cited and distinguished. *S. v. Dalton*, 204.

2. *Criminal Law—Conspiracy—Necessaries of Food—Common Law—Reasonable Profits.*—An agreement among dealers in a necessary article of food, to raise its price, is an indictable offense at the common law, and the evidence in this case being that dealers controlling 60 per cent of the supply of milk in a town having by a written agreement raised its price, testimony is irrelevant that a dealer not a party to the agreement had also raised the price of his milk to his customers, or whether the agreement was reasonable or necessary for the article to yield a profit in its sale. *S. v. Craft*, 208.

3. *Same—Evidence.*—Upon trial for conspiracy among dealers to sell milk in a town at an advanced price, it is proper to show by competent testimony of a witness that the price was consequently advanced. *Ibid.*

4. *Criminal Law—Conspiracy to Raise Price—Intent—Evidence.*—Upon the trial for a conspiracy to raise the price of milk in a community, the only question presented is whether the defendants had so agreed, and if, in consequence, they raised the price, the intent to raise the price being the criminal intent which makes the offense. *Ibid.*

5. *Criminal Law—Conspiracy to Raise Price—Common Law—Statutory Offense—Interpretation of Statutes—Appeal and Error—Harmless Error.*—A conspiracy among dealers to raise the price of a necessary article of food being indictable under the common law, it is not reversible error for the trial judge to exclusively so regard it in the conduct of the trial and erroneously instruct the jury that it was not a statutory offense, though in fact it was so made by chapter 41, Laws 1913, secs. 1, 2, and 3. *Ibid.*

CONSTITUTION OF NORTH CAROLINA.

ART.

II, sec. 14. This section cannot be set up to invalidate act empowering assessment of damages to land by road commission in action by taxpayer. *Hargrave v. Commissioners*, 626.

II, sec. 14. In this case it is held that a bond issue for municipal necessaries should be sustained without approval of popular vote. *Ibid.*

IV, sec. 8. Supreme Court may review proceedings of inferior courts by *certiorari*, etc. *S. v. Tripp*, 150.

VII, sec. 7. Validity of bonds for school purposes not dependent upon a void provision of the statute, is not thereby affected. *Moran v. Commissioners*, 289.

VII, sec. 7. Courts cannot enjoin road commissioners in performance of their duties to maintain roads, etc., under a constitutional statute. *Hargrave v. Commissioners*, 626.

X, sec. 6. Wife assumes a direct liability as surety for her husband within intent of Martin Act. *Royal v. Southerland*, 405.

CONSTITUTIONAL LAW.

1. *Criminal Law—Courts—Writ of Review — Procedure — Constitutional Law—Statutes.*—There being no appeal provided where a judgment in a criminal action has been suspended by the trial court with the defendant's consent, and sentence subsequently imposed, the Supreme Court has authority under Article IV, sec. 8, of our Constitution, and the Superior Court under Revisal, sec. 584, in the exercise of its appellate jurisdiction, to review the judicial proceedings of courts of inferior jurisdiction by writs of *certiorari*, *recordari*, and *supersedeas*, in order to afford a litigant his legal right of redress; and except in rare instances, which do not obtain in the case at bar, the appellate courts are confined to the facts as they appear of record, and can only review the proceedings as to their regularity or on questions of law or legal inference, as where the lower court has refused to hear evidence on the subject before imposing the sentence or has committed manifest and gross abuse of the discretion reposed in them. *S. v. Tripp*, 150.

2. *Constitutional Law—Unusual Punishment—Secret Assault—Appeal and Error.*—The sentence of the court in this trial for secret assault is not objectionable as imposing an unusual or excessive punishment. *S. v. Knotts*, 173.

3. *Schools—Bond Issues — Taxation — Constitutional Law—Injunction—Construction and Equipment—Vote of People—Maintenance.*—The validity of bonds carried at an election within a designated district for the construction and equipment of a "farm-life school" therein, and in accordance with the statute authorizing it, is not affected by the failure of the statute to provide for its maintenance; and while school purposes are not necessaries within the meaning of our Constitution, Art. VII, sec. 7, and require that taxation for such purpose must be submitted to the voters, a provision of the statute providing that for the maintenance of the school the county commissioners shall make an appropriation in a certain sum under certain con-

CONSTITUTIONAL LAW—*Continued.*

ditions, which provision is unconstitutional, affords no ground for an injunction against the issuance of the bonds, not made contingent on the appropriation. *Moran v. Commissioners*, 289.

4. *Schools — Taxation — Bond Issues—Appropriations—Vote of People—Constitutional Law.*—Where a statute provides that the issuance of bonds for the construction of a farm-life school be submitted to the voters of a certain district, and for an appropriation from the State's funds for the maintenance of the school, upon condition that the county also appropriate a like amount for that purpose, the question of the constitutionality of the appropriations made without the approval of the voters does not affect the validity of the bonds. *Semble*, the appropriation of the State's funds, under such circumstances, would be valid, if the contingency were complied with. *Ibid.*

5. *Schools, Public—Charges for Tuition—Constitutional Law.*—The mere fact that a school, erected and maintained for the public in its district, is authorized by the statute to charge tuition for children from other parts of the State, does not affect the validity of statute, as such schools are recognized as public, and not private schools. *Whitford v. Comrs.*, 159 N. C., 160, cited and applied. *Ibid.*

6. *Statutes—Inheritance Tax—Constitutional Law.*—The inheritance tax imposed in the Machinery Act of 1909 is constitutional and valid. *Norris v. Durfey*, 321.

7. *Husband and Wife — Separate Property — Suretyship — Constitutional Law.*—The State Constitution, Art. X, sec. 6, providing that the separate property of the wife shall not be liable for the debts of the husband, has no application to the obligation of the wife as surety of her husband such obligation being regarded as a direct one between the creditor and herself within the intent and meaning of the Martin Act, ch. 109, Public Laws of 1911. *Royal v. Southerland*, 405.

8. *Contempt of Court—Statutes—Constitutional Law.*—While a statute is unconstitutional which unduly interferes with the inherent power of the Superior Courts to summarily hear matters in contempt of court and punish the offenders, objection may not be taken to Revisal, ch. 17, secs. 939 *et seq.*, on this ground, the provisions being in accordance with the modern doctrine; and having reference to the history of this statute, the context and the language employed, the authority expressly given therein with reference to constructive contempts arising by means of publication, etc., is construed and upheld as written, that the power to punish summarily for defamatory reports and publications, etc., about a matter that is past and ended, no longer exists. *In re Brown*, 417.

9. *Counties — Roads and Highways—Necessary Expenses—Constitutional Law—Taxation—Bond Issues.*—The construction and maintenance of public roads are a necessary public expense, for which the General Assembly may provide, and create a board therefor distinct from the county commissioners, and fix and authorize a levy of tax therefor, without causing the proposition to be submitted to the vote of the people. *Hargrave v. Commissioners*, 626.

CONSTITUTIONAL LAW—*Continued.*

10. *Same—Statutes—Power of Courts.*—The question as to whether a legislative act, providing for an issuance of bonds, passed in accordance with Art. II, sec. 14, of the State Constitution, sufficiently safeguards the rights of the citizen as to the assessment of damages for land to be taken by the road commission in improving the roads of a county will not be considered in an action brought by the taxpayer to restrain the commissioners from exercising the authority given them, and can only be raised by the landowner when the occasion occurs. *Ibid.*

11. *Same—Injunction.*—The courts cannot enjoin road commissioners in the performance of their duties in the maintenance, construction, and management of the public roads of the county, under legislative authority, imposed by a statute passed in accordance with Art. VII, sec. 7, of the State Constitution; and the objections to the statute in question that the board is a self-perpetuating body because the members are to fill vacancies, etc., without limitation as to the duration, or responsibility to the people for their acts, etc., or that the members are not subject to removal except upon indictment for misfeasance, and then only for the willful failure or refusal to perform a duty, should be addressed to the lawmaking power, and not to the courts. *Ibid.*

12. *Courts, Power of—Official Acts—Mandamus—Injunction.*—The power of the courts over officials acting under authority of a valid statute cannot extend to enforce disobedience to the act. It is only to enforce their faithful performance of their duties that the courts can supervise them by *mandamus* or injunction. *Ibid.*

13. *Supreme Court — Decisions — Estoppel—Statutes.*—The Supreme Court having by numerous decisions held that an act of the Legislature authorizing a bond issue for public roads is valid if conforming to Art. II, sec. 14, of the State Constitution, without submitting the proposition to a vote of the people, and in construing acts involving proportionately to population and property value no greater amount of bonds than are here in controversy, is estopped to apply a different rule to the facts on this appeal. *Ibid.*

CONTEMPT.

1. *Contempt of Court—Adjournment—Publication—Jurisdiction—Power of Court.*—The judge of the Superior Court ordinarily has the inherent power to hear and determine matters of contempt of his court, both as to direct and constructive contempts, without the intervention of the jury; but in proceedings relating to constructive contempt by publication of false and scurrilous matters relating to the acts, conduct, and habits of the presiding judge, or concerning his official or personal conduct, published after the adjournment of the court, it becomes a matter personal to the judge, and he must seek redress by the ordinary methods and bring his cause before an impartial tribunal. *In re Brown*, 417.

2. *Same—Statutes—Constitutional Law.*—While a statute is unconstitutional which unduly interferes with the inherent power of the Superior Courts to summarily hear matters in contempt of court and punish

CONTEMPT—*Continued.*

the offenders, objection may not be taken to Revisal, ch. 17, secs. 939, *et seq.*, on this ground, the provisions being in accordance with the modern doctrine; and having reference to the history of this statute, the context and the language employed, the authority expressly given therein with reference to constructive contempts arising by means of publication, etc., is construed and upheld as written, that the power to punish summarily for defamatory reports and publications, etc., about a matter that is past and ended, no longer exists. *Ibid.*

3. *Contempt of Court—Jurisdiction—Motion to Dismiss.*—The refusal of the court to sustain a motion to dismiss the summary proceedings for contempt was proper in this case, it appearing that the newspaper containing the published matter was circulated in the county wherein the court was held at the time in question. *Ibid.*

4. *Reference—Discretion—Contempt of Court.*—A motion for a reference under section 875, Revisal, is addressed to the discretion of the Superior Court judge, and exception to the order refusing the reference is without merit. *Ibid.*

CONTINUANCE. See Equity.

CONTRACTS. See Vendor and Purchaser; Bailment; Municipal Corporations; Divorce; Attorney and Client; Deeds and Conveyances; Insurance; Judgments, 17; Corporations; Statute of Frauds; Mechanics' Liens.

1. *Contracts—Conditions—Part Performance—Equity—Money Expended.* Under the facts of this case *it is held* that the defendant railroad company is not entitled to consideration in equity upon the grounds that it had expended money upon a proposed railroad to which certain townships had voted to subscribe, upon certain conditions, which the defendant had failed to perform, among them, that the road should be operated from certain points within three years. *McCracken v. R. R.*, 62.

2. *Parent and Child—Services—Wills—Consideration by Devise—Breach of Contract—Quantum Valebat.*—Where an adult child renders services in the care and support of his aged parent under an agreement between them that the parent should in consideration thereof devise certain lands to the child, and the services are accordingly rendered by the child until the parent voluntarily leaves the home of the child, and renders it impossible to perform his part of the contract, by conveying the lands to others, a right of action presently accrues to the child, who has performed his part of the contract, and he may recover for the reasonable value of the services rendered. *Patterson v. Franklin*, 75.

3. *Contracts.*—There being evidence that the defendant in this case had paid certain judgments with moneys in his hands claimed by the plaintiffs, according to a valid agreement with him, and which the jury has found to be a fact under proper instructions from the court, no error is found. *Taylor v. Holding*, 91.

4. *Vendor and Purchaser—Contracts—Certain Quantity "or More."*—A contract to purchase a certain quantity of guano, "or more," by a fixed date, to be shipped out by the seller as ordered, is not too in-

CONTRACTS—*Continued.*

definite in its terms to be enforcible by the seller as to the quantity definitely agreed upon. *Guano Co. v. Mercantile Co.*, 223.

5. *Contracts—Evidence—Other Contracts.*—Where in a suit upon contract for the sale of goods the purchaser denies the terms thereof, it is not competent for him to show that the contract was different from the one alleged, by evidence that the seller had made a different contract for the sale of his wares with other persons. *Ins. Co. v. Knight*, 160 N. C., 592, cited and distinguished. *Ibid.*

6. *Contracts—Married Women—Necessaries—Husband's Liability—Promise of Wife—Indebitatus Assumpsit.*—The common law rule that the husband is liable for the funeral expenses of his deceased wife and for "necessaries" during their married life is not affected by chapter 109, Laws 1911, authorizing a married woman to contract and deal as if she were unmarried, with certain reservations, when there is nothing to show an express promise to pay on her part, or that the articles were sold on her credit or under such circumstances as to make her exclusively or primarily liable according to the equitable principles of *indebitatus assumpsit. Bowen v. Daugherty*, 242.

7. *Contracts — Married Women — Separate Estate—Necessaries—Funeral Expenses—Husband's Liability—Interpretation of Statutes.*—If the wife, having a separate estate, predecease her husband, and the latter dies with property amply sufficient to pay his debts and funeral expenses, and those of his wife for necessaries, and leaves a will disposing of all of his property, the funeral and other necessary expenses of the wife are chargeable to the husband's estate, as an expense for which he is liable under the common law and in preference to the beneficiaries under the husband's will, in the absence of proof that the wife had in some way assumed personal liability therefor. Ch. 109, Laws 1911; Revisal, sec. 87. *Ibid.*

8. *Vendor and Purchaser—Contract—Delivery—Measure of Damages—Evidence—Market Quotations.*—In an action against the seller of several hundred barrels of potatoes, for a breach of contract in failing to deliver them, it is competent, upon the measure of damages, for the plaintiff, as a witness, to give his opinion of the price of the potatoes, based on information delivered from competent sources, such as market reports published in newspapers relied on by the financial world, etc., and his testimony that the potatoes were worth at least $3 or more a barrel is competent as to the value definitely stated. *Ferebee v. Berry*, 281.

9. *Contracts, Written—Vendor and Purchaser—Conditional Sales—Title—Parol Evidence.*—Where a conditional sale of a chattel has been entered into in writing between the seller and purchaser, it may be shown that contemporaneously and as a part of the contract, not reduced to writing, the seller should retain the title to the chattel until paid for or the conditions are performed by the purchaser. *Brown v. Mitchell*, 312.

10. *Same—Subsequent Agreements—Consideration.*—Where a written contract for the sale of a sick mule has been entered into between the seller and purchaser, that the latter take the mule and should it get

CONTRACTS—*Continued.*

well or able to work in a year he would pay $20 for it, parol evidence is admissible to show that subsequent to the writing and according to its terms it was agreed between the parties by parol that the seller should retain the title, the consideration expressed in the writing being sufficient to support the subsequent agreement resting in parol. *Ibid.*

11. *Equity—Contracts—Misrepresentations, Reliance Upon—Fraud.*—In the negotiation for the purchase of shares of corporate stock the purchaser, after receiving and paying for the shares, entered into a written agreement with the seller that the latter would repurchase the certificates at the same price, provided the purchaser would deliver them to him in ten days from that date. *Held:* The purchaser's entering into the subsequent agreement was inconsistent with the theory that he relied upon the representations theretofore made by the seller, alleged to have been false, which is necessary to be shown in order to set aside the first transaction on the ground of fraud. *Pritchard v. Dailey*, 330.

12. *Equity—Contracts—"Promissory Representations"—Fraud.*—Representations made in the sale of certificates of corporate stock looking to the future value of the shares are only "promissory representations," or statements of the seller's opinion, and are, in themselves, insufficient as evidence of fraud, necessary to set aside the sale. *Ibid.*

13. *Equity—Contracts—Fraud—Intent.*—In order to invalidate a transaction for fraudulent representations made by the seller, it must be shown, not only that they were false, or untrue, but that he knew them to be false at the time, and made them with intent to deceive. *Ibid.*

14. *Husband and Wife—Wife as Surety—Contracts, Written—Parol Evidence—Statute of Frauds.*—Where the wife signs as surety on a note of her husband, which she further secures by a mortgage on her lands, evidence on behalf of the wife that she only intended to pledge her land for the payment of the debt is in contradiction of the note, and is incompetent as contradicting the written instrument by parol evidence. *Royal v. Southerland*, 405.

15. *Contracts, Written—Ambiguity—Misapprehension of Parties.*—While ordinarily a written contract clearly expressing an agreement made between the parties will not be set aside, in the absence of fraud, for a mistaken impression of its terms resting solely in the mind of one of the parties, this rule of construction has no application where the essential terms of the agreement are ambiguously expressed, reasonably susceptible of different interpretations, and it is clearly made to appear that these terms have been used and intended by one of the parties in one sense and by the other in a different sense; for therein the minds of the parties not coming to an agreement, there can have been no contract made. *Lumber Co. v. Boushall*, 501.

16. *Same—Equity—In Statu Quo.*—Where, in permissible instances, it is shown that the parties to an alleged contract had supposed they had agreed upon its terms, when in point of fact they had not done so with reference to its material parts, the law will place them *in statu quo*. *Ibid.*

CONTRACTS—*Continued.*

17. *Contracts to Convey—Ambiguity—Mistake—Deeds and Conveyances—Timber—Damages.*—Where it appears that the parties to a contract to convey a certain tract of land, known and designated as the M. tract, each in good faith, thought a large body of timber was situated thereon, when it was upon an adjoining tract, and the vendor stated to the vendee at the time that he was unfamiliar with the land; and it appears that he contracted to sell only the M. tract and the title he had thereto or was authorized by other owners thereof to convey, *it is held* that the minds of the parties had not come together into a valid or enforcible contract for the sale of the land whereon the timber was situate, and the transaction afforded no right of action for the purchaser to recover any damages he may have received by reason of the inability of the vendor to convey it. *Ibid.*

18. *Same—Negligence.*—Where both parties to a contract to convey lands honestly supposed that a large body of timber was growing thereon, when in fact it was on an adjoining tract of land, and the supposed purchaser brings his action to recover the damages he has sustained for the inability of the vendor to make the deed contemplated by the contract, and it appears that the vendor had informed the purchaser, at the time, that he was personally unacquainted with the boundaries, and that his title had come to him by devise or descent, and the title deeds were in the possession of others, *it is held* that, under the facts stated, the principle of culpable negligence will not apply to the vendor so as to deny him the defense that no agreement had been made, and to avoid the payment of the damages sought in the action. *Ibid.*

19. *Contracts—Mistake—Trials—Wrong Theory—Appeal and Error.*—In this action to recover damages for the breach of a contract to convey certain lands, known as the M. tract, the plaintiff asserted that the contract was one way, and the defendant another way, and prayed for specific performance; and the allegations and evidence being sufficiently broad for the Supreme Court on appeal to determine the matter upon the correct ground that no contract had in fact been made, the respective prayers for relief are not of the substance, and the decision is put upon the correct view of the case. *Ibid.*

20. *Contracts—Failure to Agree—Deeds and Conveyances—Timber—Part Payment—Damages—Offsets—Pleadings—Appeal and Error—Costs.*—Where it appears that the parties to the action have mistakenly supposed that they had entered into a valid contract to convey lands, the plaintiff claiming damages for the inability of the defendant to convey the title he was supposed to have contracted to convey and the defendant demanding specific performance; that the plaintiffs have paid a certain sum of money and had cut timber upon the lands. *Held:* The plaintiff is entitled to recover the sum he has paid, with interest, and on repleader by defendant the latter is entitled, as an offset, to the value of the timber cut as it stood on the ground; and in this case cost is taxed against defendant in the lower court, and cost on appeal is divided. *Ibid.*

21. *Contracts, Vendor and Vendee—Equity—Mental Incapacity—Intoxication—Cancellation—Fraud—Ratification—Trials—Issues.*—In a suit to set aside a contract for the sale of lands on the ground of mental

CONTRACTS—*Continued.*

incapacity of the plaintiff at the time, with evidence that thereafter he paid a part of the purchase price and executed his notes for the balance, an issue as to the mental incapacity of the plaintiff to make the agreement of purchase is insufficient; for in suits of this character equity will afford no relief, in the absence of fraud, or if the complaining party has suffered no disadvantage, or if he has subsequently ratified his acts; and under the circumstances of this case separate and appropriate issues should also have been submitted to the jury. *Cameron v. Power Co.*, 138 N. C., 365, cited and distinguished as an action at law. *Burch v. Scott*, 602.

22. *Contracts — Equity—Cancellation—Intoxication—Fraud—Presumptions.* A presumption of fraud will arise from dealing with a person so intoxicated that his condition is manifest, and a court of equity will afford relief if he is imposed upon. *Ibid.*

23. *Contracts, Vendor and Vendee — Equity — Intoxication—Mental Incapacity—Evidence.*—In a suit to set aside a contract for the sale of lands, to recover a part of the purchase price paid by the plaintiff and to cancel notes given by him for the balance thereof, on the ground that the plaintiff was mentally incapacitated from drink at the time, an instruction from the court to answer the issue in plaintiff's favor if the jury found that his drunkenness was so excessive as to render him incapable of consent, "or for the time to incapacitate him from exercising his judgment," constitutes reversible error on the alternative proposition, the measure of the plaintiff's disability being such as would incapacitate him from understanding the nature of his act, its scope and effect, or consequences. *Ibid.*

24. *Trials — Instructions — Contracts—Counterclaim—Appeal and Error—Harmless Error.*—In an action brought by an architect to recover the contract price for plans and specifications furnished for a building, alleged to be due him, which the defendant denies and alleges that certain moneys advanced the plaintiff thereon were agreed to be repaid in the event of his failure to perform the contract, under conflicting evidence a charge of the court, in response to a request from the jury for further instruction, that they had the physical power to divide the amount claimed by the plaintiff is not reversible error, it appearing that the court immediately and correctly charged upon the burden of proof of each of the parties upon the respective issues, and how they should regard the evidence in reaching their conclusions; and it further appearing that the plaintiff's damages had been assessed at a smaller amount than he was entitled to under the evidence, it is error of which the defendant cannot complain on appeal. *Gambier v. Kimball*, 642.

25. *Contracts—Breach of Warranty—Conditions—Compliance.*—Where the seller of certain machinery sues upon notes given for the balance of its purchase price, and the defendant alleges a counterclaim for damages upon a breach of warranty, expressly providing that notice of a failure to satisfy the warranty should be given the plaintiff in five days, affording him opportunity to make necessary changes and allowing the defendant to return the machinery if not made to conform to the warranty; and it appears that the defects complained of were

CONTRACTS—*Continued.*

apparent and discovered by the defendant within the five days specified, and he did not notify the plaintiff thereof, which he had ample opportunity to do, but kept the machinery and did not complain until action brought, the defendant cannot successfully rely upon the breach of the warranty, and judgment thereon should be rendered in the plaintiff's favor. *Frick v. Boles*, 654.

26. *Contracts—Breach of Warranty—Conditions—Pleadings—Proof—Issues.* Where a warranty in a contract for the sale of goods requires that notice of a failure of the goods to satisfy the warranty be given the seller in five days, etc., an issue as to the reasonableness of the notice should not be submitted to the jury, in an action on the warranty, in the absence of allegation and proof thereof, and when defendant knew of the breach within the five days. *Ibid.*

27. *Executors and Administrators—Lands of Testator—Options—Unauthorized Acts—Specific Performance.*—Executors have not the power to contract with reference to a sale of the lands of their testator without special authority to do so, and especially does this apply to options of purchase given thereon; therefore specific performance of their contracts to convey such lands given as an option is not enforcible. *Hedgecock v. Tate*, 660.

CONTRIBUTION. See Parties, 13.

CONTRIBUTORY NEGLIGENCE. See Negligence; Questions for Jury, 1, 2.

CONVERSION. See Mortgages, 10.

CONVICTION. See Abandonment.

CORPORATIONS. See Vendor and Purchaser.

1. *Corporations—Deeds and Conveyances—Execution.*—A registered copy of a deed purporting to be that of a corporation, and appearing in form to be such, reciting that it was made "in pursuance of a resolution passed by its stockholders" on a certain date, signed by the president and two stockholders, with the corporate seal attached, and witnessed and executed and registered in 1876, *is held* to be sufficiently executed as a corporate act, under the common law and the statute then in force. Code, sec. 695; Rev. Code, ch. 26, sec. 22. *Power Corporation v. Power Co.*, 219.

2. *Same—Corporate Seals—Presumptions.*—A corporate deed executed by the proper officers of the corporation and bearing its seal is presumptive evidence that the seal was affixed by the proper authority. The deed in question was executed in 1876 by the president and two stockholders of the corporation, witnessed, and the seal appeared to have been affixed thereto. *Held:* It was a sufficient execution under the laws then existing. *Ibid.*

3. *Same—Probate.*—A probate officer, after reciting the State, county, probate court, and date, by certifying that the witness to a corporation deed, made in 1876, was the "subscribing witness to the foregoing conveyance, and made oath according to law that he witnessed the execution of the same by the parties for the purposes therein set forth," etc., raises a presumption of correct probate, inclusive of the

CORPORATIONS—*Continued.*

authority of the attesting witness, which will be taken as valid in the absence of evidence to the contrary. *Ibid.*

4. *Corporations—Deeds and Conveyances—Presumptions—Corporate Seals—Registrations.*—The failure of the register of deeds to copy the seal of the corporation on his books, or make an imitation copy thereon, does not render the conveyance of the lands made in 1876 invalid where the recitals in the deed signify that the seal was in fact attached, it appears upon the original, and the books show the name of corporation appearing in brackets therein at its proper location. *Ibid.*

5. *Water Companies—Contracts with City—Rights of Citizens—Fire Damage.*—A citizen whose property has been destroyed by fire may recover damages of a water corporation for a breach of its contract with the city "to afford a supply of water for the use of the citizens—and protection from fire," when the damages were proximately caused thereby. *Gorrell v. Water Co.*, 124 N. C., 328, cited and sustained. *Morton v. Water Co.*, 582.

6. *Same—Decisions—Corporation Charter—Implied Provisions.*—The right of a citizen and taxpayer to recover for the loss of his property by fire caused by the failure of a water corporation to perform its contract with the city to furnish a supply of water for fire protection, impliedly incorporates within the provisions of its charter the law then existing; and in this action for damages for destruction by fire, it appearing that *Gorrell v. Water Co.*, 124 N. C., 328, had been decided some two years before the defendant had acquired its charter, it acquired its charter rights subject to the doctrine therein announced by the Supreme Court. *Ibid.*

7. *Pleadings—Amendments—Court's Discretion—Appeal and Error.*—An exception to an amendment allowed in the discretion of the trial judge, which does not change the issues raised by the pleadings, will not be considered on appeal unless this discretionary power has been abused; and the same rule applies when the issues are changed, unless it appears that the appellant has been prejudiced in not being able to secure and introduce his evidence. *Ibid.*

8. *Water Companies — Contract with City — Breach — Damage by Fire—Other Fires.*—Where a citizen sues a water company for damages from fire alleged to have been caused by the failure of the defendant to supply the agreed quantity of water for fire protection under a contract with the city, and the evidence thereon is conflicting, it is competent for the plaintiff to show that the defendant had failed to thus supply water at other fires which had occurred under ordinary and usual conditions. *Ibid.*

9. *Corporations—Officers—Subsequent Declarations—Principal and Agent—Evidence.*—After the president and superintendent of a water corporation have been permitted to testify in its behalf as to the condition of the plant, in an action by a citizen to recover damages for a fire loss, it is competent for the plaintiff to show on their cross-examination, and by other witnesses, declarations, made by them after the fire, to contradict their testimony; for declarations of this character do not fall within the prohibition as to declarations of ordinary agents made after the act complained of. *Ibid.*

CORPORATION COMMISSION.

1. *Railroad—Public and Private Ways—Grade Crossings—Corporation Commission.*—Authority is conferred by statute [Rev., 1097 (10)] upon the Corporation Commission to abolish grade crossings by a railroad company when by the operation of the railroads they become dangerous or inconvenient to the public traveling along their highways or private ways. *Tate v. R. R.*, 523.

2. *Corporation Commission—Corporate Acts—Ministerial Duties—Individual Members—Mandamus.*—The Corporation Commission acts as a body and in a corporate capacity, and an action or proceeding to compel that body to perform its ministerial duties must be brought against it in that capacity and not against its members, for its functions are not individual or personal, but corporate. Hence mandamus to compel the refund of taxes alleged to have been paid under an excessive valuation of property will not lie against two of the commissioners, as individuals. *Shoe Co. v. Travis*, 599.

COSTS. See Trials, 6; Appeal and Error, 44, 76.

COUNTERCLAIM. See Pleadings, 15; Instructions, 27.

COUNTIES. See Schools.

1. *Counties—Roads and Highways—Necessary Expenses—Constitutional Law—Taxation—Bond Issues.*—The construction and maintenance of public roads are a necessary public expense, for which the General Assembly may provide, and create a board therefor distinct from the county commissioners, and fix and authorize a levy of tax therefor, without causing the proposition to be submitted to the vote of the people. *Hargrave v. Commissioners*, 626.

2. *Same—Statutes—Power of Courts.*—The question as to whether a legislative act, providing for an issuance of bonds, passed in accordance with Art. II, sec. 14, of the State Constitution, sufficiently safeguards the rights of the citizen as to the assessment of damages for land to be taken by the road commission in improving the roads of a county will not be considered in an action brought by the taxpayer to restrain the commissioners from exercising the authority given them, and can only be raised by the landowner when the occasion occurs. *Ibid.*

3. *Same—Injunction.*—The courts cannot enjoin road commissioners in the performance of their duties in the maintenance, construction, and management of the public roads of the county, under legislative authority, imposed by a statute passed in accordance with Art. VII, sec. 7, of the State Constitution; and the objections to the statute in question that the board is a self-perpetuating body because the members are to fill vacancies, etc., without limitation as to the duration, or responsibility to the people for their acts, etc., or that the members are not subject to removal except upon indictment for misfeasance, and then only for the willful failure or refusal to perform a duty, should be addressed to the lawmaking power, and not to the courts. *Ibid.*

COURTS. See Clerks of Court; Contempt.

1. *Courts—Improper Remarks—Interpretation of Statutes—Appeal and Error.*—Remarks made by the judge in the course of a trial involving

COURTS—*Continued.*

the genuineness of signatures of the indorsers of a note, in regard to plaintiff's calling upon the principal, who had not been introduced, to testify, is reversible error, under our statute, which forbids the court from expressing or intimating an opinion upon the evidence. *Bank v. McArthur*, 48.

2. *Appeal and Error—Several Causes—Agreement of Parties—Courts.*—Where there are several causes between the same parties, upon the same subject matter and involving the same exceptions, the parties may agree among themselves that one or more of them may be appealed from and the result control them all; but this rests solely upon the agreement of the parties, and is not subject to the control of the courts. *Land Co. v. McKay*, 83.

3. *Appeal and Error—Failure to File Record—Rules of Court.*—Where the record in cases on appeal to the Supreme Court has not been filed by the appellant in this Court under the requirements of Rule 4 (164 N. C., 540), it will be dismissed upon motion of the appellee, filed with proper certificates, made under Rule 17, and the party in default must abide the consequences unless unavoidable cause is shown. *Ibid.*

4. *Supreme Court—Rehearing—Petition Dismissed.*—This petition to rehear having been fully and carefully considered, and it appearing that the errors assigned have already been passed upon in well considered opinions of this Court, and no new fact has been called to the attention of the Court, or new case or authority cited, or new position assumed, the petition is dismissed. *Weston v. Lumber Co.*, 98.

5. *Courts—Expressions of Opinion—Speeches to Jury—Interpretation of Statutes—Appeal and Error.*—In this case it is held that the remarks of the trial judge made with reference to the argument of defendant's counsel in his address to the jury were not an intimation of opinion upon the facts, and not held for error. Revisal, sec. 535. *S. v. Rogers*, 112.

6. *Appeal and Error — Indictment — Omission from Record — Power of Courts—Motion to Supply—Certiorari—Procedure.*—Where an appeal is taken to the refusal of the trial court to quash an indictment, it is the duty of the appellant to see that a transcript of the indictment appears in the record; and when it does not so appear he should apply to the Superior Court to supply it, if one convenes in time; and if not, he should send to the Supreme Court as much of the record as could be procured, and apply here for a *certiorari* to give him opportunity to move in the court below. *S. v. McDraughon*, 131.

7. *Appeal and Error—Power of Courts—Indictment—Omissions.*—The Superior Court has power to supply, by copy, an indictment necessary to be set out in the record in a criminal case on appeal to the Supreme Court which has been lost accidentally or otherwise, upon motion of appellant, based upon affidavits. *Ibid.*

8. *Criminal Law—Courts—Judgment Suspended—Consent of Defendant—Recorders' Courts.*—The authority of the courts having jurisdiction of the subject matter to suspend judgment upon conviction in criminal matters for a determinate period and for a reasonable length of time, arising from the disposition of the court to ameliorate the condition

COURTS—*Continued.*

of the defendant, and requiring his consent, express or implied by his presence at the time without objection, or otherwise, applies to municipal or recorders' courts. The power of the recorder, under the statute, to suspend the judgment, and the constitutionality of the statutory jurisdiction conferred, is upheld in this case. *S. v. Hyman*, 164 N. C., 411. *S. v. Tripp*, 150.

9. *Same—Appeal—Trial de Novo—Waiver.*—When it appears that a defendant convicted in a criminal action has consented that the judgment be suspended against him, it will be considered a waiver of his right of appeal on the principal issue of his guilt or innocence; and, where this has been done in a court inferior to the Superior Court, of his right to a trial *de novo*, under the statute. *Ibid.*

10. *Same—Writ of Review—Procedure—Constitutional Law—Statutes.*—There being no appeal provided where a judgment in a criminal action has been suspended by the trial court with the defendant's consent, and sentence subsequently imposed, the Supreme Court has authority under Article IV, sec. 8, of our Constitution, and the Superior Court under Revisal, sec. 584, in the exercise of its appellate jurisdiction, to review the judicial proceedings of courts of inferior jurisdiction by writs of *certiorari*, *recordari*, and *supersedeas*, in order to afford a litigant his legal right of redress; and except in rare instances, which do not obtain in the case at bar, the appellate courts are confined to the facts as they appear of record, and can only review the proceedings as to their regularity or on questions of law or legal inference, as where the lower court has refused to hear evidence on the subject before imposing the sentence or has committed manifest and gross abuse of the discretion reposed in them. *Ibid.*

11. *Appeal and Error—Fragmentary Appeals—Directing Verdict "Not Guilty"—Order Striking Out Entry—Mistrial—Discretion of Court—Interpretation of Statutes.*—Where the judge has ordered the entry to be made by the clerk of a verdict of not guilty on the trial of a criminal case, for a variance between the offense charged in the indictment and the proof, but conceiving his action to be erroneous, he then, in the presence of the jury, still sitting on the case, directs the clerk to strike out the entry and, withdrawing a juror, directs a mistrial, *it is held* that the order of the judge striking out the verdict of not guilty left the case in exactly the same attitude it was before the entry of such verdict, and the withdrawal of a juror and order of mistrial, being in the discretion of the court, except in capital cases, are not reviewable. *S. v. Ford*, 165.

12. *Same—Fragmentary Appeals.*—An appeal is fragmentary from an order of the trial judge to the clerk to strike out a verdict of not guilty in a criminal case, which the judge had directed to be entered, but subsequently, when the jury is still sitting on the case, it is stricken out by the order of the court, and the appeal will be dismissed; for in such instances the acts of the court are analogous to his rulings upon evidence or like matters during the progress of the trial. *Ibid.*

13. *Appeal and Error—Courts—Presumptions.*—Every intendment and presumption on appeal is in favor of the validity of the judgment of the Superior Court appealed from; and where it appears that summons

COURTS—*Continued.*

had not been served on the defendant, and it entered a general as well as a special appearance for the purpose of dismissing the action, without showing which was done first, and judgment has been rendered against it, it will be presumed that by a general appearance first entered the right to dismiss upon the special appearance had been lost. *Hassell v. Steamboat Co.*, 296.

14. *Statutes—Interpretation—State Departments—Courts.*—The construction given the inheritance tax statute by the Attorney-General and State Treasurer are only *prima facie* correct, and not binding upon the courts, though given consideration as persuasive authority. *Norris v. Durfey*, 321.

15. *Appeal and Error—Certiorari—Appeal Dismissed—Newly Discovered Evidence—Superior Courts—Jurisdiction.*—Where an appeal has been docketed and dismissed in the Supreme Court under Rule 17, for failure to prosecute it, the adjudication relates back to the final judgment appealed from, and the Superior Court judge is without jurisdiction to consider a motion for a new trial for newly discovered evidence. *Lancaster v. Bland*, 377.

16. *Appeal and Error—Newly Discovered Evidence—Superior Courts.*—An appeal will not lie from the refusal of the Superior Court judge, in his discretion, to grant a new trial for newly discovered evidence. *Ibid.*

17. *Pleadings—Conflict of Laws—Demurrer—Trials—Questions for Jury.*—Where the complaint alleges a cause of action under the laws of this State for the negligent killing of plaintiff's intestate by a railroad company, and that the act complained of was caused in an adjoining State, the issue that under the laws of that State no cause of action has been stated cannot be raised by demurrer *ore tenus;* and when the issue is raised by the answer, it is determined here in accordance with the practice of our courts. *Harrison v. R. R.*, 382.

18. *Same—Evidence.*—Where a complaint alleges a cause of action for the negligent killing by a railroad company of the plaintiff's intestate, occurring in another State, and it is contended by the defendant that under the laws of that State there is insufficient evidence that its train struck and killed the deceased, the fact must be determined by the rules of evidence obtaining here. *Ibid.*

19. *Same—Jurisdiction—Trials.*—Where the complaint alleges a cause of action against a railroad company for the negligent killing of plaintiff's intestate occurring in another State, and the defendant pleads the law of that State in bar of recovery, the measure of duty owed by the defendant to the intestate and its liability for negligence must be determined according to the law of that State. *Ibid.*

20. *Conflict of Laws—Decisions of Other States—Construction—Trials—Questions for Court.*—While the laws of another State, when applicable to the controversy, are ordinarily to be determined by the jury when the evidence is conflicting, this rule does not obtain when the decisions of the courts of the other State are alone introduced in evidence, upon the controverted matter, without objection, for then the interpretation of these decisions is exclusively a matter of law for the courts. *Ibid.*

COURTS—*Continued.*

21. *Same—Trials—Instructions—Appeal and Error.*—Where the laws of Virginia are alone applicable in an action brought here against a railroad company for the negligent running upon and killing the plaintiff's intestate, and it appears that, from the interpretation of the decisions of that court introduced in evidence by consent, the plaintiff was a trespasser on the defendant's track at that time, to whom the defendant owed the duty only not to willfully injure him after discovering his helpless and perilous condition upon the track, a charge of the court to the jury, laying down different principles of law to govern the jury, is reversible error, though the instructions were correctly given according to the principles obtaining here. *Ibid.*

22. *Conflict of Laws—Issues.*—An issue framed according to our own laws in an action brought here, but controlled by the laws of another jurisdiction, differing from ours, should be so framed as to be responsive under the laws of the other State. *Ibid.*

23. *Judicial Sale—Commissioner's Deed—Correction by Court—Appeal and Error—Costs.*—A commissioner appointed by the court to sell land involved in the controversy is not a party to the action and has no interest in the subject of it which will give him the right of appeal; and where an appeal of this character has been taken, the costs are taxed against the commissioner personally. *Summerlin v. Morrisey,* 409.

24. *Evidence—Deceased—Transactions, etc.—Trials—Instructions—Expressions of Opinion.*—In an action on a note brought by husband and wife against the administrator of the deceased, it is incompetent for the husband to testify that he was present at the time and saw the deceased receive the money for the note, for this is evidence of a transaction with the deceased by an adverse party in interest, forbidden by the statute; but where this testimony has been given without objection, it is not an expression of opinion upon the evidence for the trial judge to state the law to the jury and remark that he would have ruled it out had it been objected to, for this is only a caution to the jury that they should scrutinize his testimony, and does not cast any imputation upon the truthfulness of the witness. *White v. Guynn,* 434.

25. *Courts—Expression of Opinion—Interest of Witness—Trials.*—In proceedings by an administrator to sell lands of deceased to make assets to pay debts, the execution of the note was testified to by the plaintiff, and a witness for the defendant testified that the note had been paid and that he had a mortgage on the land in question. *Held:* It was error for the court to charge the jury that the defendant's witness was not interested in the result of the action, such being an expression of his opinion upon the weight of the evidence prohibited by statute, which was exclusively for the determination of the jury. *Swan v. Carawan,* 472.

26. *Parties—Courts—Discretion.*—The refusal of the trial court to make parties not necessary to the controversy rests within the discretion of the trial judge, which is not reviewable. *Guthrie v. Durham,* 573.

27. *Parties—Court's Discretion—Tort-Feasors—Municipal Corporations—Excavation—Degrees of Liability.*—Where a municipality permits a

COURTS—*Continued.*

property owner to excavate along the sidewalk of its streets, who, while the excavation is being dug, surrounds it with a fence, which gives way while a pedestrian is leaning thereon, who, being injured, brings his action against the city for alleged negligence in permitting a dangerous condition to exist, the negligent act of the property owner would be antecedent, in point of time, to that of the city, in failing to exercise a proper degree of supervisory care; and the liability of the city is secondary to that of the property owner who caused the excavation to be made. *Ibid.*

28. *Pleadings—Amendments—Description of Lands—Court's Discretion—Appeal and Error.*—An amendment of the complaint, in an action to recover lands, to make the description therein conform to that of the deed under which the plaintiff claims, is not reviewable in this case, there being no evidence that the trial judge had therein abused the discretion reposed in him. *King v. McRackan*, 621.

29. *Counties—Necessary Expense—Statutes—Power of Courts.*—The question as to whether a legislative act, providing for an issuance of bonds, passed in accordance with Art. II, sec. 14, of the State Constitution, sufficiently safeguards the rights of the citizen as to the assessment of damages for land to be taken by the road commission in improving the roads of a county will not be considered in an action brought by the taxpayer to restrain the commissioners from exercising the authority given them, and can only be raised by the landowner when the occasion occurs. *Hargrave v. Commissioners*, 626.

30. *Courts, Power of—Official Acts—Mandamus—Injunction.*—The power of the courts over officials acting under authority of a valid statute cannot extend to enforce disobedience to the act. It is only to enforce their faithful performance of their duties that the courts can supervise them by mandamus or injunction. *Ibid.*

31. *Supreme Court—Decisions—Estoppel—Statutes.*—The Supreme Court having by numerous decisions held that an act of the Legislature authorizing a bond issue for public roads is valid if conforming to Art. II, sec. 14, of the State Constitution, without submitting the proposition to a vote of the people, and in construing acts involving proportionately to population and property value no greater amount of bonds than are here in controversy, is estopped to apply a different rule to the facts on this appeal. *Ibid.*

32. *Attachment—Summons—Returnable Thirty Days—Justices' Courts—Interpretation of Statutes.*—In attachment and publication on a nonresident defendant before a justice of the peace, where defendant's property within the jurisdiction of the court has been levied on, a summons is not required; and therefore the requirements of Revisal, sec. 1445, that the summons must be made returnable not more than thirty days after its issuance is inapplicable. *Mills v. Hansel*, 651.

33. *Same—Court's Jurisdiction—Republication.*—The court acquires jurisdiction of an action by attachment upon the property of a nonresident defendant within its jurisdiction, and the action should not be dismissed because summons by publication was not ordered within thirty days after the issuance of the warrant, it being within the authority of the court, having acquired jurisdiction, to order a republication,

COURTS—*Continued.*

which should be done in order that the plaintiff may not be deprived of his remedy should the defendant remove his property from the State. *Ibid.*

CRIMINAL LAW. See Assault; Cocaine; Conspiracy; Abandonment.

1. *Indictment—Criminal Law—Unlawful Burning—Ginhouse—Interpretation of Statutes.*—An indictment for "willfully and feloniously setting fire to a certain ginhouse, the property of W. B. H., with intent to burn and destroy the same," is sufficient for conviction of the offense charged under Revisal, secs. 3336, 3341, the word "ginhouse" meaning the same as "cotton gin"; and where the punishment inflicted was within the limits prescribed by either section, it becomes immaterial under which section the conviction was had. *S. v. Rogers*, 112.

2. *Same—Evidence—"Charring."*—Where the defendant has been tried and convicted under an indictment charging that he willfully and feloniously set fire to a certain "ginhouse," etc., it is held that the evidence of "charring" is sufficient proof of "burning" to sustain the sentence; and it is further held that the motion in arrest of judgment was properly denied under the circumstances, the objection relating to informalities and refinement, and the defendant having been fully informed of the charge against him. Revisal, secs. 3254, 3255. *Ibid.*

3. *Criminal Law—Unlawful Burning—Questions—Identification—Appeal and Error.*—Upon a trial for setting fire to a certain ginhouse, etc., a witness testified that he knew the prisoner well, and saw the defendant running away from the ginhouse, which was ablaze, and recognized him in the light of the fire. The defendant objected to a question of the solicitor, asking if the witness had any doubt that the prisoner was the man whom he saw, the question with the answer held to be no error. *Ibid.*

4. *Criminal Law—Work on Road—Indictment, Sufficient—Statutes.*—A warrant charging the statutory offense for failure to work the public roads is sufficient to sustain a conviction which substantially follows the statute, and a motion in arrest of judgment upon the ground of the insufficiency of the warrant will be denied when it charges that the defendant did, on or about a certain date, in a certain county, unlawfully and willfully fail to work a certain public road on which he was due road service, after he had legal warning from the overseer, and without tendering the overseer of the road the sum of one dollar. *S. v. Moore*, 166 N. C., 288, cited and applied. *S. v. Thomas*, 146.

5. *Criminal Law—Work on Road—Statutes—Indictment—Matters of Defense.*—It is not necessary for a warrant under the statute for the unlawful failure to work a public road to charge that the defendant was an able-bodied man between the ages of 18 and 45 years, for this is a matter of defense. *Ibid.*

6. *Criminal Law—Work on Roads—Defense—Certificates of Performance—Trial—Evidence—Questions for Jury.*—Where upon trial for unlawfully failing to work the roads a defendant pleads not guilty, and introduces a certificate that he had performed this service from August, 1913, to August, 1914, and the evidence on the part of the State tended to prove that the defendant was notified to work in August, 1914, a

CRIMINAL LAW—*Continued.*

conflict of evidence on the material fact arises as to whether the certificate covered the time when the defendant was notified to work; and a request that the court charge the jury that they return a verdict of not guilty upon the whole evidence is properly refused. *Ibid.*

7. *Criminal Law—Work on Road—Overseer—Notice—Agreements—Admissions—Trials.*—The defendant being tried for unlawfully failing to work on the public road under a sufficient indictment, a witness testified, without objection, that he was overseer of that section, and it is held that it was competent for him to further testify that the defendant lived on that particular road, and that upon giving him the notice required, and telling him of the day appointed and where to go, he had agreed to do so, the agreement of defendant being in the nature of an admission that the service was due by him. *Ibid.*

8. *Criminal Law—Courts—Judgment Suspended—Consent of Defendant—Recorders' Courts.*—The authority of the courts having jurisdiction of the subject matter to suspend judgment upon conviction in criminal matters for a determinate period and for a reasonable length of time, arising from the disposition of the court to ameliorate the condition of the defendant. and requiring his consent, express or implied, by his presence at the time without objection, or otherwise, applies to municipal or recorders' courts. The power of the recorder, under the statute, to suspend the judgment, and the constitutionality of the statutory jurisdiction conferred, is upheld in this case. *S. v. Hyman*, 164 N. C., 411. *S. v. Tripp*, 150.

9. *Same—Appeal—Trial de Novo—Waiver.*—When it appears that a defendant convicted in a criminal action has consented that the judgment be suspended against him, it will be considered a waiver of his right of appeal on the principal issue of his guilt or innocence; and, where this has been done in a court inferior to the Superior Court, of his right to a trial *de novo*, under the statute. *Ibid.*

10. *Same—Writ of Review—Procedure—Constitutional Law—Statutes.*—There being no appeal provided where a judgment in a criminal action has been suspended by the trial court with the defendant's consent, and sentence subsequently imposed, the Supreme Court has authority under Article IV, sec. 8, of our Constitution, and the Superior Court under Revisal, sec. 584, in the exercise of its appellate jurisdiction, to review the judicial proceedings of courts of inferior jurisdiction by writs of *certiorari*, *recordari*, and *supersedeas*, in order to afford a litigant his legal right of redress; and except in rare instances, which do not obtain in the case at bar, the appellate courts are confined to the facts as they appear of record, and can only review the proceedings as to their regularity or on questions of law or legal inference, as where the lower court has refused to hear evidence on the subject before imposing the sentence or has committed manifest and gross abuse of the discretion reposed in them. *Ibid.*

11. *Criminal Law—Indictment—Sufficiency—Interpretation of Statutes.*—Under the provisions of Revisal, sec. 3254, a warrant of indictment, etc., in criminal cases shall be sufficient in form if the charge against the prisoner is expressed therein in a plain, intelligible, and explicit manner, and they may not be quashed, or stay of judgment granted,

by reason of any informality or refinement, if in the bill or proceeding sufficient matter appears to enable the court to proceed to judgment. *S. v. Knotts*, 173.

12. *Same—Duplicity—Motions to Quash.*—A motion to quash an indictment for assault because of duplicity will be denied when it appears on the face of the indictment that though the assault is charged as being made on two or more persons, it was committed by one and the same act; the remedy of the defendant, if any is available, being by proper application to require the State to elect or, perhaps, to sever the prosecutions. *Ibid.*

13. *Criminal Law—Intent—Deadly Weapon—Malice Presumed—Trials—Instructions.*—From the intentional commission of a criminal offense, without just cause or excuse, the law will presume general malice, which will support a verdict of guilty; and upon trial for a secret assault with a deadly weapon it is not error for the judge to charge the jury that malice would be presumed from the use of the weapon, and immediately thereafter that malice would be presumed from the intentional use thereof. *Ibid.*

14. *Criminal Law—Secret Assault—Common Design—Evidence—Trials.*—On trial for a secret assault there was evidence tending to show that the several defendants were alone in the shadow of a deserted house in the nighttime, and seeing two policemen approach, who were unaware of their presence, one of them said to the others, "Let us kill them." One of the policemen, using a flashlight to see his way along, flashed it in the face of one of the defendants, who fired upon him, and this was seen by the other policeman following, but not by the one who was then shot, whereupon the other defendants, excepting one, firing from the dark, inflicted injuries upon the other policeman. *Held:* The defendants being together and aiding and abetting each other in pursuance of an unlawful and common design, were each guilty of a secret assault upon the policeman first shot, who did not see his assailant; and this applies, also, to the defendant thus engaged, who did not have a pistol or use one, as he is considered as having participated in the assault. Revisal, sec. 3621. *Ibid.*

15. *Criminal Law — Conspiracy — Inference — Circumstantial Evidence — Trials—Questions for Jury.*—No direct proof of an agreement to enter into a conspiracy for an unlawful purpose is necessary, for the conspiracy may be perfected by the union of the minds of the conspirators; and the fact of conspiracy may be established by an inference of the jury from other facts proved—that is, by circumstantial evidence. *Ibid.*

16. *Criminal Law—Secret Assault—Common Design—Aider and Abettor—Evidence—Former Acts—Robbery.*—There was evidence tending to show that all the defendants charged with a secret assault upon two policemen were together on the night prior to the time, under suspicious circumstances, and afterwards held up, with pistols, some Negro boys for the purpose of robbery, and that after the assault charged, one was active in looking after another one of them who had been shot. At the time of the assault this defendant was present with the others, but was unarmed and did not actively engage in the shoot-

CRIMINAL LAW—*Continued.*

ing which occurred. *Held:* The evidence tending to show a secret assault made by the other defendants was evidence against the one who was present but did not actively participate in the assault, and the evidence of the robbery was also competent against all the defendants upon the question of whether the design to commit the subsequent secret assault was common to them all. *Ibid.*

17. *Criminal Law — Defendants' Character — Presumptions — Trials — Remarks of Counsel—Appeal and Error.*—Where the defendants in a criminal action have not testified as witnesses, it is correct for the trial judge to refuse to charge the jury, on their behalf, that the law presumed them to be men of good character; and where the prisoner's attorney in addressing the jury has urged upon them this erroneous proposition, it was not error to permit the solicitor, in reply, to argue that the defendants had not taken the witness stand and their attorney should not be permitted to claim that their character was good. *Ibid.*

18. *Criminal Law—Conspiracy—Necessaries of Food—Common Law—Reasonable Profits.*—An agreement among dealers in a necessary article of food, to raise its price, is an indictable offense at the common law, and the evidence in this case being that dealers controlling 60 per cent of the supply of milk in a town having by a written agreement raised its price, testimony is irrelevant that a dealer not a party to the agreement had also raised the price of his milk to his customers, or whether the agreement was reasonable or necessary for the article to yield a profit in its sale. *S. v. Craft*, 208.

19. *Same—Evidence.*—Upon trial for conspiracy among dealers to sell milk in a town at an advanced price, it is proper to show by competent testimony of a witness that the price was consequently advanced. *Ibid.*

20. *Criminal Law—Indictment—Proof—Immaterial Variance.*—A variance between the charge of an indictment that the defendants conspired together to raise the price of milk to 13 cents per quart, and the proof that it was raised to 12½ cents per quart, is immaterial, the fact that the price was raised in consequence of the agreement being controlling. *Ibid.*

21. *Criminal Law—Indictment, Form of—Interpretation of Statutes.*—An indictment is sufficient in form under Revisal, 3254, which charges the offense "in a plain, intelligible, and sufficient manner"; and where the indictment is for an offense at common law it will not be held fatally defective that the indictment charged the offense as being "against the form of the statute and also against the peace and dignity of the State." *Ibid.*

22. *Criminal Law—Conspiracy to Raise Price—Intent—Evidence.*—Upon the trial for a conspiracy to raise the price of milk in a community, the only question presented is whether the defendants had so agreed, and if, in consequence, they raised the price, the intent to raise the price being the criminal intent which makes the offense. *Ibid.*

23. *Criminal Law—Admissions — Instructions — Directing Verdict.*—When upon the trial for conspiracy among dealers to raise the price of milk

CRIMINAL LAW—*Continued.*

in a certain community the defendants admit entering into the agreement and the consequent raising of the price, it is proper, and not objectionable as directing a verdict, for the judge to relate the admission to the jury and instruct them that thereunder the defendants would be guilty. *Ibid.*

24. *Criminal Law—Conspiracy to Raise Price—Common Law—Statutory Offense—Interpretation of Statutes—Appeal and Error—Harmless Error.*—A conspiracy among dealers to raise the price of a necessary article of food being indictable under the common law, it is not reversible error for the trial judge to exclusively so regard it in the conduct of the trial and erroneously instruct the jury that it was not a statutory offense, though in fact it was so made by chapter 41, Laws 1913, secs. 1, 2, and 3. *Ibid.*

25. *Municipal Corporations—Cities and Towns—Theft of Boat—State Offense.*—The theft of a boat upon a river from the wharf of a city is an offense against the State, and the thief, after arrest, should be incarcerated in the county jail, and not in the city lockup. *Hobbs v. Washington*, 293.

26. *Municipal Corporations—Police Officers—Unlawful Arrest—Warrants for Arrest.*—The arrest of a person by an officer without a warrant is allowed upon emergency (Revisal, secs. 3176-8), but a warrant must be procured as soon thereafter as possible (Revisal, sec. 3182); and, under the circumstances of this case, it appearing that this was not done, the officer responsible for the arrest is personally answerable in damages. *Ibid.*

DAMAGES. See Negligence; False Imprisonment; Waters; Malicious Prosecution; Railroads.

1. *Vendor and Purchaser—Dealers—Contracts—Fertilizer—Express Warranty of Analysis—Measure of Damages.*—In an action upon a warranty in the sale of fertilizer to a dealer, that the fertilizers should contain ingredients according to an agreed formula, the damages, when recoverable, are limited to the difference between the value of the article delivered and its value or market price if it had been such as it was warranted to be. *Guano Co. v. Live Stock Co.*, 442.

2. *Contracts to Convey—"Bond for Title"—Penalty—Liquidated Damages—Election—Measure of Damages.*—Where in a contract to convey lands, written in the ordinary form, it appears that a certain sum is fixed upon as a penalty for the failure of the vendor to convey a perfect title in accordance with its terms, and that the sum so fixed is in disproportion to the magnitude of the transaction, the complaining party is not confined to a recovery of the stated sum as a stipulation fixing the extent of liquidated damages, but at his election may sue for the damages he has actually sustained. *Lumber Co. v. Boushall*, 501.

3. *Contracts—Failure to Agree—Deeds and Conveyances—Timber—Part Payment—Damages—Offsets—Pleadings—Appeal and Error—Costs.*—Where it appears that the parties to the action have mistakenly supposed that they had entered into a valid contract to convey lands, the plaintiff claiming damages for the inability of the defendant to con-

DAMAGES—*Continued.*

vey the title he was supposed to have contracted to convey and the defendant demanding specific performance; that the plaintiffs have paid a certain sum of money and had cut timber upon the lands: *Held:* The plaintiff is entitled to recover the sum he has paid, with interest, and on repleader by defendant the latter is entitled, as an offset, to the value of the timber cut as it stood on the ground; and in this case cost is taxed against defendant in the lower court, and cost on appeal is divided. *Ibid.*

4. *Municipal Corporations—Condemnation—Appropriation Unauthorized—Compensation—Measure of Damages.*—The measure of damages to the plaintiff for the unlawful appropriation of a part of the lands for street purposes by a municipal corporation is the value of the lands taken, subject to the diminution in value to the remainder, or the difference in value before and after the street was opened. *Lloyd v. Venable*, 531.

5. *Carriers of Goods—Negligence—Damage to Shipment Repaired—Measure of Damages.*—Where a shipment of buggies has been damaged by the negligence of the carrier, and it appears that the manufacturer has repaired the damage as a personal matter between it and the consignee, it is error for the trial judge in the latter's action to confine the measure of damages to the difference between the market value of the buggies at the time they were delivered to the defendant for shipment and their market value when the repairs had been made; for the plaintiff is entitled to recover the reasonable cost of repairing the buggies had the manufacturer charged therefor, interest on the purchase price, together with such other damage as he may have proximately sustained by reason of the defendant's negligence; the difference between the value of the buggies when received by the carrier for shipment and their value when tendered to the consignee upon his demand for them being the rule of damages. *Little v. R. R.*, 658.

DAMNUM ABSQUE INJURIA. See Negligence.

DECEASED. See Evidence, 11.

DECEASED PERSON. See Statutes.

DECLARATIONS. See Evidence, 9.

DEEDS AND CONVEYANCES. See Corporations, 1, 4; Statute of Frauds; Executors and Administrators; Limitations of Actions, 11, 12; Husband and Wife; Pleadings; Contracts; Mortgages; Evidence.

1. *Deeds and Conveyances—How Construed—Intent—Estates for Life.*—Under the modern doctrine that a deed should be interpreted as a whole to give effect to the grantor's intent, and without undue weight to its formal parts, it is held that a deed for lands to the sons of the grantor as tenants in common, with an *habendum* "reserving and retaining" in the grantor "an estate in the land during his life and the lives of" his four daughters, naming them, expressing the desire of the grantor that he and his said daughters shall and may live on the said lands during their lives as members of his family, and after

DEEDS AND CONVEYANCES—*Continued.*

his death his daughters as members of the family or families of his sons, conveys to the sons the fee in the lands after the termination of the life interests reserved. *Brown v. Brown*, 4.

2. *Same—Repugnancy.*—A conveyance of the fee, with reservation in the *habendum* of a life estate in the grantor for his own benefit and for the use of his four daughters during their lives, will not be construed as repugnant when it appears, interpreting the deed as a whole, that it was the intent of the grantor that the grantees should take in remainder, nor will the word "reserves" used in connection with the first estate, be given a technical meaning to defeat the intent of the grantor thus ascertained. *Ibid.*

3. *Deeds and Conveyances—Interpretation—Estates for Life—Expressed Motives.*—Where a deed to lands, by proper interpretation, conveys the fee in remainder after reserving to the grantor and his daughters life estates, the object or motive for making the gift to the daughters, stated in the conveyance, will not be permitted to affect the clear intent of the grantor, as gathered from the unambiguous language expressed in the deed construed as a whole, it not being, in this case, inconsistent therewith. *Ibid.*

4. *Deeds and Conveyances — Estates for Life — Reservation — Uses and Trusts—Statute of Uses—Estates in Remainder.*—Where the grantor reserves in his conveyance of land a life estate to himself and for the use and benefit of his daughters during their lives, with remainder over to his sons, it is immaterial whether the life estate for the daughters is regarded as reserved directly to them or indirectly through their father, as their trustee, they having the use or equitable estate; for if reserved to them directly, the statute of uses would merge both the legal and equitable estates in the daughters upon the death of the grantor; and if reserved to them indirectly through the grantor, at his death the heirs at law would hold the legal title in trust for the daughters during their lives, with remainder over to the sons. *Ibid.*

5. *Deeds and Conveyances—Estates for Life—Remainder—Limitation of Actions—Adverse Possession.*—The grantor of lands, reserving a life estate to himself and for the benefit of his four daughters for their lives, conveyed the remainder to his two sons in fee, who by proper conveyances divided their interest in the lands, expressly referring therein to the reservation of the life estates. Thereafter one of the sons conveyed to the other his estate in the divided lands, and continued to live thereon with his father and sisters until their death. After the death of his father and soon after the death of his last surviving sister, his grantee brought this action for possession of the land, to which he pleaded title by adverse possession and introduced evidence tending only to show that he had lived on the lands with his sisters during their lives and used the rents and profits. *Held:* The evidence was insufficient to be submitted to the jury upon the question of defendant's adverse possession, and judgment should have been entered for the plaintiff. *Ibid.*

6. *Same—Happening of Contingency—Time of Entry.*—Where the grantor of lands reserves a life estate in the lands for himself and also for

DEEDS AND CONVEYANCES—*Continued.*

the use and benefit of his daughters during their lives, with limitation over to his sons, who agree to a division of their interest and convey the same to each other by interchangeable deeds, and thereafter one of them conveys his interest to the other, not to take effect until "after the falling in of the life estate of the grantor's daughters," by the terms of this conveyance his grantee's right of entry on the lands, or of possession, does not take effect until the happening of the event stated, and the grantor's possession cannot be considered adverse until then, and at that time only the statute of limitations will commence to run. *Ibid.*

7. *Deeds and Conveyances—Estates for Life—Remaindermen—Limitation of Actions—Adverse Possession.*—A limitation over to the two sons of the grantor of lands after reserving a life estate in favor of the grantor and his daughters, in which one of the sons conveyed his interest to the other during the continuance of the first estate, and remained in possession with his father and sisters. *Held:* The possession of the grantor was only permissive, and did not adverse to the grantee and the daughters remaining in possession, until their death, and the possession of the grantor could not have been adverse, though the statute of uses did not unite in the daughters both the legal and the equitable title. *Ibid.*

8. *Deeds and Conveyances—Consideration—Support—Trial—Instructions—Actions.*—In this action to declare a deed void for the failure of the grantee to perform the conditions therein stated to support certain beneficiaries in consideration therefor, it is held that the issues involved are those of fact, properly submitted to the jury under a correct instruction that the support of the beneficiaries should be a reasonable and proper one, considering their station and condition in life; and further, the issues having been answered adversely to plaintiff, the question becomes immaterial as to whether the action would lie. *Gregory v. Wallace*, 81.

9. *Deeds and Conveyances—Interpretation—Color of Title—Description—Naming Tract—Identification.*—Where the description of lands in a deed, relied on for color of title, gives course and distance by specific calls, and refers to the land conveyed as the "Hancy Jones land," and there is evidence tending to identify the *locus in quo* within the boundaries named, the name given to the land in the deed will be considered only as identifying the tract, and its different location will not be controlling. The charge of the court in this case is approved. *Locklear v. Savage*, 159 N. C., 236. *Lumber Co. v. McGowan*, 86.

10. *Limitations of Actions—Deeds and Conveyances—Defective Execution—"Color."*—Adverse possession is sufficient to ripen title under "color" and applies where there is a defect in the execution of the instrument relied on, or it has been improperly admitted to probate. *Power Corporation v. Power Co.*, 219.

11. *Trusts and Trustees—Deeds and Conveyances—Beneficiaries—Execution—Married Women.*—Where in a deed in trust to lands the title is conveyed absolutely and in fee to the trustee, the deed of the trustee will pass the title to the lands, without the execution of the instrument by the beneficiaries or others, and is competent evidence of the

DEEDS AND CONVEYANCES—*Continued.*

grantee's title; and objection that the wives of the beneficiaries had not also joined in the conveyance is untenable, especially when it appears from the deed that the husbands executed the deed for the sole purpose of saving the trustee harmless. *Ibid.*

12. *Husband and Wife—Deeds and Conveyances—Execution of Feme Covert—Estate Conveyed—Title—Evidence.*—The failure of the wife to execute with her husband a deed to his lands affects only the amount of the estate conveyed, and to that extent is evidence of the grantee's title, except where the conveyance by the husband is of his duly "allotted" homestead. *Ibid.*

13. *Judicial Sales—Deeds and Conveyances—Dead Grantee—Payment by Purchaser—Equitable Title—Heirs at Law—Action—Payment in Fact—Presumptions—Separate Findings.*—A deed executed to a purchaser of lands sold under judgment of court, after his death, is void; but upon proof of the payment of the purchase price bid at the sale an equitable estate would vest in his heirs, upon which they may maintain their action. In this case there being circumstantial evidence that the purchase price was paid, it is suggested that separate findings be had upon the questions of payment in fact and payment by presumption from lapse of time, should the case again be tried. *Ibid.*

14. *Judicial Sales—Destroyed Records—Deeds and Conveyances—Recitals—Secondary Evidence—Trials.*—Recitals in a deed executed in pursuance of a judicial decree or in a sheriff's deed upon execution sale are only secondary evidence of the facts recited, and where it is claimed by the party relying thereon that the court record referred to has been destroyed, the destruction of the original record must be clearly proved by him before the secondary evidence can be regarded. *Thompson v. Lumber Co.*, 226.

16. *Deeds and Conveyances—Judicial Sales—Timber Deeds—Period for Cutting—Remaining Timber—Owners of Land—Subsequent Purchase—Merger.*—After the expiration of the period of time allowed for cutting timber conveyed separate from the land has elapsed the title to the remaining timber thereon revests in the owner of the land; and where at a judicial sale of the timber the commissioner states that interest on the purchase price allowed in the deed for further extension beyond the original period would belong to the present owners of the land, they may not object that no security for this interest was given to them, when the purchasers of the timber at the sale have subsequently purchased the land itself, for then the title to the timber and the land has merged in them. As to whether the statement made by the commissioner at the sale is enforcible, *quære*. *Shannonhouse v. McMullan*, 239.

17. *Deeds and Conveyances—Conditions Subsequent—Breach—Forfeiture.* Where a conveyance of land, which is made upon consideration of support and maintenance of the grantor for life, expressly provides that "the deed shall be null and void" upon the failure of the grantee to perform the services named therein, the obligation of the grantee to perform them is a condition subsequent which will work a forfeiture upon his failure to do so, and will not be construed as a covenant, for the breach of which damages are alone recoverable, constituting a charge upon the land. *Brittain v. Taylor*, 271.

DEEDS AND CONVEYANCES—*Continued.*

18. *Same—Cessation of Estate—Revesting of Estate.*—In construing deeds and contracts, that method should be followed, if practicable, which will give effect to every part; and where it thus appears that the grantor has conveyed his land in consideration of support and maintenance for life, as a condition subsequent, upon the performance of which the grantee's estate is made to depend, and the latter fails to perform the services required, the estate will cease in the grantee and revest in the grantor at his election. *Ibid.*

19. *Deeds and Conveyances—Conditions Subsequent—Forfeiture—Grantor's Possession—Presumptions.*—Where a grantor retains possession of the land conveyed upon a condition subsequent, he is presumed to hold for the purpose of enforcing the forfeiture had it occurred, and he then chose so to do; and being already in possession, the question as to the necessity of an entry for the purpose of enforcing the forfeiture for a breach of the condition cannot arise. *Ibid.*

20. *Same—Acts of Grantor — Waiver.*—The mere silence of a grantor remaining in possession of the lands conveyed by him, after the breach by the grantee of a condition subsequent, or any indulgence then granted by him to the grantee, will not have the effect of a waiver of his right, when such has not prejudiced the grantee or induced him to do something which will work to his detriment if the forfeiture is enforced, though his acts and conduct may be evidence of an agreement not to take advantage of the forfeiture, or of an affirmation of the continuance of the estate in the grantee. *Ibid.*

21. *Same — Trials — Questions for Jury.— Courts — Matters of Law.*—The question as to the waiver of the forfeiture of an estate granted upon a condition subsequent, where there has been a breach thereof, which is generally one of intention, may sometimes be declared as a matter of law, but it is usually an inference of fact for the jury. *Ibid.*

22. *Deeds and Conveyances—Conditions Subsequent—Actions—Heirs at Law.*—The grantor of lands upon a condition subsequent, during his life, and his heirs or privies in blood after his death, may take advantage of the breach of the condition and may bring suit to declare the estate forfeited, and to recover the lands. *Ibid.*

23. *Deeds and Conveyances—Conditions Subsequent—Breach—Pleadings—Demurrer.*—The allegations of the complaint in this action to recover lands for the breach of a condition subsequent, brought by the heirs at law of the grantor, imply that the grantor remained in possession during her life and that the plaintiffs have had the possession since her death, and upon the said allegations, considered as a whole, the Court will not hold, as matter of law, that there had been a waiver by the grantor, or the plaintiffs, her heirs at law, of the breach of the condition subsequent, upon which the conveyance had been made to the ancestor of the defendants, under whom they claim. *Ibid.*

24. *Deeds and Conveyances — Description of Lands — Reservations from Deed—Void Descriptions—Parol Evidence.*—A conveyance of lands by definite and sufficiently given metes and bounds is not rendered void for uncertainty by excepting from the operation of the conveyance certain lands with description insufficient to admit of parol evidence

DEEDS AND CONVEYANCES—*Continued.*

of identification; for the lands sufficiently described will pass by the deed inclusive of the lands excepted under the insufficient description. *Bartlett v. Lumber Co.*, 283.

25. *Deeds and Conveyances—Covenants of Warranty—Intent.*—The courts will construe a deed as a whole when necessary to interpret a covenant of warranty of title therein, in order to arrive at the intent of the covenantor. *Spencer v. Jones*, 291.

26. *Same—Two Grantors—Special Warranty—Exclusive Words.*—Where J. and S. convey land, covenanting that they are seized in fee simple and have the right to convey in fee, that it is free from encumbrances, "that they will warrant and defend the title to the same against the claims of all persons whomsoever claiming by, through, or under them, the said special warranty applying only to S. and his heirs," the special warranty is construed, by its very terms, to exclude J. from any liability thereunder, and damages for its breach cannot be enforced against him. *Ibid.*

27. *Estates—Remainders—Deeds and Conveyances—Interpretation of Statutes.*—A conveyance of land in contemplation of marriage, and in lieu of dower, to M., "to descend to the heirs of the body of the said M. in fee simple, the issue of such marriage, and on failure of issue to revert to the heirs of" the grantor, providing also for the year's support of the grantee and that she shall receive a child's part of his personal estate. *Held:* The grantor, from the construction of the instrument, did not anticipate that he would survive his wife, or that there was a possibility of reverter to him; and that the "reverter" to his heirs, under Revisal, 1583, meant to his children after the death of his wife and the nonhappening of the stated contingency. *Thompson v. Batts*, 333.

28. *Deeds and Conveyances—Words of Inheritance—Estates for Life.*—A deed to lands without the use of the word "heirs" in connection with the name of the grantee, executed prior to 1879, conveys only a life estate to the grantee. *Cedar Works v. Lumber Co.*, 391.

29. *Deeds and Conveyances—Words of Inheritance—Limited Warranty—Intent—Estates for Life.*—It is held that a deed to swamp lands, made in 1857, conveying all the grantor's right, title, and interest in and to the lands, with sufficient description, without the use of the word "heirs" in connection with the name of the grantee, reciting it was purchased by the grantor at a certain commissioner's sale in 1832, but no deed therefor had been received, with warranty only as to the grantor and heirs, and no other person, affords no evidence within itself that by mutual mistake the words of inheritance, necessary to create a conveyance in fee at that time, had been omitted from the instrument by mutual mistake; but, to the contrary, only a life estate was intended to be and was conveyed. *Ibid.*

30. *Deeds and Conveyances—Fraud—Intent—Pleadings—Amendments.*—In order to set aside a conveyance of land for fraud, the representations must not only have been false, and knowingly so, by the party making them, but with the intent to deceive, and positively alleged in the complaint, and not by implication; but under the circumstances of this case it is held that the plaintiff intended to charge a fraudulent

DEEDS AND CONVEYANCES—*Continued.*

intent, and an amendment should be allowed if this defense is relied on by him. *Foy v. Stephens*, 438.

31. *Deeds and Conveyances—Contracts to Convey Lands—Bond for Title—Third Persons—"Color"—Adverse Possession—Limitations of Actions.* While the mere possession of the obligee under a bond for title or executory contract to convey lands, with full and sufficient description, will not ordinarily be held as adverse to the obligor, it is otherwise as to third persons who do not claim title under him; and, as to them, the continuance of the possession for the statutory period, under the contract, falls within the definition of "color," and will ripen the title in the claimant. *Knight v. Lumber Co.*, 452.

32. *Deeds and Conveyances—Trials—Evidence—Contracts to Convey Timber—Tender of Deed.*—In an action to compel a defendant to perform his contract to purchase timber on certain lands of the plaintiff it is competent for the plaintiff to introduce in evidence his deed, which he has previously tendered, purporting to convey the timber, for the purpose of showing he was ready and willing to perform his part of the contract. *Timber Co. v. Lumber Co.*, 454.

33. *Deeds and Conveyances—Contracts to Convey Timber—Trials—Defective Title—Parties—Evidence.*—Where the title to lands of the plaintiff, in controversy, depends upon a judgment in certain former proceedings for their sale, and defendant introduces evidence that a party to that proceeding had filed in the clerk's office a petition to set aside the sale on the ground that he had been made a party thereto without his authority, which was not served and which is relied on as evidence of a defective title, it is competent to show by witnesses, who were present when the petition was prepared and knew its contents, that the petitioner had authorized his joinder as a party to the proceedings for the sale of the lands. *Ibid.*

34. *Appeal and Error—Trials—Damages—Evidence—Deeds and Conveyances—Tender of Deed.*—Where the plaintiff has tendered his deed under his contract to convey standing timber, and demands damages in his action for the burning of timber on the lands, the rejection of evidence upon the question of the damages, without showing that they occurred prior to the tender of the deed, is not erroneous. *Ibid.*

35. *Deeds and Conveyances—Chattels—Limitations in Remainder.*—A reservation by the grantor of chattels, in a deed attempting to convey them in remainder, reserves the whole estate, and the limitation in remainder is void. *Outlaw v. Taylor*, 511.

36. *Deeds and Conveyances — Date of Execution — "Children"—Estates—Limitations.*—A grant of land directly to the children of a living person conveys the title only to those who are alive at the time of the execution of the deed, including a child then *en ventre sa mere*, it being necessary to the validity of a deed that there should be a grantee, as well as a grantor and thing granted; but where there is a reservation of a life estate in the parent or another, with limitation over to the children, the reason for this rule ceases, and all the children who are alive at the termination of the first estate, whether born before or after the execution of the deed, take thereunder. *Powell v. Powell*, 561.

DEEDS AND CONVEYANCES—*Continued.*

37. *Injunction—Deeds and Conveyances—Covenants.*—A conveyance of a part of the grantor's lands, adjoining his building, with covenant on the part of the grantee, for himself, his heirs and assigns, that he will erect and perpetually maintain a stairway between the plaintiff's building and one to be erected by himself next to it, is a binding covenant running with the lands, and is enforcible. *Ring v. Mayberry*, 563.

38. *Deeds and Conveyances—Covenants of Grantee — Acceptance — Easements.*—The acceptance of a deed to lands containing a covenant running with the land on the part of the grantee is equivalent in this case to the grant of an easement. *Ibid.*

39. *Deeds and Conveyances—Covenants of Grantee—Equity—Mutual Mistake—Parol Evidence.*—A deed may be corrected by parol evidence so as to show the omission, by mutual mistake, of a covenant on the part of the grantee, running with the lands conveyed. *Ibid.*

40. *Injunction—Restraining Order—Deeds and Conveyances—Covenants of Grantee—Erection of Stairways—Mandatory Injunction.*—In a suit to restrain the breach of a covenant to maintain a stairway for the use of the plaintiff, an adjoining owner, there was allegation and proof that this stairway had been maintained for a period of years in a building which had been destroyed, and that the defendant was erecting a new building in its place in such manner as to leave it out. *Held:* An order restraining the construction of the building as stated, without leaving open a space for the stairway, was proper, as it was conducive to the less inconvenience; and the objection of the defendant that a mandatory injunction was the proper remedy to be sought was rendered nugatory. *Ibid.*

41. *Deeds and Conveyances—Defective Probates—Husband and Wife—Color of Title—Purchasers for Value—Statutes.*—Where the husband has failed, as required, to join in a deed to his wife's lands, and the privy examination of the wife has not been taken according to law, the deed may be relied on as color of title. *King v. McRackan*, 621.

42. *Deeds and Conveyances—Defective Probate—Registration—Purchaser for Value.*—The registration of a deed to lands having a defective probate will be dealt with and treated as if unregistered, to the extent that the same may affect registered deeds made to the same lands to purchasers for value, since 1885. Revisal, sec. 979. *Ibid.*

43. *Same—Recitations — Consideration — Third Persons — Evidence.*—One relying upon a registered deed to show title as against a third person claiming the lands by adverse possession under "color" is required to allege and prove that he is a purchaser for value, of which the recital of consideration in his deed is no evidence either as to the amount or that it had been paid, such matter being regarded as *res inter alios acta*. *Ibid.*

44. *Deeds and Conveyances—Color—Adverse Possession—Added Possession.* Under claim of land under color, the statutory period of possession may be shown by continuity thereof of two or more of those under whom the party claims, so that added together they will be sufficient. *Ibid.*

DEMURRER. See Pleadings.

DESCENT AND DISTRIBUTION.

1. *Descent and Distribution—Adopted Father—Natural Father—Interpretation of Statutes.*—Revisal, sec. 177, providing for the adoption of infant children for life or a lesser term, in dealing with the question of devolution and transfer of real property by descent and distribution, confers the hereditable qualities on the child only, and not on the adopting parent; and where such child by adoption dies seized of realty, without leaving brother or sister, and the property is claimed by both the adopted and natural father, the law confers it upon the latter under our general statute of descents, Revisal, ch. 30, rule 6. *Edwards v. Yearby,* 663.

2. *Descent and Distribution—Suggested Changes—Legislative Power.*—The rules of devolution and transfer of property by descent and distribution come entirely within the province of the Legislature, to which must be addressed any suggested changes. *Ibid.*

DISCRETION. See Contempt.

DISCRETION OF COURT. See Courts.

DIVERSION. See Waters.

DIVORCE.

1. *Divorce—Marriage—Mental Incapacity—Voidable Contracts—Ratification—Interpretation of Statutes.*—Where one of the contracting parties to a marriage is mentally incapable in law, at the time, to make the contract, it does not *ipso facto* render the ceremony void, but it is only voidable until set aside by an appropriate action, which will not be decreed when it appears that the party seeking the relief has not been misled or in any manner deceived at the time and has knowingly continued the relationship for years, resulting in the birth of several children of the marriage, for therein he will be held to have ratified the contract of marriage. Revisal, secs. 1560, 2083. *Watters v. Watters,* 411.

2. *Divorce—Subsequent Incapacity—Interpretation of Statutes.*—Insanity afterwards afflicting a party to a contract of marriage is not a ground for divorce. Revisal, secs. 1560, 2083. *Ibid.*

3. *Divorce—Mental Incapacity—Fraud.*—A marriage contract will not be set aside by the court on the ground of mental incapacity of a party except at the instance of the other party thereto, except when he has entered therein or was induced thereto by reason of fraud, without knowledge of the existing conditions. *Ibid.*

4. *Divorce—Void Marriages—Interpretation of Statutes.*—Construing Revisal secs. 1560 and 2083 together, it is held that the only marriages that are void *ab initio* are those within the proviso of section 2083, *i. e.*, where one of the parties was a white person and the other a Negro or an Indian or of Negro or Indian descent to the third generation, inclusive, or bigamous marriages. *Ibid.*

DOMESTIC RELATIONS. See Husband and Wife; Parent and Child.

DRAINAGE. See Waters.

DRUNK. See Evidence, 13.

DYING DECLARATIONS. See Evidence, 9.

EASEMENTS. See Municipal Corporations; Deeds and Conveyances; Railroads, 16, 18.

ELECTION. See Vendor and Purchaser, 1; Mortgages.

1. *Counties—School Districts—Bond Issues—Registration—Elections—Interpretation of Statutes.*—Where a statute authorizing the proposition to issue bonds to be submitted to the voters provides that the voters in the district "shall be required to register in accordance with the registration laws governing the election of the members of the General Assembly before being permitted to vote in said election," a new registration is not required; for the statute authorizes the use of the registration books used in the last general election of the members of the General Assembly. *Casey v. Dare County*, 285.

2. *Bond Issues—Equity—Injunction—Elections—Registrar—Appeal and Error.*—In this action to restrain the issuance of bonds for local public school purposes the exception of the plaintiff that no registrar acted therein as required by law is not sustained by the evidence, and though the trial judge overruled the exception, but made no finding on the matters raised thereby, the exception is not sustained on appeal. *Ibid.*

3. *Bond Issues—Registrar—Irregularities, Effect of—Equity—Injunction—Legal Majority.*—Where the plaintiffs seek to restrain to the hearing the issuance of bonds for local public school purposes, for irregularities of the registrar in permitting names to be stricken from the registration books by unauthorized persons, and in being temporarily absent, it is necessary for them to show, in order to obtain the injunctive relief, that these irregularities changed the result of the election, the question thus presented being whether the proposition had been carried by the requisite legal majority. *Ibid.*

ELECTRIC COMPANIES.

1. *Electric Companies—Supervision—Negligence—Trials—Evidence—Nonsuit.*—The plaintiff was employed in a foundry, and for the purpose of seeing how to clean out molds, which was a part of his employment, he was required to hold in his hand an electric light or bulb, connected with the current of electricity furnished by the defendant over its wires and equipment to his employer, and though he had been accustomed to doing this for several years without harm or injury to himself, on the occasion complained of he was suddenly and without warning shocked into insensibility and permanently injured, with evidence that the shock was far in excess of the voltage contracted for by his employer, and caused by a defect in a transformer on defendant's pole on the outside of the building used for lessening the voltage before supplying it to the employer; that the company owned and had sole management and control of the lighting, wiring, and appliances on the outside of the building, and that it had failed in its duty to properly inspect the same and keep them in proper condition. *Held:* Upon a motion to nonsuit, considering the evidence in the most favor-

ELECTRIC COMPANIES—*Continued.*

able view for the plaintiff, the issue as to defendant's actionable negligence was for the determination of the jury. The charge in this case is approved. *Shaw v. Public Service Corporation*, 611.

2. *Trials—Instructions—Requested Prayers—Appeal and Error.*—A charge of the court given in response to appellant's request affords him no proper ground for exception on appeal. *Ibid.*

3. *Same—General Charge.*—The refusal to give appellant's instructions in the language of the requests is not erroneous, if it appears that the judge has substantially given them in his own language in the general charge without weakening their legal force and effect, for a substantial compliance therewith is sufficient. *Ibid.*

4. *Electricity—Negligence—Inspection—Res Ipsa Loquitur.*—A corporation which supplies electricity for lighting purposes deals in such a deadly instrumentality as to hold it to the highest degree of care in the supervision of its wires and appliances in connection therewith; and where there is evidence that an injury was received by an employee of its customer in using or handling an electric light or bulb in the course of his employment, due to a defective transformer of the company, which had not theretofore occurred under the same circumstances, it is sufficient to take the case to the jury upon the question of the defendant's actionable negligence in failing to properly inspect its wires and appliances; and also for the application of the doctrine of *res ipsa loquitur*, the conditions causing the injury being exclusively within its control. *Ibid.*

EQUITY. See Injunctions; Reformation; Mortgages.

1. *Railroads—Counties and Towns—Bond Issues—Conditional Subscription—Contracts—Equity—Time of the Substance—Conditions Precedent—Enforcement.*—Where a statute authorizes the submission to the voters of townships along the line of a proposed railroad the question of subscribing thereto, and creates the board of county commissioners agents of the townships for the purpose, and the voters have approved the proposition upon condition, among other things, that the proposed railroad should be in operation within three years, the period stated is of the substance of the contract, and will be strictly enforced whether regarded as a condition precedent or subsequent, without power of the county commissioners to change or modify it; and the principles of equity relating to relief against forfeitures or penalties have no application; and it is further held, the condition provided in this case was a condition precedent, where strict performance may be insisted on. *McCracken v. R. R.*, 62.

2. *Contracts—Conditions—Part Performance—Equity—Money Expended.* Under the facts of this case it is held that the defendant railroad company is not entitled to consideration in equity upon the grounds that it had expended money upon a proposed railroad to which certain townships had voted to subscribe, upon certain conditions, which the defendant had failed to perform, among them, that the road should be operated from certain points within three years. *Ibid.*

3. *Judicial Sales—Deeds and Conveyances—Dead Grantee—Payment by Purchaser—Equitable Title—Heirs at Law—Action—Payment in Fact*

EQUITY—*Continued.*

—*Presumptions—Separate Findings.*—A deed executed to a purchaser of lands sold under judgment of court, after his death, is void; but upon proof of the payment of the purchase price bid at the sale an equitable estate would vest in his heirs, upon which they may maintain their action. In this case there being circumstantial evidence that the purchase price was paid, it is suggested that separate findings be had upon the questions of payment in fact and payment by presumption from lapse of time, should the case again be tried. *Thompson v. Lumber Co.*, 226.

4. *Equity — Contracts — Misrepresentations, Reliance Upon — Fraud.*—In the negotiation for the purchase of shares of corporate stock the purchaser, after receiving and paying for the shares, entered into a written agreement with the seller that the latter would repurchase the certificate at the same price, provided the purchaser would deliver them to him in ten days from that date. *Held:* The purchaser's entering into the subsequent agreement was inconsistent with the theory that he relied upon the representations theretofore made by the seller, alleged to have been false, which is necessary to be shown in order to set aside the first transaction on the ground of fraud. *Pritchard v. Dailey*, 330.

5. *Equity—Contracts—"Promissory Representations"—Fraud.*—Representations made in the sale of certificates of corporate stock looking to the future value of the shares are only "promissory representations," or statements of the seller's opinion, and are, in themselves, insufficient as evidence of fraud, necessary to set aside the sale. *Ibid.*

6. *Equity—Contracts—Fraud—Intent.*—In order to invalidate a transaction for fraudulent representations made by the seller, it must be shown, not only that they were false, or untrue, but that he knew them to be false at the time, and made them with intent to deceive. *Ibid.*

7. *Mortgages—Foreclosure—Voidable Sales—Mortgagee in Possession—Waste—Equity—Accounting.*—Where the foreclosure under a mortgage is rendered ineffectual by the purchase of the lands by the mortgagee, or his assignee, at the foreclosure sale, who has taken over the property and holds it, he is held to account to the mortgagor for spoil and waste done upon the lands which he has committed or intentionally authorized, while in his possession. *Owens v. Mfg. Co.*, 397.

8. *Contracts—Mistake—Equity—In Statu Quo.*—Where, in permissible instances, it is shown that the parties to an alleged contract had supposed they had agreed upon its terms, when in point of fact they had not done so with reference to its material parts, the law will place them *in statu quo*. *Lumber Co. v. Boushall*, 501.

9. *Equity—Continuance of Cause—Conditions—Pleadings Stricken Out—Judgment Pro Confesso.*—Where a continuance of a cause of an equitable nature coming on for trial is granted a defendant upon condition that he give a certain bond in relation thereto during the present term, which he fails to do, without just cause, he is in contempt of court, and as a punishment the judge may, as a matter in

EQUITY—*Continued.*

his discretion, strike out the answer and render such judgment *pro confesso* as the plaintiff may be entitled to under the allegations of his complaint. *Lumber Co. v. Cottingham*, 544.

10. *Equity—Administration—Jurisdiction—Same Court—Specific Performance—Injunction—Interpretation of Statutes.*—The plaintiff being a purchaser under the ordinary contract to convey timber, alleges that he is entitled to an extension period under the terms of the contract for cutting, etc., though not appearing upon its face by reason of a mutual mistake in the date thereof, and that he had in time tendered the defendant the consideration specified for the extension of the said period, which the defendant had refused, and that the defendant was then cutting the timber upon the land. *Held:* The plaintiff's action is of an equitable nature, asking specific performance of his contract and an injunction against the continued cutting of the timber by the defendant; and though the technical differences between actions at law and suits in equity have been abolished, and both are administered by the same court, the powers and jurisdiction of the courts of equity are preserved. *Ibid.*

11. *Deeds and Conveyances—Covenants of Grantee—Equity—Mutual Mistake—Parol Evidence.*—A deed may be corrected by parol evidence so as to show the omission, by mutual mistake, of a covenant on the part of the grantee, running with the lands conveyed. *Ring v. Mayberry*, 563.

12. *Contracts, Vendor and Vendee—Equity—Mental Incapacity—Intoxication—Cancellation—Fraud—Ratification—Trials—Issues.*—In a suit to set aside a contract for the sale of lands on the grounds of mental incapacity of the plaintiff at the time, with evidence that thereafter he paid a part of the purchase price and executed his notes for the balance, an issue as to the mental incapacity of the plaintiff to make the agreement of purchase is insufficient; for in suits of this character equity will afford no relief, in the absence of fraud, or if the complaining party has suffered no disadvantage, or if he has subsequently ratified his acts; and under the circumstances of this case separate and appropriate issues should also have been submitted to the jury. *Cameron v. Power Co.*, 138 N. C., 365, cited and distinguished as an action at law. *Burch v. Scott*, 602.

13. *Contracts—Equity—Cancellation—Intoxication—Fraud—Presumptions.* A presumption of fraud will arise from dealing with a person so intoxicated that his condition is manifest, and a court of equity will afford relief if he is imposed upon. *Ibid.*

14. *Contracts, Vendor and Vendee—Equity—Intoxication—Mental Incapacity—Evidence.*—In a suit to set aside a contract for the sale of lands, to recover a part of the purchase price paid by the plaintiff and to cancel notes given by him for the balance thereof, on the ground that the plaintiff was mentally incapacitated from drink at the time, an instruction from the court to answer the issue in plaintiff's favor if the jury found that his drunkenness was so excessive as to render him incapable of consent, "or for the time to incapacitate him from exercising his judgment," constitutes reversible error on the alternative proposition, the measure of the plaintiff's disability being such as

EQUITY—*Continued.*

would incapacitate him from understanding the nature of his act, its scope and effect, or consequences. *Ibid.*

15. *Executors and Administrators—Implied Authority—Liability of Agent—Knowledge of Purchaser.*—While an unauthorized person assuming to act as agent of another is liable in damages to the one dealing with him in good faith, as upon an implied warranty of authority, the doctrine does not obtain when the third person deals with knowledge of the want of authority of the supposed agent; and where damages are sought personally against an executor for his failure to perform a contract or option to convey lands of his testator, signed by him as executor, and purporting to assume no personal liability, the proposed purchaser takes with knowledge that the law implies no agency, and recovery will be denied. *Hedgecock v. Tate*, 660.

ESTATES.

1. *Deeds and Conveyances—How Construed—Intent—Estates for Life.*—Under the modern doctrine that a deed should be interpreted as a whole to give effect to the grantor's intent, and without undue weight to its formal parts, it is held that a deed for lands to the sons of the grantor as tenants in common, with an *habendum* "reserving and retaining" in the grantor "an estate in the land during his life and the lives of" his four daughters, naming them, expressing the desire of the grantor that he and his said daughters shall and may live on the said lands during their lives as members of his family, and after his death his daughters as members of the family or families of his sons, conveys to the sons the fee in the lands after the termination of the life interests reserved. *Brown v. Brown*, 4.

2. *Same—Repugnancy.*—A conveyance of the fee, with reservation in the *habendum* of a life estate in the grantor for his own benefit and for the use of his four daughters during their lives, will not be construed as repugnant when it appears, interpreting the deed as a whole, that it was the intent of the grantor that the grantees should take in remainder, nor will the word "reserves" used in connection with the first estate, be given a technical meaning to defeat the intent of the grantor thus ascertained. *Ibid.*

3. *Deeds and Conveyances—Interpretation—Estates for Life—Expressed Motives.*—Where a deed to lands, by proper interpretation, conveys the fee in remainder after reserving to the grantor and his daughters life estates, the object or motive for making the gift to the daughters, stated in the conveyance, will not be permitted to affect the clear intent of the grantor, as gathered from the unambiguous language expressed in the deed construed as a whole, it not being, in this case, inconsistent therewith. *Ibid.*

4. *Deeds and Conveyances—Estates for Life—Reservation—Uses and Trusts—Statute of Uses—Estates in Remainder.*—Where the grantor reserves in his conveyance of land a life estate to himself and for the use and benefit of his daughters during their lives, with remainder over to his sons, it is immaterial whether the life estate for the daughters is regarded as reserved directly to them or indirectly through their father, as their trustee, they having the use or equitable estate; for if reserved to them directly, the statute of uses would

ESTATES—*Continued.*

merge both the legal and equitable estates in the daughters upon the death of the grantor; and if reserved to them indirectly through the grantor, at his death the heirs at law would hold the legal title in trust for the daughters during their lives, with remainder over to the sons. *Ibid.*

5. *Deeds and Conveyances—Estates for Life—Remainder—Limitation of Actions—Adverse Possession.*—The grantor of lands, reserving a life estate to himself and for the benefit of his four daughters for their lives, conveyed the remainder to his two sons in fee, who by proper conveyances divided their interest in the lands, expressly referring therein to the reservation of the life estates. Thereafter one of the sons conveyed to the other his estate in the divided lands, and continued to live thereon with his father and sisters until their death. After the death of his father and soon after the death of his last surviving sister, his grantee brought this action for possession of the land, to which he pleaded title by adverse possession and introduced evidence tending only to show that he had lived on the lands with his sisters during their lives and used the rents and profits. *Held:* The evidence was insufficient to be submitted to the jury upon the question of defendant's adverse possession, and judgment should have been entered for the plaintiff. *Ibid.*

6. *Same—Happening of Contingency—Time of Entry.*—Where the grantor of lands reserves a life estate in the lands for himself and also for the use and benefit of his daughters during their lives, with limitation over to his sons, who agree to a division of their interest and convey the same to each other by interchangeable deeds, and thereafter one of them conveys his interest to the other, not to take effect until "after the falling in of the life estate of the grantor's daughters," by the terms of this conveyance his grantee's right of entry on the lands, or of possession, does not take effect until the happening of the event stated, and the grantor's possession cannot be considered adverse until then, and at that time only the statute of limitations will commence to run. *Ibid.*

7. *Estates Per Autre Vie—Uses and Trusts—Statute of Uses.*—The English law as settled by 29 Charles II., that where there is no special occupant in whom an estate may vest, the tenant *per autre vie* may devise it by will or it shall go to the executors or administrators and be assets in their hands for payment of debts; and by 14 Geo. II., ch. 20, that the surplus of such estates *per autre vie*, after payment of debts, shall go in the course of distribution like a chattel interest, was changed by Revised Code, brought forward in section 128, Rule 11, Code of 1883 (Revisal, sec. 1556), and under our statute the estate *per autre vie* is descendible to the heirs of its owner. But this rule does not apply to the facts of this case, where the estate was held in trust by the donor to the use of his daughters and at his death descended to his heirs at law charged with the trust, or where the statute of uses would execute the legal estate in the daughters for whose use the estate was created. *Ibid.*

8. *Estates—Creditors—Distributions—Interpretation of Statutes.*—Revisal, sec. 87, is only designed to recognize priorities among the creditors of the deceased and to establish the order of payment between claimants

ESTATES—*Continued.*

who have valid debts against the deceased, and was never intended to create a liability which did not otherwise exist. *Bowen v. Daugherty*, 242.

9. *Contracts—Married Women—Separate Estate — Necessaries — Funeral Expenses—Husband's Liability—Interpretation of Statutes.*—If the wife, having a separate estate, predecease her husband, and the latter dies with property amply sufficient to pay his debts and funeral expenses, and those of his wife for necessaries, and leaves a will disposing of all of his property, the funeral and other necessary expenses of the wife are chargeable to the husband's estate, as an expense for which he is liable under the common law and in preference to the beneficiaries under the husband's will, in the absence of proof that the wife had in some way assumed personal liability therefor. Ch. 109, Laws 1911; Revisal, sec. 87. *Ibid.*

10. *Deeds and Conveyances—Conditions Subsequent—Breach—Forfeiture.*—Where a conveyance of land, which is made upon consideration of support and maintenance of the grantor for life, expressly provides that "the deed shall be null and void" upon the failure of the grantee to perform the services named therein, the obligation of the grantee to perform them is a condition subsequent which will work a forfeiture upon his failure to do so, and will not be construed as a covenant, for the breach of which damages are alone recoverable, constituting a charge upon the land. *Brittain v. Taylor*, 271.

11. *Same—Cessation of Estate—Revesting of Estate.*—In construing deeds and contracts, that method should be followed, if practicable, which will give effect to every part; and where it thus appears that the grantor has conveyed his land in consideration of support and maintenance for life, as a condition subsequent, upon the performance of which the grantee's estate is made to depend, and the latter fails to perform the services required, the estate will cease in the grantee and revest in the grantor at his election. *Ibid.*

12. *Deeds and Conveyances—Conditions Subsequent—Forfeiture—Grantor's Possession—Presumptions.*—Where a grantor retains possession of the land conveyed upon a condition subsequent, he is presumed to hold for the purpose of enforcing the forfeiture had it occurred, and he then chose so to do; and being already in possession, the question as to the necessity of an entry for the purpose of enforcing the forfeiture for a breach of the condition cannot arise. *Ibid.*

13. *Same—Acts of Grantor—Waiver.*—The mere silence of a grantor remaining in possession of the lands conveyed by him, after the breach by the grantee of a condition subsequent, or any indulgence then granted by him to the grantee, will not have the effect of a waiver of his right, when such has not prejudiced the grantee or induced him to do something which will work to his detriment if the forfeiture is enforced, though his acts and conduct may be evidence of an agreement not to take advantage of the forfeiture, or of an affirmation of the continuance of the estate in the grantee. *Ibid.*

14. *Partition—Owelty—Charge Upon Land—Life Tenant—Limitation of Actions.*—In a division of land by a voluntary deed of partition among tenants in common, subject to the life estate of another,

ESTATES—*Continued.*

charging one of the parts owelty in a certain sum, the ten-year statute bars the right of recovery for the charge of owelty upon the land and begins to run during the life estate to which the land is subjected. *Newsome v. Harrell*, 295.

15. *Wills, Interpretation—Contingent Remainders—Final Distribution.*—A devise and bequest of the testator's real and personal property to his wife and children, "the division not to be final until my youngest child is 21 years, and if either die without children, their property is to be equally divided between their brothers and sisters." *Held:* The wife presently takes her share of the property devised to her; and the children presently take a determinable fee to their whole interest in the property, to be defeated upon the happening of the contingency of dying without children, the final division to take place when the youngest child is 21 years. *Ibid.*

16. *Estates—Remainders—Heirs—Children.*—While as a general common-law rule, subject to some exceptions, a conveyance of an estate for life in lands to another, with remainder to the heirs of the grantor, could not divest the grantor of the fee, under the rule that *nemo est hœres viventis*, this does not prevail under the provisions of the Revisal, sec. 1583, that "any limitation by deed, will, or other writing to the heirs of a living person shall be construed to be the children of such person, unless a contrary intention appear, by the deed or will." *Thompson v. Batts*, 333.

17. *Same—Deeds and Conveyances—Interpretation of Statutes.*—A conveyance of land in contemplation of marriage, and in lieu of dower, to M., "to descend to the heirs of the body of the said M. in fee simple, the issue of such marriage, and on failure of issue to revert to the heirs of" the grantor, providing also for the year's support of the grantee and that she shall receive a child's part of his personal estate. *Held:* The grantor, from the construction of the instrument, did not anticipate that he would survive his wife, or that there was a possibility of reverter to him; and that the "reverter" to his heirs, under Revisal, 1583, meant to his children after the death of his wife and the nonhappening of the stated contingency. *Ibid.*

18. *Estates—Rule in Shelley's Case.*—The rule in *Shelley's case* is a rule of property without regard to the intent of the grantor or devisor, and is recognized as such and applied in the courts of this State in proper instances. *Robeson v. Moore*, 388.

19. *Estates—Limitations—Rule in Shelley's Case.*—Where, under a will, a tract of the testator's land is "loaned" to T. during the term of his natural life, and at his death it is devised to his heirs at law in fee simple, the rule in *Shelley's case* applies and T. takes the land in fee simple. *Ibid.*

20. *Deeds and Conveyances—Words of Inheritance—Estates for Life.*—A deed to lands without the use of the word "heirs" in connection with the name of the grantee, executed prior to 1879, conveys only a life estate to the grantee. *Cedar Works v. Lumber Co.*, 391.

21. *Deeds and Conveyances—Words of Inheritance—Limited Warranty—Intent—Estates for Life.—It is held* that a deed to swamp lands,

ESTATES—*Continued.*

made in 1857, conveying all the grantor's right, title, and interest in and to the lands, with sufficient description, without the use of the word "heirs" in connection with the name of the grantee, reciting it was purchased by the grantor at a certain commissioner's sale in 1832, but no deed therefor had been received, with warranty only as to the grantor and heirs, and no other person, affords no evidence within itself that by mutual mistake the words of inheritance, necessary to create a conveyance in fee at that time, had been omitted from the instrument by mutual mistake; but, to the contrary, only a life estate was intended to be and was conveyed. *Ibid.*

22. *Reformation of Instruments—Equity—Right to Reform—Estates—Limitation of Actions—Adverse Possession.*—The right to reform a deed to lands for mutual mistake is not an estate in the lands, and, when corrected, the reformed instrument cannot relate back so as to render seven years possession of the lands theretofore held by the claimant such as to ripen his title therein, as against the rights of one having the connected paper title. *Ibid.*

23. *Wills—"Or" as "And"—Estates—Contingent Remainders.*—In a devise of lands to the testator's four sons, "but should either of them die before arriving at the age of 21, or without children surviving him," the word "or" should be read as "and," so as to require both contingencies to occur before the limitation over should take effect, and thus save the inheritance to the child or children of any of the sons who should die under age. *Ham v. Ham*, 486.

24. *Same—Vested Interests.*—A devise of lands to the testator's four sons, with provision, "but should either of them die before arriving at the age of 21, or without children surviving him," vests in each of the sons the title to his interest in the lands upon his becoming 21 years of age, without regard to his having or not having children. *Ibid.*

25. *Same—Survivorship.*—A devise to the testator's four sons, with provision that the lands be partitioned when they attain the age of 21 years, and upon the death of each of the sons his share "shall go to the others that are living, but not to any of my other children," it appearing that the testator had other living children for whom he had also made provision, does not include within the intent and meaning of the limitation over the surviving child or children of a deceased son, the words "shall go to the others that are living" referring only to the testator's four sons who are named in the devise. *Ibid.*

26. *Same—Ultimate Survivor.*—It appearing from a devise of lands to the testator's four sons that he intended successive survivorships, by directing that at the death of each under age, or without leaving children to survive him, then his or their share shall go to the others that are living," the question whether the last surviving son, or the last two of the surviving sons, would take the estate, is, under the facts of this case, immaterial, one of the last two having acquired the share of the other by purchase. *Ibid.*

27. *Wills — Contingent Limitations — Rule in Shelley's Case.*—A devise of lands to the four sons of the testator upon contingency that "should either of the sons die before arriving at the age of 21, or leaving children surviving him, then and in that case his or their share shall be

ESTATES—*Continued.*

taken and equally divided between those who are living" is construed, under the circumstances of this case and in connection with another and relevant clause of the will, as if it had read "before" or "without leaving children surviving him," and the children of a deceased devisee may only inherit from his own father, and not take as purchaser under the will of the testator. *Ibid.*

28. *Estates—Timber Deeds—Defeasance—Judgment Liens.*—Timber growing upon lands is regarded as realty, and a deed thereto giving power to cut and remove the same within a stated period creates an estate therein defeasible as to all timber not cut and appropriated within the time allowed; and while such estate exists it is subject to a lien of a docketed judgment against the grantee of the timber and to the ordinary methods of enforcing collection of the same. *Fowle v. McLean*, 537.

29. *Deeds and Conveyances—Date of Execution—"Children"—Estates—Limitations.*—A grant of land directly to the children of a living person conveys the title only to those who are alive at the time of the execution of the deed, including a child then *en ventre sa mere*, it being necessary to the validity of a deed that there should be a grantee, as well as a grantor and thing granted; but where there is a reservation of a life estate in the parent or another, with limitation over to the children, the reason for this rule ceases, and all the children who are alive at the termination of the first estate, whether born before or after the execution of the deed, take thereunder. *Powell v. Powell*, 561.

ESTOPPEL.

1. *Railroads—Bond Issues—Township Subscriptions—Contracts—Estoppel.* Where there is nothing in a statute authorizing counties, townships, etc., to submit to the qualified voters therein the proposition of subscribing to a proposed railroad, which prohibits the vote being taken upon certain lawful conditions, not expressed in the statute, and the railroad company had theretofore entered into a written agreement with a trustee that the bonds should be held by it and delivered upon the stated conditions, which were of importance in voting upon the question proposed, the railroad company, having agreed to the conditions contained in the contract, is estopped to question their validity. *McCracken v. R. R.*, 62.

2. *Husband and Wife—Judgment—Estoppel in Pais—Moneys Received—Credits—Trials—Questions for Jury.*—In proceedings brought by the wife to recover the value of her services rendered to her aged parent, under a valid agreement that such services would be compensated for by him, and her husband has set up this claim in an arbitration in which the wife was not a party, relating to his account as guardian of the father, and has been paid a certain sum under the arbitration purporting to be in full of his wife's demand, and has paid it over to her, though the wife was a witness in the proceeding to arbitrate, there is nothing in her conduct which could operate as an estoppel *in pais*, and the question of her recovery should be submitted to the jury, regarding the money she has received as a payment *pro tanto*, should she succeed in recovering a larger sum. *Patterson v. Franklin*, 75.

ESTOPPEL—*Continued.*

3. *Jurors—Misconduct—Estoppel.*—Where the appellant knows before verdict rendered that a juror had placed himself in circumstances warranting an inference of misconduct, and, having opportunity, does not then object, he is estopped to impeach the verdict afterwards rendered, on that ground. *Lewis v. Fountain*, 277.

4. *Executors and Administrators — Deeds and Conveyances — Recitals — Lost Records—Evidence—Judgment—Estoppel.*—The question of the ownership of the lands belonging to the estate of a decedent in proceedings to sell them to make assets to pay his debts by his personal representative is directly involved in the proceedings, and the judgment therein is conclusive upon the parties thereto and will estop them in a collateral or direct proceeding from claiming the lands from this or other sources while the judgment continues in force. *Pinnell v. Burroughs*, 315.

5. *Mortgages—Elections—Pleadings—Amendments—Inconsistent Causes—Estoppel.*—In an action brought by a mortgagor to set aside a foreclosure sale whereat the mortgagee became the purchaser, the plaintiff prayed for his relief that the property thus sold be restored to the trust fund, and the defendant resisted the equity sought, alleging that the sale was valid, and, further, that title to the property had since been acquired by an innocent purchaser for value. The court, without objection, allowed plaintiff to amend and set up his equitable right to compensation for the breach of trust by the mortgagee. *Held:* The plaintiff was not concluded by the relief prayed for in the original complaint from setting up his equity in his amendment thereto, under the doctrine of election between inconsistent causes of action; and the defendant, by its answer and not objecting to the issues raised or to the proceedings at the trial under the amendment, is estopped to rely upon that equitable principle on appeal. The Court *further held* that the mortgagor was not required to take chances on the result of the issue as to the third party being an innocent purchaser for value, and the doctrine of election, therefore, did not apply. *Warren v. Susman*, 457.

6. *Municipal Corporations—Condemnation—Unauthorized Acts—Compensation—Agreement—Estoppel—Appeal and Error.*—The defendant, a municipal corporation, which had attempted to appropriate a part of the plaintiff's land for street purposes by condemnation without legislative authority, cannot rely, on appeal, upon an agreement alleged to have been made with the plaintiff, as an estoppel, when it appears that the question as to the existence of an agreement was properly decided by the jury in the plaintiff's favor. *Lloyd v. Venable*, 531.

7. *Estoppel—Judgments—Parties.*—The doctrine of estoppel by judgment will not be applied to one not a party to the action wherein it was rendered. *King v. McRackan*, 621.

8. *Supreme Court—Decisions — Estoppel — Statutes.*—The Supreme Court having by numerous decisions held that an act of the Legislature authorizing a bond issue for public roads is valid if conforming to Art. II, sec. 14, of the State Constitution, without submitting the proposition to a vote of the people, and in construing acts involving pro-

ESTOPPEL—*Continued.*

portionately to population and property value no greater amount of bonds than are here in controversy, is estopped to apply a different rule to the facts on this appeal. *Hargrave v. Commissioners*, 626.

9. *Mortgages—Bills and Notes—Stipulations by Mortgagor—Acceptance by Mortgagee—Estoppel.*—Where the seller of lands has drafted and sent to the purchaser a note secured by a mortgage thereon, who by interlineation in both excludes personal liability and returns them to the seller, who keeps them without objection, forecloses the mortgage, applies the proceeds of sale to the note, and then sues for the balance due, he will not be permitted to retain the benefits of the transaction and repudiate the contract in part; for having accepted the papers with the material change therein, he will be estopped, in the absence of fraud, by his own acts of acquiescence. *Chilton v. Groome*, 639.

EVIDENCE. See Trials; Telegraphs, 1; New Trials; Criminal Law, 2; Homicide, 3, 4, 5; Conspiracy; Abandonment; Husband and Wife, 4; Assault; Courts, 18.

1. *Evidence — Handwritings — Comparisons — Collateral Issues — Jury.*—Where the genuineness of signatures of indorsers on a note is attacked in an action thereon, it is error for the court to permit witnesses, who have testified from knowledge derived from dealings with the parties that in their opinion the signatures were not genuine, to be cross-examined by the use of copies of signatures of the parties made by an expert engraver, and shown through an aperture in an envelope detached from other writing; for an examination of this character introduces collateral questions into the controversy, multiplies the issues in point of fact, if not in form, tends to divert the minds of the jurors from the real question to be decided, and to put the witnesses to an unfair disadvantage. *Bank v. McArthur*, 48.

2. *Evidence—Handwritings—Comparisons—Standards — Interpretation of Statutes.*—In controversies involving the genuineness of handwritings, our statute, by clear implication, excludes the examination of any papers but those shown to be genuine as standards or models of the true handwriting for comparison with the writings in dispute. *Ibid.*

3. *Evidence — Handwritings — Comparisons — Photographic Copies — Enlarged Copies—Testimony of Photographer—Appeal and Error.*—In an action against sureties on a note, the signatures of the sureties being denied, the court permitted the introduction of photographic-microscopic reproductions of the disputed signatures, greatly enlarged, for the purpose of comparison with the genuine signatures of the indorser, which were not so enlarged, by the defendants' expert witness, without testimony of the photographer to show that the reproductions of the disputed signatures were exact. *Held:* To be reversible error, under the evidence in this case. *Ibid.*

4. *Deeds and Conveyances—Interpretation—Color of Title—Description—Naming Tract—Identification.*—Where the description of lands in a deed, relied on for color of title, gives course and distance by specific calls, and refers to the land conveyed as the "Hancy Jones land," and there is evidence tending to identify the *locus in quo* within the boundaries named, the name given to the land in the deed will be con-

EVIDENCE—*Continued.*

sidered only as identifying the tract, and its different location will not be controlling. The charge of the court in this case is approved. *Locklear v. Savage*, 159 N. C., 236. *Lumber Co. v. McGowan*, 86.

5. *Witnesses—Maps — Evidence—"Approximately Correct."*—A witness is permitted to make a map, while on the stand, and explain his testimony therefrom, though he testifies that the map was "approximately correct." *S. v. Rogers*, 112.

6. *Criminal Law—Secret Assault—Common Design—Evidence—Trials.*—On trial for a secret assault there was evidence tending to show that the several defendants were alone in the shadow of a deserted house in the nighttime, and seeing two policemen approach, who were unaware of their presence, one of them said to the others, "Let us kill them." One of the policemen, using a flashlight to see his way along, flashed it in the face of one of the defendants, who fired upon him, and this was seen by the other policeman following, but not by the one who was then shot, whereupon the other defendants, excepting one, firing from the dark, inflicted injuries upon the other policeman. *Held:* The defendants being together and aiding and abetting each other in pursuance of an unlawful and common design, were each guilty of a secret assault upon the policeman first shot, who did not see his assailant; and this applies, also, to the defendant thus engaged, who did not have a pistol or use one, as he is considered as having participated in the assault. Revisal, sec. 3621. *S. v. Knotts*, 173.

7. *Criminal Law — Conspiracy — Inference — Circumstantial Evidence — Trials—Questions for Jury.*—No direct proof of an agreement to enter into a conspiracy for an unlawful purpose is necessary, for the conspiracy may be perfected by the union of the minds of the conspirators; and the fact of conspiracy may be established by an inference of the jury from other facts proved—that is, by circumstantial evidence. *Ibid.*

8. *Criminal Law—Secret Assault—Common Design—Aider and Abettor—Evidence—Former Acts—Robbery.*—There was evidence tending to show that all the defendants charged with a secret assault upon two policemen were together on the night prior to the time, under suspicious circumstances, and afterwards held up, with pistols, some Negro boys for the purpose of robbery, and that after the assault charged, one was active in looking after another one of them who had been shot. At the time of the assault this defendant was present with the others, but was unarmed and did not actively engage in the shooting which occurred. *Held:* The evidence tending to show a secret assault made by the other defendants was evidence against the one who was present but did not actively participate in the assault, and the evidence of the robbery was also competent against all the defendants upon the question of whether the design to commit the subsequent secret assault was common to them all. *Ibid.*

9. *Evidence—Dying Declarations — Opinions — Collective Facts—Trials—Questions for Jury.*—In cases of homicide, dying declarations of the deceased are frequently made under conditions rendering it impossible for the declarant to state the circumstances in connection with his death in detail, and making it necessary to receive his statement as

EVIDENCE—*Continued.*

evidence of a collective fact, in proper instances; and *it is held* that where the defendant and the deceased went together into the home of the defendant, where the deceased was killed with a pistol, and immediately after the shooting the deceased crawled from the house to the porch and fell to the ground and there made his dying statement that the defendant had shot him without cause, the statement is not objectionable as the opinion of the deceased, but competent as his statement of the fact, which at least should be submitted to the jury, under proper instructions when there is doubt whether the statement was the declarant's opinion or his statement of the fact. *S. v. Williams*, 191.

10. *Homicide—Trials—Evidence—Corroboration—Testimony Before Coroner—Appeal and Error—Harmless Error.*—The defendant upon a trial for murder introduced the written testimony of his witness given before the coroner to corroborate his evidence given on the trial, some of which was not admitted by the trial judge, who held that the part excluded had not been testified to on the trial, and upon a comparison made in the Supreme Court on appeal, *it is held* no reversible error was committed, it appearing that, if erroneous, the excluded evidence was insufficient to furnish grounds for a new trial of the case. *Ibid.*

11. *Homicide — Self-defense — General Character for Violence — Previous Declarations of Deceased.*—Upon the question of self-defense arising under the evidence on a trial for homicide, the general character of the deceased for violence is admissible in proper instances, and there is well considered authority that evidence of his acts of violence coming under the defendant's observation or of which he has been informed by the deceased is also competent; but where there is no evidence of this general character of the deceased for violence, or that the prisoner believed him to be a dangerous man, or stood in fear of him, and there is ample evidence to the contrary, the exclusion of the defendant's offered testimony that the deceased told him he had had a fight with a man in a hotel in Richmond, and had stabbed him twice, without further narration, or giving the time of its occurrence, will not be held for reversible error; and *it is further held* that the conduct of the deceased in stabbing the man, had it occurred, is not necessarily evidence of violence or of unlawful conduct. *Ibid.*

12. *Homicide—Evidence—Dying Declarations—Impeachment.*—Where, upon a trial for murder, dying declarations of the deceased are admitted, they should be received as the testimony of any other witness, and their weight and credit are for the jury, and where they are sought to be impeached by the defendant's evidence, it is competent to corroborate the declarations by evidence of the good character of the deceased or by showing that he had made other similar statements. *Ibid.*

13. *Homicide—Drunkenness—Evidence—Corroboration.*—When, on a trial for murder, testimony is competent which tends to show that the defendant was drinking at the time, evidence that he was playing, laughing, and scrambling in a store several hours before the homicide is competent as corroborative. *Ibid.*

EVIDENCE—*Continued.*

14. *Husband and Wife—Deeds and Conveyances—Execution of Feme Covert —Estate Conveyed—Title—Evidence.*—The failure of the wife to execute with her husband a deed to his lands affects only the amount of the estate conveyed, and to that extent is evidence of the grantee's title, except where the conveyance by the husband is of his duly "allotted" homestead. *Power Corporation v. Power Co.*, 219.

15. *Contracts—Evidence—Other Contracts.*—Where in a suit upon contract for the sale of goods the purchaser denies the terms thereof, it is not competent for him to show that the contract was different from the one alleged, by evidence that the seller had made a different contract for the sale of his wares with other persons. *Ins. Co. v. Knight*, 160 N. C., 592, cited and distinguished. *Guano Co. v. Mercantile Co.*, 223.

16. *Judicial Sales—Destroyed Records—Deeds and Conveyances—Recitals—Secondary Evidence—Trials.*—Recitals in a deed executed in pursuance of a judicial decree or in a sheriff's deed upon execution sale are only secondary evidence of the facts recited, and where it is claimed by party relying thereon that the court record referred to has been destroyed, the destruction of the original record must be clearly proved by him before the secondary evidence can be regarded. *Thompson v. Lumber Co.*, 226.

17. *Destroyed Records—Trials—Evidence.*—Where the party claiming title to land relies upon the destruction of court records affecting it and the recitals of the record in the deed made in pursuance thereof, the destruction of such records is not sufficiently shown by the testimony of the clerk of the court, in whose office the records were required to be kept, that he had ineffectually searched in his office for the original papers, without saying to what extent; that he satisfied himself they could not easily be found, and was unable to say whether they could be found or not. *Ibid.*

18. *Judicial Sales — Executors and Administrators—Docket Entries—Evidence.*—Docket entries relied on by a party to show his title to the lands in dispute, under a deed from an administrator to sell the lands to make assets, are too meager to furnish evidence of the proceedings and record, when they do not show whose administrator the grantor was, nor whose heirs were the defendants, nor refer in any manner to the lands sold under the proceedings. *Ibid.*

19. *Waters—Upper Proprietor — Diversion — Drainage Ditches—Irrelevant Evidence—Condemnation—Drainage Act.*—Where the upper proprietor of lands has diverted the natural flow of the water thereon to the damage of the lower proprietor, the latter may then recover his damages caused thereby, and it is no defense to show that he might have reduced his damages by cutting drainage ditches on his own land or by agreeing that the upper proprietor should cut them. The defendant's remedy, if any, was by proceedings for condemnation under the Drainage Act. *Waters v. Kear*, 246.

20. *Railroads — Killing of Animals—Negligence—Expressions of Opinion—Res Gestæ.*—The expression of an unidentified person that the defendant railroad company had been guilty of negligence in running upon and killing with its train the defendant's cow, made after the occurrence, is incompetent as tending to show that the killing was negli-

EVIDENCE—*Continued.*

gently done, as his privity with defendant and his authority to bind it had not been shown, and as it was a statement of a past transaction, and not a part of the *res gestæ*. *Fleming v. R. R.*, 248.

21. *Appeal and Error—Evidence—Measure of Damages—Harmless Error.*—Error committed on the trial which has worked no wrong or prejudice to the appellant will not constitute reversible error on appeal; and where it appears, by the verdict, in an action for damages for breach of contract for the delivery of goods sold, that the jury has accepted the figures testified to by the defendant upon the measure of damages, the plaintiff's evidence thereof, though incompetent, cannot be a sufficient ground for awarding a new trial on the defendant's appeal. *Ferebee v. Berry*, 281.

22. *Vendor and Purchaser—Contract—Delivery—Measure of Damages—Evidence—Market—Quotations.*—In an action against the seller of several hundred barrels of potatoes, for a breach of contract in failing to deliver them, it is competent, upon the measure of damages, for the plaintiff, as a witness, to give his opinion of the price of the potatoes, based on information delivered from competent sources, such as market reports published in newspapers relied on by the financial world, etc., and his testimony that the potatoes were worth at least $3 or more a barrel is competent as to the value definitely stated. *Ibid.*

23. *Deeds and Conveyances—Description of Lands—Reservations from Deed—Void Descriptions—Parol Evidence.*—A conveyance of lands by definite and sufficiently given metes and bounds is not rendered void for uncertainty by excepting from the operation of the conveyance certain lands with description insufficient to admit of parol evidence of identification; for the lands sufficiently described will pass by the deed inclusive of the lands excepted under the insufficient description. *Bartlett v. Lumber Co.*, 283.

24. *Municipal Corporations—Cities and Towns—Insanitary Lockup—Damages—State Offense—Liability.*—The act of a city's chief of police in causing the incarceration of one violating the laws of the State, and not of the city, in the insanitary lockup of the city, when unauthorized on the part of the city, does not make the latter responsible in damages for a consequent injury to the health of the prisoner; the right of action existing only against the chief of police. *Hobbs v. Washington*, 293.

25. *Contracts, Written—Vendor and Purchaser—Conditional Sales—Title—Parol Evidence.*—Where a conditional sale of a chattel has been entered into in writing between the seller and purchaser, it may be shown that contemporaneously and as a part of the contract, not reduced to writing, the seller should retain the title to the chattel until paid for or the conditions are performed by the purchaser. *Brown v. Mitchell*, 312.

26. *Same—Subsequent Agreements—Consideration.*—Where a written contract for the sale of a sick mule has been entered into between the seller and purchaser, that the latter take the mule and should it get well or able to work in a year he would pay $20 for it, parol evidence is admissible to show that subsequent to the writing and according to

EVIDENCE—*Continued.*

its terms it was agreed between the parties by parol that the seller should retain the title, the consideration expressed in the writing being sufficient to support the subsequent agreement resting in parol. *Ibid.*

27. *Mortgages, Chattel—Conditional Sales—Parol Agreements.*—A parol mortgage or conditional sale of a chattel is valid and enforcible. *Ibid.*

28. *Executors and Administrators—Deeds and Conveyances—Recitals—Lost Records—Evidence—Judgment—Estoppel.*—The question of ownership of the lands belonging to the estate of a decedent in proceedings to sell them to make assets to pay his debts by his personal representative is directly involved in the proceedings, and the judgment therein is conclusive upon the parties thereto and will estop them in a collateral or direct proceeding from claiming the lands from this or other sources while the judgment continues in force. *Pinnell v. Burroughs*, 315.

29. *Executors and Administrators—Deeds and Conveyances—Recitals—Lost Records—Evidence—Parties—Statutes—Appeal and Error.*—When the court records are shown to have been lost or destroyed, the recitals in the deed of an administrator, executor, etc., are made "*prima facie* evidence of the existence, validity, and binding force of the decree, order, or judgment, or other record, referred to or recited in the deed," by Revisal, sec. 341; and the statute also makes the deed, record, and decree valid and binding as to all persons mentioned or described therein; and where the title to a party is made to depend upon a deed of this character, and the trial judge rules that the deed could not be considered in evidence, though the loss of the records therein recited could be shown, it erroneously deprives the party of his rights to develop his case, and an appeal to the Supreme Court will directly lie. *Ibid.*

30. *Same—Parties—Presumptions.*—In this action to recover lands the defendant relied for title upon a deed made by an executor in proceedings to sell lands of the decedent to make assets to pay his debts, reciting that the present plaintiff "and others were defendants" in the proceedings; and under the admissions in the pleadings *it is held* that not only the plaintiff, but the others mentioned in the deed, were the heirs of the deceased, they being the brothers and sisters of the plaintiff, and raised a presumption, *prima facie* at least, that they were necessary parties in the former action and bound by the judgment therein. *Ibid.*

31. *Accord and Satisfaction—Disputed Accounts—Checks "in Full"—Acceptance—Rebuttal Evidence.*—A check given and received by the creditor which purports to be in full of account to date does not conclude the creditor, accepting it, from showing that in fact it was not in full, unless, under the principles of accord and satisfaction, there had been an acceptance of the check in settlement of a disputed account. *Rosser v. Bynum*, 340.

32. *Evidence, Weight of—Positive Evidence—Trials—Instructions.*—While in proper instances it will not be considered erroneous for the trial judge to charge the jury that more weight should be given to positive than to negative evidence, the rule is very restricted, and does not apply where there is a direct contradiction in the evidence of witnesses on a material fact to which their attention has been directed;

EVIDENCE—*Continued.*

and the application of the rule is reversible error where the testimony of this character is conflicting as to whether a check purporting to have been given in full had the appropriate words written on its face at the time it was given and accepted; as in this case "lbr. to date," meaning in connection with the facts presented, in full for lumber purchased to date. *Ibid.*

33. *Evidence—Checks "in Full"—Custom—Similar Transactions.*—Where in payment for lumber it is controverted that a check given and accepted therefor stated thereon, at the time of its acceptance, that it was in full, it is competent for the maker of the check to show by significant and similar entries made by him on other checks in transactions of like nature that it was his custom to do so, as bearing upon the disputed fact at issue. *Ibid.*

34. *Limitations of Actions—Adverse Possession—Color—Outstanding Titles —Purchase—Evidence.*—A party in possession of lands under a deed may buy in an outstanding claim of title to them without acknowledging paramount title in his subsequent grantor or interrupting the continuity of possession under his first deed; and where adverse possession is sufficiently shown under his first deed, for the period of time limited, it will ripen his title under color thereof, unless he has in some way been estopped or precluded from doing so. *Lumber Co. v. Cedar Works*, 344.

35. *Insurance—Principal and Agent—Fraud—Evidence—Independent Action.*—Where a judgment has been obtained against an insurance company on one of its policies, allegations and evidence tending to show fraud on the part of the insured in obtaining the policy, or an adjustment between the insured and the company's agent, and the insured had received a part of the amount agreed upon, are legal defenses available in the original action and have no bearing upon the question of fraud in the procuring and rendition of the judgment sought to be set aside for fraud in an independent action. *Mutual Asso. v. Edwards*, 378.

36. *Same—Collusion.*—Where the conduct and misrepresentation of a local agent of the insurer tends only to show that the insurer was thrown off its guard and deprived of its opportunity to make defense in an action upon its policy, in which judgment had been rendered against it, without proof or suggestion of any collusion between the agent and the insured, the result of the agent's misconduct is not attributable to the insured, and furnishes no evidence of fraud in the procurement or rendition of the judgment, necessary to set it aside in an independent action. *Ibid.*

37. *Reformation of Instruments—Equity—Mutual Mistake—Deeds and Conveyances—Connected Paper Title—Color—Evidence.*—The fact that a party seeking to reform a deed for mutual mistake does so to enable him to set up adverse possession under color thereof against a party having the true and connected title will have weight in equity against the relief prayed for. *Cedar Works v. Lumber Co.*, 391.

38. *Reformation of Instruments — Equity — Lost Deeds — Evidence.*—The principles obtaining in actions for the reëxecution of lost deeds do not apply to suits to reform conveyances of land for mutual mistake. *Ibid.*

EVIDENCE—*Continued.*

39. *Surface Water—Drainage—Negligence—Evidence—Appeal and Error—Harmless Error.*—Where damages to goods stored in a warehouse located in a basement, in a damp, soggy place, are sought in an action alleging it was caused by a wrongful diversion of the flow of surface waters, it cannot be considered for error on appeal that a witness, not having qualified as an expert, was permitted to testify that the water would rise in a basement of this character unless built with concrete floor and walls, as such would naturally be inferred by an intelligent jury from their own knowledge of such conditions, and especially where the question was undisputed in the evidence of both parties at the trial. *Brinkley v. R. R.*, 428.

40. *Appeal and Error—Evidence—Answer to Questions—Harmless Error.*—An exception to an answer of a witness that he did not know the information sought to be elicited by the question, cannot be considered as prejudicial, and will not be considered as error on appeal. *Ibid.*

41. *Surface Waters—Drainage—Negligence—Evidence — City Engineers—Due Care.*—In an action against a city and a *quasi*-public corporation for damages to goods from the rising of water in a basement wherein they were stored, alleged to have been caused by an improper or insufficient sewer constructed by the defendant, etc., to carry the water off, with evidence that the defendant city had put in a 24-inch pipe, under a street, and the defendant corporation had continued the same drain across its property below, the minutes of the defendant city, showing the appointment of engineers to construct the drainage of the town, are competent to be shown upon the question of the exercise of due care. *Ibid.*

42. *Surface Waters—Drainage—Negligence—Evidence—Ordinary Rainfall—Appeal and Error—Harmless Error.*—Where damages are sought upon the grounds that they were caused to plaintiff's goods by water rising in his cellar, occasioned by insufficient drainage constructed by the defendant and heavy rains, it cannot prejudice the plaintiff that a witness was permitted to testify that the drainage was sufficient to carry off the water in an ordinary rainfall, when that fact is not controverted on the trial. *Ibid.*

43. *Evidence—Deceased—Transactions, etc.—Trials—Instructions—Expressions of Opinion.*—In an action on a note brought by husband and wife against the administrator of the deceased, it is incompetent for the husband to testify that he was present at the time and saw the deceased receive the money for the note, for this is evidence of a transaction with the deceased by an adverse party in interest, forbidden by the statute; but where this testimony has been given without objection, it is not an expression of opinion upon the evidence for the trial judge to state the law to the jury and remark that he would have ruled it out had it been objected to, for this is only a caution to the jury that they should scrutinize his testimony, and does not cast any imputation upon the truthfulness of the witness. *White v. Guynn*, 434.

44. *Vendor and Purchaser — Contracts — Fertilizers — Dealers—Breach of Warranty — Damages — Express Warranty—Parol Evidence.*—In the sale of personal property the law will not imply a warranty at vari-

EVIDENCE—*Continued.*

ance with that agreed upon between the parties, or permit parol evidence to vary or contradict the warranty expressed in a written contract of sale; and a written warranty in the sale of fertilizers by a manufacturer to a dealer therein, guaranteeing the fertilizer to be in accordance with the analysis printed on the sack, but not as to results from its use; that verbal promises conflicting with the terms of the contract were unauthorized, and would not be recognized, *is held* to restrict the warranty within the stated terms and to exclude parol evidence tending to show the warranty to have been otherwise. *Guano Co. v. Live Stock Co.*, 442.

45. *Vendor and Purchaser—Contracts—Dealers—Fertilizers—Express Warranty of Analysis—Evidence—Effect on Crops—Interpretation of Statutes.*—Where fertilizers sold to a dealer are warranted only to contain ingredients according to a certain analysis, but not as to results, evidence of the effect of the fertilizer upon the crop is competent in an action upon the breach of warranty of sale when properly limited to the inquiry as to whether, under relevant and proper conditions, the ingredients of the fertilizers were according to the formula guaranteed, notwithstanding our statutes, Revisal, secs. 3445, 3957, making the analysis of fertilizers certified by the Department of Agriculture *prima facie* evidence of their contents. *Ibid.*

46. *Vendor and Purchaser — Contracts — Dealers — Fertilizers—Effect on Crop—Substantive Evidence.*—Where in an action for damages upon a breach of warranty in the sale of fertilizer it is competent to show the use of the fertilizer upon lands and its effect upon crops, the evidence is substantive and not limited merely to purposes of corroboration. *Tomlinson v. Morgan*, 166 N. C., 557, cited and approved. *Ibid.*

47. *Deeds and Conveyances—Contracts to Convey Timber—Trials—Defective Title—Parties—Evidence.*—Where the title to lands of the plaintiff, in controversy, depends upon a judgment in certain former proceedings for their sale, and defendant introduces evidence that a party to that proceeding had filed in the clerk's office a petition to set aside the sale on the ground that he had been made a party thereto without his authority, which was not served and which is relied on as evidence of a defective title, it is competent to show by witnesses, who were present when the petition was prepared and knew its contents, that the petitioner had authorized his joinder as a party to the proceedings for the sale of the lands. *Timber Co. v. Lumber Co.*, 454.

48. *Insurance, Fire—Parol Contract—"Binder"—Written Evidence.*—In the absence of statutory regulation, a parol contract of fire insurance is valid, and a written memorandum thereof, called a binder, is also competent evidence of the agreement entered into between the parties. *Lea v. Insurance Co.*, 478.

49. *Insurance, Fire — Parol Agreement—"Binder"—Contracts—Evidence—Trials.*—Evidence that the insured requested fire insurance in a certain sum on tobacco he had in a certain warehouse from the local agent of the insurer, who agreed thereto, gave a written memorandum or "binder" to that effect, contemplating, according to the custom between the parties, the subsequent delivery of the statutory form of

EVIDENCE—*Continued.*

policy, and payment of the premium, is sufficient upon the question of whether a valid contract of insurance had been entered into, under the circumstances of this case. *Ibid.*

50. *Insurance, Fire—Parol Agreement—Principal and Agent—Agent's Authority—Evidence—Trials.*—Where the evidence tends to show that an insurance company customarily sends to its local agents batches of its policies, properly signed by its officials and wanting only the signatures of the local agents to give them validity; that these agents were accustomed to bind the company by parol agreement to insure, giving the insured a written memorandum or "binder" thereof, followed by the delivery of the statutory forms of policies, which were received by the home office without question, it is sufficient upon whether the acts of the agents therein were authorized by the company and binding upon it. *Ibid.*

51. *Originals—Notice—Parol Evidence—Notice to Produce Original.*—In an action to recover damages of a telegraph company for its negligent failure to deliver a message relating to sickness, the court permitted the plaintiff to testify as to the contents of a letter written to defendant's agent within the sixty days (after notification to the defendant and its failure to produce the original letter) that he "would make demand on it for $5,000 for nondelivery of the telegram sent to him at R. on 29 April, 1912," but rejected testimony as to what the message was about, or its nature. *Held:* The ruling of the court excluding this evidence was erroneous. *Bennett v. Telegraph Co.*, 496.

52. *Damages—Written Demand — Telegraphs — Mailing Letter—Presumptions.*—The mailing of a letter properly addressed is presumptive evidence that it was received by the addressee within a reasonable time, which applies, in this case, to a letter making demand upon a telegraph company for damages arising from its negligent delay in delivering a telegram to the sendee. *Ibid.*

53. *Insurance, Life—Premiums—Payment—Waiver—Evidence.*—The payment of a premium on a life insurance policy, according to its terms, is necessary to keep the insurance in force; and this requisite is not waived when the insurer receives the money for the premium when it is past due, in ignorance of the sickness of the insured, resulting in his death, without issuing a receipt, requests a statement of good health from the insured, and returns the money after his death, shortly thereafter occurring. *Clifton v. Insurance Co.*, 499.

54. *Evidence — Letters — Originals—Notice to Produce—Carbon Copies.*—When the opposing party has been notified to produce the original letters, in his possession, at the trial, carbon copies thereof are admissible as evidence when the original ones would be, and when duly proven by the person who wrote them. *Ibid.*

55. *Vendor and Purchaser—Fertilizers—Breach of Warranty—Effect Upon Crop—Trials—Evidence.*—A breach of warranty in the sale of fertilizers to be used by the purchaser in the cultivation of his crop may be shown by evidence that the crop was not beneficially affected by its use, provided a proper foundation for its admission is first laid by evidence tending to show that the land was adapted to the growth of the contemplated product, had been properly cultivated and tilled,

EVIDENCE—*Continued.*

with propitious weather or seasons, so as to exclude any element which would render the evidence uncertain as to the cause of the loss or the diminution of the crop, and rid it of its speculative character. *Carter v. McGill*, 507.

56. *Same—Chemical Analysis—Appeal and Error.*—In an action on breach of warranty of grade in the sale of fertilizer to a consumer, a chemical analysis of the fertilizer is not the indispensable, though, perhaps, the better test, and it is reversible error for the trial judge to exclude an answer to a question, when it is stated by the attorney for the appellant that he would show by this and other witnesses that the fertilizer was worthless; and his further statement, "that it had no beneficial effect on the crop," was merely a logical deduction to be made from its worthless character. *Ibid.*

57. *Telegraphs—Delivery Limits — Service Message — Extra Charge — Refusal of Sender to Pay or Guarantee—Sender's Instructions.*—Where the sendee of a telegram announcing the death and time of burial of a deceased person is beyond the reasonable free-delivery limits of the telegraph company, at the terminal office, in this case 3 miles, it is the duty of the agent of the company, upon ascertaining the fact, to wire the information back to the sending office, where the sender should be so notified, with request for guarantee or payment of the special charges required for the extra service in delivering the message; and when the sender refuses to do so, but instructs that the message be mailed from the terminal office to the addressee, which is accordingly done, and this alone causes the addressee to arrive too late for the funeral, the latter may not recover actual or compensatory damages, in his action against the company, for his inability to have been then present. *Smith v. Telegraph Co.*, 515.

58. *Telegraphs — Conflicting Evidence — Sender's Statement — Impeaching Evidence.*—Where the agent of the sender of a message has been notified that the sendee was beyond the free-delivery limits of the telegraph company's terminal office, in accordance with information given in a service message sent from that place, and the evidence is conflicting as to whether he guaranteed the extra charge required for its delivery or instructed that the telegram be mailed to the addressee from the terminal office; and he has testified that he had sent two messages to different people, and that he had given these instructions about the other message, it is competent, as tending to contradict his testimony, to introduce as evidence his written statement previously given, that he had been notified that the message in question had not been delivered for the reasons stated; that the addressee was not expected to come; and that the company was not to blame, as it had followed his instructions in mailing the telegram. *Ibid.*

59. *Preliminary Negotiations—Notice—Evidence—Merger—Deeds and Conveyances.*—In negotiating for the sale of lands to a railroad company to be acquired by it for laying more tracks and extending its yard in a town, the vendor refused to make the sale if the company should, in making the extension, obstruct a roadway that for a great number of years had crossed the railroad track at that place, to which the proper official of the company replied, by letter, that there were only

EVIDENCE—*Continued.*

two ways in which it could be done, by condemnation or by consent of the supervisors of public roads. The roadway in question had not been dedicated to public use or accepted as such by the proper public officials. Theretofore the vendor of the lands had contracted with the plaintiffs to deliver timber at his mills, with which the obstruction of the roadway would interfere, who bring their action for damages and an injunction. *Held:* Though the negotiations leading up to the transaction merged in the deed to the lands accordingly acquired by the defendant railroad company, the letters of the defendant were competent to show that there was a road across its track at the point named which it agreed that it would not attempt to obstruct, except in the manner stated. *Tate v. R. R.*, 523.

60. *Municipal Corporations—Condemnation—Unauthorized Acts—Evidence—Value of Lands—Appeal and Error—Harmless Error.*—In this action to recover damages of a municipality for the unlawful appropriation of the plaintiff's lands for street purposes, testimony of a price offered by a witness for plaintiff's land, if not competent as substantive evidence, was only admitted for the purpose of contradicting him or impeaching his estimate of its value, and is not held as reversible error on defendant's appeal. *Lloyd v. Venable*, 531.

61. *Malicious Prosecution—False Pretense—Debt—Enforcement of Collection—Evidence.*—The fact that the prosecutor in a criminal action had instituted it in order to compel the payment of a debt by the defendant is evidence of a malicious motive in an action brought by the defendant therein against the prosecutor to recover damages for malicious prosecution. *Motsinger v. Sink*, 548.

62. *Bills and Notes—Notice of Dishonor—Banks and Banking—Customs—Evidence.*—Where want of notice of dishonor, etc., is relied upon as a defense in an action upon a negotiable instrument, it is competent, as corroborative evidence, for the bank to show that proper notices were mailed to the defendant's address, and its custom as to the character and time of sending such notices. *Bank v. Wilson*, 557.

63. *Deeds and Conveyances—Covenants of Grantee—Equity—Mutual Mistake—Parol Evidence.*—A deed may be corrected by parol evidence so as to show the omission, by mutual mistake, of a covenant on the part of the grantee, running with the lands conveyed. *Ring v. Mayberry*, 563.

64. *Negligence—Circumstantial Evidence—Sufficiency.*—Where negligence is alleged as the basis of an action it may be proven by circumstantial evidence, and while it must do more than raise a possibility or conjecture, the plaintiff is entitled to have it submitted to the jury if, after a fair consideration, the more reasonable probability is in favor of the plaintiff's contention. *McRainey v. R. R.*, 570.

65. *Judgments—Default and Inquiry—Admissions—Evidence—Counter Demands.*—A judgment by default for the want of an answer is an admission of every material and traversable allegation of the declaration or complaint necessary to the plaintiff's cause of action, and evidence upon the inquiry tending to prove that no right of action existed, or denying the cause of action, is irrelevant and inadmissible. *Plumbing Co. v. Hotel Co.*, 577.

EVIDENCE—*Continued.*

66. *Corporations—Officers—Subsequent Declarations—Principal and Agent—Evidence.*—After the president and superintendent of a water corporation have been permitted to testify in its behalf as to the condition of the plant, in an action by a citizen to recover damages for a fire loss, it is competent for the plaintiff to show on their cross-examination, and by other witnesses, declarations, made by them after the fire, to contradict their testimony; for declarations of this character do not fall within the prohibition as to declarations of ordinary agents made after the act complained of. *Morton v. Water Co.*, 582.

67. *Pleadings—Tax Lists—Impeaching Evidence.*—Where the complaint in an action to recover damages for property destroyed alleges that its valuation for taxation is the true one, the tax list thereof is competent to contradict the plaintiff's testimony at the trial, and the ordinary rule does not apply. *Ibid.*

68. *Contracts, Vendor and Vendee—Equity—Intoxication—Mental Incapacity—Evidence.*—In a suit to set aside a contract for the sale of lands, to recover a part of the purchase price paid by the plaintiff and to cancel notes given by him for the balance thereof, on the ground that the plaintiff was mentally incapacitated from drink at the time, an instruction from the court to answer the issue in plaintiff's favor if the jury found that his drunkenness was so excessive as to render him incapable of consent, "or for the time to incapacitate him for exercising his judgment," constitutes reversible error on the alternative proposition, the measure of the plaintiff's disability being such as would incapacitate him from understanding the nature of his act, its scope and effect, or consequences. *Burch v. Scott*, 602.

69. *Electricity—Negligence—Inspection—Res Ipsa Loquitur.*—A corporation which supplies electricity for lighting purposes deals in such a deadly instrumentality as to hold it to the highest degree of care in the supervision of its wires and appliances in connection therewith; and where there is evidence that an injury was received by an employee of its customer in using or handling an electric light or bulb in the course of his employment, due to a defective transformer of the company, which had not theretofore occurred under the same circumstances, it is sufficient to take the case to the jury upon the question of the defendant's actionable negligence in failing to properly inspect its wires and appliances; and also for the application of the doctrine of *res ipsa loquitur*, the conditions causing the injury being exclusively within its control. *Shaw v. Public Service Corporation*, 611.

70. *Trials—Evidence—Principal and Agent—Corroboration.—Held* in this case that a hypothetical question asked an expert witness was correctly framed upon the evidence; that a question asked was admissible for the purpose of contradiction or impeaching the credibility of a witness; and that certain other testimony was competent as not falling within the rule relating to declarations or statements of an agent after the fact. *Ibid.*

71. *Deeds and Conveyances—Defective Probate—Registration—Purchaser for Value.*—The registration of a deed to lands having a defective

EVIDENCE—*Continued.*

probate will be dealt with and treated as if unregistered, to the extent that the same may affect registered deeds made to the same lands to purchasers for value, since 1885. Revisal, sec. 979. *King v. McRackan*, 621.

72. *Same—Recitations—Consideration—Third Persons—Evidence.*—One relying upon a registered deed to show title as against a third person claiming the lands by adverse possession under "color" is required to allege and prove that he is a purchaser for value, of which the recital of consideration in his deed is no evidence either as to the amount or that it had been paid, such matter being regarded as *res inter alios acta. Ibid.*

73. *Principal and Agent—Acts of Agent—Evidence of Agency.*—While ordinarily the existence or extent of an agency may not alone be shown either by the declarations or acts of a supposed agent, it is otherwise where his acts, in the course of his employment, and indicative of his authority, are of such character and circumstances, or so often repeated, as to permit a fair and reasonable inference that they were approved or knowingly permitted by the principal; for in such way they become relevant on the question of authority expressly conferred. *Powell v. Lumber Co.*, 632.

74. *Partnership—Trusts and Trustees—Deeds and Conveyances—Misrepresentation by Partner—Fraud—Intent—Evidence.*—Where two persons enter into a partnership for the purchase of lands, and one of them, acting for both, purchases at a less price than he had represented to the other, who in ignorance thereof pays his part, the acts of the purchasing partner are fraudulent upon the other and entitle him to recover the amount in excess of his obligation which he has been called upon to pay; and testimony as to a fraudulent intent is immaterial. *Chilton v. Groome*, 639.

EXCHANGE OF NOTES. See Bills and Notes.

EXCUSABLE NEGLECT. See Appeal and Error, 63, 67.

EXECUTORS AND ADMINISTRATORS. See Judicial Sales.

1. *Executors and Administrators—"Entire Control"—Wills.*—A devise to the wife of the testator of the home place for life and at her death to his children in fee, share and share alike, with further provision, in a later item, that his wife and children "shall share equally in both real and personal property, the division not to be final until my youngest child, Virginia, is 21, if living, and if either die without children, their property is to be equally divided between their brothers and sisters," does not create a trust merely by the appointment of executors, stating that they were for the purpose "to execute this my last will and to have entire control thereof so long as may be necessary for the fulfillment of this will," and to act as guardian for minor children of the testator, the powers given the executors being only such as they would otherwise have had as a matter of law, and the appointment of a guardian being unnecessary to a trust estate. *Bank v. Johnson*, 304.

2. *Wills, Interpretation—Executors and Administrators—Passive Trusts—Possession and Use—Statute of Uses.*—Executors named in a will

EXECUTORS AND ADMINISTRATORS—*Continued.*

"to all intents and purposes to execute this may last will and testament; to have entire control thereof so long as may be necessary for the fulfillment of this will," etc., if construed to hold as trustees, they are, upon the terms of the will being construed, trustees only of a passive trust, and the devisees and legatees will be entitled to the present possession and use of the property they derived by the will, under the statute of uses. *Ibid.*

3. *Executors and Administrators — Deeds and Conveyances — Recitals— Lost Records—Evidence—Judgment—Estoppel.*—The question of the ownership of the lands belonging to the estate of a decedent in proceedings to sell them to make assets to pay his debts by his personal representative is directly involved in the proceedings, and the judgment therein is conclusive upon the parties thereto and will estop them in a collateral or direct proceeding from claiming the lands from this or other sources while the judgment continues in force. *Pinnell v. Burroughs*, 315.

4. *Executors and Administrators—Deeds and Conveyances — Recitals— Lost Records—Evidence — Parties — Statutes — Appeal and Error.*— When the court records are shown to have been lost or destroyed, the recitals in the deed of an administrator, executor, etc., are made "*prima facie* evidence of the existence, validity, and binding force of the decree, order, or judgment, or other record, referred to or recited in the deed," by Revisal, sec. 341; and the statute also makes the deed, record, and decree valid and binding as to all persons mentioned or described therein; and where the title to a party is made to depend upon a deed of this character, and the trial judge rules that the deed could not be considered in evidence, though the loss of the records therein recited could be shown, it erroneously deprives the party of his rights to develop his case, and an appeal to the Supreme Court will directly lie. *Ibid.*

5. *Same—Parties—Presumptions.*—In this action to recover lands the defendant relied for title upon a deed made by an executor in proceedings to sell lands of the decedent to make assets to pay his debts, reciting that the present plaintiff "and others were defendants" in the proceedings; and under the admissions in the pleadings it is held that not only the plaintiff, but the others mentioned in the deed, were the heirs of the deceased, they being the brothers and sisters of the plaintiff, and raised a presumption, *prima facie* at least, that they were necessary parties in the former action and bound by the judgment therein. *Ibid.*

6. *Executors and Administrators—Lands of Testator — Options — Unauthorized Acts—Specific Performance.*—Executors have not the power to contract with reference to a sale of the lands of their testator without special authority to do so, and especially does this apply to options of purchase given thereon; therefore specific performance of their contracts to convey such lands given as an option is not enforcible. *Hedgecock v. Tate*, 660.

7. *Executors and Administrators—Implied Authority—Liability of Agent —Knowledge of Purchaser.*—While an unauthorized person assuming to act as agent of another is liable in damages to the one dealing

EXECUTORS AND ADMINISTRATORS—*Continued.*

with him in good faith, as upon an implied warranty of authority, the doctrine does not obtain when the third person deals with knowledge of the want of authority of the supposed agent; and where damages are sought personally against an executor for his failure to perform a contract or option to convey lands of his testator, signed by him as executor, and purporting to assume no personal liability, the proposed purchaser takes with knowledge that the law implies no agency, and recovery will be denied. *Ibid.*

FALSE IMPRISONMENT.

1. *False Imprisonment — Asylums — Insane Persons—Inducements—Contracts—Rules of Institution—Damages.*—Where under inducement that a hospital is a private sanitarium for the nervous sick, which furnishes to its patrons, for hire, luxurious accommodations and elegant diet, baths, etc., a patron admittedly sane signs a contract to abide by and be subject to its rules, unaware and without notice that the institution was in fact a private asylum for the insane, the agreement cannot give the institution the right to detain her against her will in a scantily furnished room, on meager diet, and to coerce her into submission by placing her in a padded cell near those of shrieking maniacs, subject her to rough treatment, and to cut her off from communication with her family; and such detention being unlawful, actual damages are recoverable. *Cook v. Hospital,* 250.

2. *False Imprisonment—Good Faith—Punitive Damages.*—As to whether the question of good faith will be a defense to a recovery of punitive damages for unlawful detention or imprisonment, *quære. Ibid.*

3. *False Imprisonment—Insane Asylums—Rules—Infringement—Duty of Authorities.*—Where one has been induced to enter into a private insane asylum for hire, while sane, not knowing its character, and has signed an agreement to submit to its rules, the recourse of the authorities of the institution is to discharge her for infringement of the rules, and not forcibly detain and coerce her into submission; and should she, while confined, become too dangerous to be set at large, it becomes the duty of the authorities to notify her relatives. *Ibid.*

4. *Appeal and Error—Damages.*—Where the jury have assessed the plaintiff's actual damages for being unlawfully detained in a private insane asylum by its authorities, and the amount has been approved by the trial judge, it is not reviewable on appeal. *Ibid.*

FALSE PRETENSE. See Malicious Prosecution.

FEME COVERTS. See Contracts; Husband and Wife.

FERTILIZER.

1. *Vendor and Purchaser—Contracts — Fertilizers — Dealers — Breach of Warranty—Damages — Express Warranty — Parol Evidence.*—In the sale of personal property the law will not imply a warranty at variance with that agreed upon between the parties, or permit parol evidence to vary or contradict the warranty expressed in a written contract of sale; and a written warranty in the sale of fertilizers by a manufacturer to a dealer therein, guaranteeing the fertilizer to be in accordance with the analysis printed on the sack, but not as to

FERTILIZER—*Continued.*

results from its use; that verbal promises conflicting with the terms of the contract were unauthorized, and would not be recognized, is held to restrict the warranty within the stated terms and to exclude parol evidence tending to show the warranty to have been otherwise. *Guano Co. v. Live Stock Co.*, 442.

2. *Vendor and Purchaser—Contracts—Fertilizers—Dealers—Express Warranty—Implied Warranty.*—Where a seller of fertilizer to a dealer warrants the goods only to be according to a given analysis, but not as to results, the law will not imply a further warranty that the fertilizers should be good for the purposes for which they were sold. *Ibid.*

3. *Vendor and Purchaser—Contracts—Dealers—Fertilizers—Express Warranty of Analysis—Evidence—Effect on Crops—Interpretation of Statutes.*—Where fertilizers sold to a dealer are warranted only to contain ingredients according to a certain analysis, but not as to results, evidence of the effect of the fertilizer upon the crop is competent in an action upon the breach of warranty of sale when properly limited to the inquiry as to whether, under relevant and proper conditions, the ingredients of the fertilizers were according to the formula guaranteed, notwithstanding our statutes, Revisal, secs. 3445, 3957, making the analysis of fertilizers certified by the Department of Agriculture *prima facie* evidence of their contents. *Ibid.*

4. *Vendor and Purchaser—Dealers—Contracts—Fertilizer—Express Warranty of Analysis—Measure of Damages.*—In an action upon a warranty in the sale of fertilizer to a dealer, that the fertilizers should contain ingredients according to an agreed formula, the damages, when recoverable, are limited to the difference between the value of the article delivered and its value or market price if it had been such as it was warranted to be. *Ibid.*

5. *Vendor and Purchaser—Contracts—Dealers—Fertilizers—Effect on Crop—Substantive Evidence.*—Where in an action for damages upon a breach of warranty in the sale of fertilizer it is competent to show the use of the fertilizer upon lands and its effect upon crops, the evidence is substantive and not limited merely to purposes of corroboration. *Tomlinson v. Morgan*, 166 N. C., 557, cited and approved. *Ibid.*

6. *Vendor and Purchaser—Fertilizer—Warranty as to Analysis—Dealers—Warranty as to Results.*—Where a dealer purchases fertilizers under a contract containing a warranty as to the analysis only, and sells them to users thereof with further warranty as to results, express or implied, his further warranty is made upon his own responsibility, and cannot affect the warranty under which he has purchased them. *Ibid.*

7. *Vendor and Purchaser—Fertilizers—Breach of Warranty—Effect Upon Crop—Trials—Evidence.*—A breach of warranty in the sale of fertilizers to be used by the purchaser in the cultivation of his crop may be shown by evidence that the crop was not beneficially affected by its use, provided a proper foundation for its admission is first laid by evidence tending to show that the land was adapted to the growth of the contemplated product, had been properly cultivated and tilled,

FERTILIZER—*Continued.*

with propitious weather or seasons, so as to exclude any element which would render the evidence uncertain as to the cause of the loss or the diminution of the crop, and rid it of its speculative character. *Carter v. McGill*, 507.

8. *Same—Chemical Analysis—Appeal and Error.*—In an action on breach of warranty of grade in the sale of fertilizer to a consumer, a chemical analysis of the fertilizer is not the indispensable, though, perhaps, the better test, and it is reversible error for the trial judge to exclude an answer to a question, when it is stated by the attorney for the appellant that he would show by this and other witnesses that the fertilizer was worthless; and his further statement, "that it had no beneficial effect on the crop," was merely a logical deduction to be made from its worthless character. *Ibid.*

9. *Vendor and Purchaser—Fertilizer—Breach of Warranty—Damages—Penalty Statutes.*—A user of fertilizer is not deprived of his right to recover general damages for a breach of warranty of its grade by Revisal, sec. 3945, which penalizes the violation of its provisions. *Ibid.*

FIRES. See Railroads, 15; Corporations.

Burning of Woods—Statutory Notice—Tenants in Common—Waiver—Verdict—Appeal and Error.—Where contrary to the provisions of Revisal, sec. 3346, the owner sets fire to the woods on his own lands and injures the adjoining lands of tenants in common, without having given them prior written notice of two days required by the statute, and relies upon the waiver of one of the tenants, in possession and control, as binding upon them all. *Semble:* The waiver of notice by this tenant would be binding upon them all; but this question does not arise for decision in this case, the jury having found upon conflicting evidence that there had been no waiver of the notice by him. *Stanland v. Rourk*, 568.

FIXTURES.

Fixtures.—An instruction in this case to the jury that they find a certain logging road to be a fixture if they believed the evidence, is correct under the decision on a former appeal, 163 N. C., 15. *Basnight v. Small*, 79.

FRAGMENTARY APPEALS. See Appeal and Error, 30.

FRATERNAL ORDERS. See Insurance.

FRAUDS. See Insurance; Equity; Contracts; Judgments; Partnership.

1. *Insurance—Principal and Agent—Fraud—Evidence—Independent Action.*—Where a judgment has been obtained against an insurance company on one of its policies, allegations and evidence tending to show fraud on the part of the insured in obtaining the policy, or an adjustment between the insured and the company's agent, and the insured had received a part of the amount agreed upon, are legal defenses available in the original action and have no bearing upon the question of fraud in the procuring and rendition of the judgment sought to be set aside for fraud in an independent action. *Mutual Asso. v. Edwards*, 378.

FRAUDS—*Continued.*

2. *Same—Collusion.*—Where the conduct and misrepresentations of a local agent of the insurer tends only to show that the insurer was thrown off its guard and deprived of its opportunity to make defense in an action upon its policy, in which judgment had been rendered against it, without proof or suggestion of any collusion between the agent and the insured, the result of the agent's misconduct is not attributable to the insured, and furnishes no evidence of fraud in the procurement or rendition of the judgment, necessary to set it aside in an independent action. *Ibid.*

GIFTS.

Gifts—Delivery—Trials—Evidence—Questions for Jury.—Where there is evidence tending to show that the grandmother indorsed certain certificates of corporate stock to her granddaughter and requested the latter's father to hold them for his daughter until after her death, which he refused to do, deeming it better for the donor to so hold the stock; that she put the certificates in her Bible and afterwards stated that she had given them to her granddaughter, the evidence raises more than a conjecture of the delivery necessary to the validity of the gift; and the certificates not having been found after her death in the place the alleged donor had put them, the question of a valid gift is one for the determination of the jury in an action against the administrator and the corporation to compel the issuance of a certificate to the alleged donee to supply the place of the lost one. *Zollicoffer v. Zollicoffer*, 326.

GRADE CROSSINGS. See Railroads.

GRANDCHILDREN. See Wills.

HANDWRITINGS. See Evidence, 1, 2, 3.

HARMLESS ERROR. See Appeal and Error.

HEALTH.

1. *Cities and Towns—Health—Ordinance—Statutes—Interpretation—Presumptions.*—In construing an ordinance or statute relating to public health it will be assumed that the lawmaking power intended to remedy an evil and not to restrict unnecessarily the use of property or the engaging in any lawful business, and ordinances of this character should be strictly construed to that end, giving effect, if possible, to every word and phrase. Hence, an ordinance reading, "No person shall keep hides, guano, etc., . . . to the annoyance of any citizen or the detriment of the public health within 400 feet of the dwelling house of any citizen of the city," does not make the mere keeping of the commodities named within the distance specified a violation thereof, unless it is shown that the act complained of was to the "annoyance" of a citizen "or a detriment to the public health." *S. v. Supply Co.*, 101.

2. *Municipal Corporations — Cities and Towns — Governmental Duties—Health—Negligence—Personal Injury—Damages.*—Negligent acts of the employees of a municipality which cause personal injuries are not ordinarily actionable against the city, when done in pursuance of authority conferred on the city by law for the public benefit; and

HEALTH—*Continued.*

where such employees have collected trash and garbage from the premises of its citizens, and burn the trash on the city lot, and the dress of a child, left with other children on the lot, catches fire, resulting in her death, the negligence of the employees in charge, if any, arises from the performance by the city of a governmental function for the preservation of health, and there being no statutory liability imposed upon the city in such matters, it cannot be held to respond in damages in an action to recover them. *Hines v. Rocky Mount*, 162 N. C., 409, where the wrongful acts are held to amount to a taking of private property in injuring the value of lands, etc., cited and distinguished. *Snider v. High Point*, 608.

HEIRS. See Estates.

HEIRS AT LAW. See Judicial Sales.

HOMESTEAD. See Husband and Wife, 4.

HOMICIDE.

1. *Homicide—Self-defense—Willingness.*—Where the evidence is conflicting, upon a trial for a homicide, as to the question of whether the prisoner was guilty of manslaughter or was justified in the killing by acting in self-defense, it is reversible error for the trial judge to charge the jury that the prisoner would be guilty of manslaughter should they find that the prisoner entered willingly into the fight with a deadly weapon, although for the purpose of defending himself, for every man who is induced to act in self-defense by reason of a threatened and deadly attack upon himself in a very genuine sense does so willingly. *S. v. Pollard*, 116.

2. *Same—Elements of Self-defense—Unlawful Fighting—Trials—Instructions.*—Where self-defense is relied upon on a trial for homicide, with evidence tending to establish it, it is for the jury to determine whether the prisoner acted with reasonable apprehension that he must kill the deceased in order to save his own life or himself from great bodily harm; and should they find that the prisoner acted with such reasonable apprehension exclusively in his own defense, judging his conduct by circumstances as they reasonably appeared to him at the time of the homicide, and that he had not provoked the fight, or was not at fault in bringing it about, they should render a verdict of acquittal. *Ibid.*

3. *Same—Killing of Officer—Evidence.*—The defendant, on trial for the murder of an officer of the law, was suspected by the latter of keeping a gambling place, he having watched the place for some time, occasioning bad blood between the prisoner and himself. There was evidence tending to show that the deceased was a man of violent temper and dangerous, and had actually threatened to kill the prisoner, and that these things were known to the prisoner; that at the time of the homicide the deceased entered the prisoner's place of business, armed with two pistols in his pockets, and was ordered out by the prisoner, and also that the deceased had remarked to others upon this occasion that he was not taking any chances that evening; that deceased refused to leave at the prisoner's command, and followed him as he was waiting on a customer, and was again ordered to leave,

HOMICIDE—*Continued.*

whereupon the deceased again refused to leave, and cursed the prisoner, throwing his right hand to his right hip, and putting his left foot a little forward, and then the prisoner fired his pistol, when a struggle ensued for the possession of the pistol, in which the pistol was again fired, and under these circumstances the fatal wound was inflicted. *Held:* Reversible error for the judge to charge the jury, among other things, that if they found that the prisoner was willing, under the circumstances, to enter into the fight, he would be guilty of manslaughter, for such a charge leaves out the question whether the deceased unlawfully entered into the fight. *Ibid.*

4. *Homicide—Principal—Abettor—Evidence—Trials—Questions for Jury.* Where two defendants are on trial for the same homicide, and the deed was committed by one of them in the presence of the other, either actual or constructive, who has encouraged and abetted the killing, the latter is guilty of the same degree of crime as the one whose act directly caused the homicide; and where the evidence tends to show that A. and B. had ill-will toward C.; that A. assaulted C., urged on by B., who had an open knife in his hand; whereupon C. in turn assaulted A., then left the room where the fight occurred, followed by B., with his drawn knife, and that A. attempted to follow, but was detained by a third person; that a very few minutes thereafter C. was found dead in an adjoining room from a knife cut near the region of the heart, in the presence of B., and the evidence being sufficient to sustain a verdict of the guilt of B. of murder in the second degree, it is held that it is also sufficient to sustain a verdict of guilty in the same degree against A. The principle of law relating to principals of the first and second degree in crime, and of accessories, discussed by WALKER, J. *S. v. Powell*, 134.

5. *Homicide — Trials — Evidence — Continuous Transactions.* — Upon the trial for a homicide, it is held that the testimony of a witness relating the various occurrences between the prisoners and the deceased is competent as *pars rei gestæ*, they being one continuous transaction, each event being inseparable from the other. *Ibid.*

6. *Homicide — Self-defense — Prisoner's Apprehensions — Comparative Physique—Trials—Evidence—Questions for Jury.*—Upon a trial for homicide, where it appears that the prisoner and the deceased entered willingly into the fight, and that the prisoner shot and killed the deceased when the latter was following him apparently unarmed and striking him with his hand, it is competent for a witness in behalf of the State, a physician who had professionally attended the deceased, to testify that the deceased had had tuberculosis for several months before his death, accompanied by a cough and loss of voice, the prisoner having pleaded self-defense and testified that the deceased was taller than he was, and weighed more, it being for the jury to determine whether the deceased, in his physical condition, was apparently weak or strong or incapable of overpowering the prisoner or of successfully resisting his attack. *S. v. Heavener*, 156.

7. *Appeal and Error—Homicide—New Trials—Prejudicial Error—Immaterial Evidence.*—Upon a trial for homicide, when it appears that the prisoner and deceased became suddenly engaged in a fight, in the former's store, and that the prisoner shot and killed the deceased with

HOMICIDE—*Continued.*

a pistol which he drew from his pocket, testimony of a witness that the prisoner kept his pistol in a showcase near which the firing commenced will not be held as reversible error, as it cannot be considered that testimony of this slight character could have influenced the jury in deciding the main issue as to the guilt of the prisoner, or that a different result would follow upon another trial. *Semble:* The evidence admitted was competent under the circumstances of this case, and, furthermore, being objected to after it had been received and there being no ruling thereon by the trial court, its admission cannot be held as error on appeal. *Ibid.*

8. *Homicide—Verdict, Directing—Nonsuit—Deadly Weapon—Malice, Presumption.*—Malice is presumed from the killing of a human being with a deadly weapon, with the burden on the defendant to show facts and circumstances which would reduce the homicide from murder to manslaughter or excusable homicide, and under such circumstances the judge may not direct a verdict for the defendant, especially, as in this case, where there is evidence that the prisoner has used excessive force in repelling the attack made on him by the deceased, which raises a question for the jury. *Ibid.*

9. *Homicide—Trials—Instructions—Verdicts—Appeal and Error—Harmless Error.*—On a trial for homicide, where the verdict rendered by the jury convicts the defendant in a less degree, the refusal of the court to give special instructions upon the law, arising from the evidence, of murder in the second degree is harmless if erroneous. *Ibid.*

10. *Homicide — Trials — Instructions Given — Instructions Asked—Appeal and Error—Harmless Error.*—Where self-defense is relied on upon a trial for murder, the refusal of the defendant's prayers for instruction as to his reasonable belief that he was in danger, when sufficiently covered in the charge to the jury, is not erroneous. *Ibid.*

11. *Homicide—Trials—Evidence — Corroboration — Testimony Before Coroner—Appeal and Error—Harmless Error.*—The defendant upon a trial for murder introduced the written testimony of his witness given before the coroner to corroborate his evidence given on the trial, some of which was not admitted by the trial judge, who held that the part excluded had not been testified to on the trial, and upon a comparison made in the Supreme Court on appeal, it is held no reversible error was committed, it appearing that, if erroneous, the excluded evidence was insufficient to furnish grounds for a new trial of the case. *S. v. Williams*, 191.

12. *Homicide — Self-defense — General Character for Violence — Previous Declarations of Deceased.*—Upon the question of self-defense arising under the evidence on a trial for homicide, the general character of the deceased for violence is admissible in proper instances, and there is well considered authority that evidence of his acts of violence coming under the defendant's observation or of which he has been informed by the deceased is also competent; but where there is no evidence of this general character of the deceased for violence, or that the prisoner believed him to be a dangerous man, or stood in fear of him, and there is ample evidence to the contrary, the exclusion of the defendant's offered testimony that the deceased told

HOMICIDE—*Continued.*

him he had had a fight with a man in a hotel in Richmond, and had stabbed him twice, without further narration, or giving the time of its occurrence, will not be held for reversible error; and it is further held that the conduct of the deceased in stabbing the man, had it occurred, is not necessarily evidence of violence or of unlawful conduct. *Ibid.*

13. *Homicide — Evidence — Dying Declarations — Impeachment.* — Where, upon a trial for murder, dying declarations of the deceased are admitted, they should be received as the testimony of any other witness, and their weight and credit are for the jury, and where they are sought to be impeached by the defendant's evidence, it is competent to corroborate the declarations by evidence of the good character of the deceased or by showing that he had made other similar statements. *Ibid.*

14. *Homicide—Drunkenness—Evidence—Corroboration.*—When, on a trial for murder, testimony is competent which tends to show that the defendant was drinking at the time, evidence that he was playing, laughing, and scrambling in a store several hours before the homicide is competent as corroborative. *Ibid.*

15. *Homicide—Trials—Argument to Jury—Extrinsic Matters—Appeal and Error.*—Where on a trial for homicide with a pistol the defendant has testified as to the place and relative positions of himself and the deceased, and expert witnesses introduced by the State have testified as to the range of the bullets and their effect, etc., it is not error for the trial judge not to permit the defendant's attorney, in addressing the jury, to demonstrate by any disinterested witness in the courtroom that the expert witnesses introduced by the State corroborated the defendant's testimony; for while counsel should comment on the evidence, it does not include the right to introduce new elements into the trial, which rests largely in the sound discretion of the trial judge. *Ibid.*

HUSBAND AND WIFE. See Contracts.

1. *Husband and Wife—Wife's Separate Earnings—Agreement by Husband —Wife's Separate Estate—Wife's Right of Action.*—Irrespective of whether the statute, chapter 109, Laws 1911, has changed the law theretofore prevailing allowing the husband the earnings of his wife and the proceeds of her labor, the husband may confer upon the wife the right to her earnings, upon which they become her separate estate, giving her a right of action to recover them in her own name. *Patterson v. Franklin*, 75.

2. *Same—Parties—Judgment Against Husband.*—Where the husband has conferred upon the wife the right to her earnings, he is not a necessary party in her action brought to recover them from a third party; and when he has been joined with her as a party plaintiff, he becomes only a nominal party, and judgments, arbitration, or other proceedings with parties affecting him alone cannot affect her right to recover, if she has a good cause of action in her own name. *Ibid.*

3. *Same—Estoppel in Pais—Moneys Received—Credits—Trials—Questions for Jury.*—In proceedings brought by the wife to recover the value

HUSBAND AND WIFE—*Continued.*

of her services rendered to her aged parent, under a valid agreement that such services would be compensated for by him, and her husband has set up this claim in an arbitration in which the wife was not a party, relating to his account as guardian of the father, and has been paid a certain sum under the arbitration purporting to be in full of his wife's demand, and has paid it over to her, though the wife was a witness in the proceeding to arbitrate, there is nothing in her conduct which could operate as an estoppel *in pais*, and the question of her right of recovery should be submitted to the jury, regarding the money she has received as a payment *pro tanto*, should she succeed in recovering a larger sum. *Ibid.*

4. *Husband and Wife—Deeds and Conveyances—Execution of Feme Covert—Estate Conveyed—Title—Evidence.*—The failure of the wife to execute with her husband a deed to his lands affects only the amount of the estate conveyed, and to that extent is evidence of the grantee's title, except where the conveyance by the husband is of his duly "allotted" homestead. *Power Corporation v. Power Co.*, 219.

5. *Husband and Wife—Deeds and Conveyances—Presumptions—Gifts—Uses and Trusts.*—The law presumes a gift by the conveyance of land made directly from the husband to his wife, or where he causes it to be conveyed to her, and no resulting trust arises by implication therefrom. *Singleton v. Cherry*, 402.

6. *Husband and Wife—Deed to Husband—Separate Property—Probate—Interpretation of Statutes.*—Chapter 109, Laws of 1911, known as the Martin Act, providing that a married woman may contract and deal with reference to her real and personal property as if she were a *feme sole*, does not alter the effect of Revisal, sec. 2107, requiring certain findings and conclusions by the probate officer to a conveyance of her lands directly to her husband, and her deed not probated accordingly is void. *Ibid.*

7. *Deeds and Conveyances—Defective Probates—Husband and Wife—Color of Title—Purchasers for Value—Statutes.*—Where the husband has failed, as required, to join in a deed to his wife's lands, and the privy examination of the wife has not been taken according to law, the deed may be relied on as color of title. *King v. McRackan*, 621.

IMPRISONMENT. See False Imprisonment.

INDICTMENT.

1. *Indictment—Criminal Law—Unlawful Burning—Ginhouse—Interpretation of Statutes.*—An indictment for "willfully and feloniously setting fire to a certain ginhouse, the property of W. B. H., with intent to burn and destroy the same," is sufficient for conviction of the offense charged under Revisal, secs. 3336, 3341, the word "ginhouse" meaning the same as "cotton gin"; and where the punishment inflicted was within the limits prescribed by either section, it becomes immaterial under which section the conviction was had. *S. v. Rogers*, 112.

2. *Same—Evidence—"Charring."*—Where the defendant has been tried and convicted under an indictment charging that he willfully and feloniously set fire to a certain "ginhouse," etc., it is held that the

evidence of "charring" is sufficient proof of "burning" to sustain the sentence; and it is further held that the motion in arrest of judgment was properly denied under the circumstances, the objection relating to informalities and refinement, and the defendant having been fully informed of the charge against him. Revisal, secs. 3254, 3255. *Ibid.*

3. *Appeal and Error—Indictment—Omission from Record—Presumptions —Duty of Appellant—Motion to Dismiss.*—Where an appeal is taken from the refusal of the trial court of the defendant's motion to quash an indictment, an inspection of the indictment is necessary for the Supreme Court to pass upon the question presented; and where it has not been sent up, the presumption being in favor of the correctness of the judgment appealed from, the burden is on the appellant to show error, and ordinarily the appeal will be dismissed upon motion of the appellee in the Supreme Court. *S. v. McDraughon*, 131.

4. *Appeal and Error — Indictment — Omission from Record — Power of Courts—Motion to Supply—Certiorari—Procedure.*—Where an appeal is taken to the refusal of the court to quash an indictment, it is the duty of the appellant to see that a transcript of the indictment appears in the record; and when it does not so appear he should apply to the Superior Court to supply it, if one convenes in time; and if not, he should send to the Supreme Court as much of the record as could be procured, and apply here for a *certiorari* to give him opportunity to move in the court below. *Ibid.*

5. *Appeal and Error—Power of Courts—Indictment—Omissions.*—The Superior Court has power to supply, by copy, an indictment necessary to be set out in the record in a criminal case on appeal to the Supreme Court which has been lost accidentally or otherwise, upon motion of appellant, based upon affidavit. *Ibid.*

6. *Criminal Law — Work on Road — Indictment, Sufficient — Statutes.*— A warrant charging the statutory offense for failure to work the public roads is sufficient to sustain a conviction which substantially follows the statute, and a motion in arrest of judgment upon the ground of the insufficiency of the warrant will be denied when it charges that the defendant did, on or about a certain date, in a certain county, unlawfully and willfully fail to work a certain public road on which he was due road service, after he had legal warning from the overseer, and without tendering the overseer of the road the sum of one dollar. *S. v. Moore*, 166 N. C., 288, cited and applied. *S. v. Thomas*, 146.

7. *Criminal Law—Work on Road—Statutes—Indictment—Matters of Defense.*—It is not necessary for a warrant under the statute for the unlawful failure to work a public road to charge that the defendant was an able-bodied man between the ages of 18 and 45 years, for this is a matter of defense. *Ibid.*

8. *Criminal Law—Indictment—Sufficiency—Interpretation of Statutes.*— Under the provisions of Revisal, sec. 3254, a warrant or indictment, etc., in criminal cases shall be sufficient in form if the charge against the prisoner is expressed therein in a plain, intelligible, and explicit manner, and they may not be quashed, or stay of judgment granted,

INDICTMENT—*Continued.*

by reason of any informality or refinement, if in the bill or proceeding sufficient matter appears to enable the court to proceed to judgment. *S. v. Knotts*, 173.

9. *Same—Duplicity—Motions to Quash.*—A motion to quash an indictment for assault because of duplicity will be denied when it appears on the face of the indictment that though the assault is charged as being made on two or more persons, it was committed by one and the same act; the remedy of the defendant, if any is available, being by proper application to require the State to elect or, perhaps, to sever the prosecutions. *Ibid.*

10. *Indictment—Conspiracy — Competition — Systematic Abuse — Common Law—Interpretation of Statutes.*—An indictment charging that the employees of a rival company in the sale of unlawful commodities had combined together to break up their competitor's business by systematically following its salesmen from house to house and place to place and to so abuse, vilify, and harass them as to deter them in their lawful business and to break up their sales; that they falsely represented that their rival company was composed of a set of thieves and liars, endeavoring to cheat and defraud the people, etc., charges a conspiracy indictable at common law, which is not restricted or abridged by statute 33 Edward I., or repealed by chapter 41, Laws 1913; and a motion to quash the indictment should not be granted. *S. v. Van Pelt*, 136 N. C., 633, cited and distinguished. *S. v. Dalton*, 204.

11. *Criminal Law—Indictment—Proof—Immaterial Variance.*—A variance between the charge of an indictment that the defendants conspired together to raise the price of milk to 13 cents per quart, and the proof that it was raised to 12½ cents per quart, is immaterial, the fact that the price was raised in consequence of the agreement being controlling. *S. v. Craft*, 208.

12. *Criminal Law—Indictment, Form of—Interpretation of Statutes.*—An indictment is sufficient in form under Revisal, 3254, which charges the offense "in a plain, intelligible, and sufficient manner"; and where the indictment is for an offense at common law it will not be held fatally defective that the indictment charged the offense as being "against the form of the statute and also against the peace and dignity of the State." *Ibid.*

INDORSERS. See Bills and Notes.

INHERITANCE TAX.

1. *Statutes—Interpretation—Legislative Intent—Inheritance Tax.*—Revenue laws, imposing an inheritance tax, should be liberally construed and that interpretation given them which would effectuate the intention of the Legislature. *Norris v. Durfey*, 321.

2. *Same—Real Estate.*—The Revenue Act of 1909, imposing an inheritance tax, enacts that "all real and personal property of whatsoever kind and nature which shall pass by will or by the intestate laws of this State . . . shall be and hereby is made subject to a tax for the benefit of the State as follows, that is to say: where the whole amount of said legacy or distributive share of personal property shall

INHERITANCE TAX—*Continued.*

exceed $2,000 the tax shall be," etc. *Held:* The State imposed the tax upon real as well as upon personal property in the manner stated. *Ibid.*

3. *Same—Exceptions.*—The language used in the Revenue Act of 1909, after imposing an inheritance tax upon real and personal property, "Where the whole amount of the said legacy or distributive share of personal property shall exceed in value $2,000," etc., has only the effect of exempting that much of the estate from the tax imposed, whether personal or real property, in favor of each legatee or devisee, to be assessed and determined by a commissioner appointed in accordance with the statute. *Ibid.*

4. *Statutes—Inheritance Tax—Constitutional Law.*—The inheritance tax imposed in the Machinery Act of 1909 is constitutional and valid. *Ibid.*

5. *Statutes—Interpretation—State Departments—Courts.*—The construction given the inheritance tax statute by the Attorney-General and State Treasurer are only *prima facie* correct, and not binding upon the courts, though given consideration as persuasive authority. *Ibid.*

6. *Statutes—Interpretation—Inheritance Tax—"Relation of Child."*—The inheritance tax law, imposing a higher rate of taxation and allowing no exemption as to those whose beneficial interest in the property is not derived as the lineal issue or lineal ancestor or husband or wife of the person who died possessed of such property, etc., by making the express provision that the lower rate and exemptions would also apply "where the person to whom such property shall be devised or bequeathed stood in the relation of child" to such person, extends the lower rate and exemptions to persons who are shown to have been regarded by the testator or ancestor as if they were his children, or lived in his family or associated with him as such, in mutual recognition of the assumed relationship, and without restriction to cases of formal adoption. *In re Inheritance Tax*, 352.

7. *Same—Jurisdiction—Clerks of Courts—Courts.*—The inheritance tax law, by providing that the "clerk of the Superior Court shall determine whether any person to whom property is so devised or bequeathed stands in the relation of child to the decedent," refers and was intended to refer the question of such relationship to the courts; primarily to the sound legal discretion of the clerk, as a mixed question of law and fact. *Ibid.*

INJUNCTION.

1. *Bond Issues—Equity—Injunction—Elections—Registrar—Appeal and Error.*—In this action to restrain the issuance of bonds for local public school purposes the exception of the plaintiff that no registrar acted therein as required by law is not sustained by the evidence, and though the trial judge overruled the exception, but made no finding on the matters raised thereby, the exception is not sustained on appeal. *Casey v. Dare County*, 285.

2. *Bond Issues—Registrar—Irregularities, Effect of—Equity—Injunction—Legal Majority.*—Where the plaintiffs seek to restrain to the hearing the issuance of bonds for local public school purposes, for irregu-

INJUNCTION—*Continued.*

larities of the registrar in permitting names to be stricken from the registration books by unauthorized persons, and in being temporarily absent, it is necessary for them to show, in order to obtain the injunctive relief, that these irregularities changed the result of the election, the question thus presented being whether the proposition had been carried by the requisite legal majority. *Ibid.*

3. *Schools—Bond Issues—Taxation — Constitutional Law — Injunction—Construction and Equipment—Vote of People—Maintenance.*—The validity of bonds carried at an election within a designated district for the construction and equipment of a "farm-life school" therein, and in accordance with the statute authorizing it, is not affected by the failure of the statute to provide for its maintenance; and while school purposes are not necessaries within the meaning of our Constitution, Art. VII, sec. 7, and require that taxation for such purpose must be submitted to the voters, a provision of the statute providing that for the maintenance of the school the county commissioners shall make an appropriation in a certain sum under certain conditions, which provision is unconstitutional, affords no ground for an injunction against the issuance of the bonds, not made contingent on the appropriation. *Moran v. Commissioners*, 289.

4. *Equity—Injunction, Permanent—Restraining Order—Serious Issues.*—Where a permanent injunction is the sole subject of an action, and the evidence raises serious questions as to the facts affecting the plaintiff's rights, the temporary injunction should be continued to the final hearing. *Guano Co. v. Lumber Co.*, 337.

5. *Equity—Nuisance—Injunction.*—Where a private enterprise has been given by a city the right to erect and use an electric trolley or hoist, for transporting its wares across a public street, 12 feet above the ground, and a permanent injunction is sought by the plaintiff, with evidence tending to show it was a serious detriment to his business in the use of the street, having the effect of frightening horses and dangerous to others using the street, it is held that such use of the street is a nuisance, that the evidence raises a serious question, and that a restraining order should be continued to the final hearing. *Ibid.*

6. *Equity—Injunction—Affidavit—Pleadings—Amendments — Court's Discretion—Appeal and Error.*—When an affidavit has been used as a complaint in a suit to enjoin the cutting of timber, and so spoken of and regarded by the parties, it is error to dismiss the action upon the ground that no complaint had been filed; and while the action of the trial judge in refusing to permit an amendment to pleadings is usually a matter within his discretion and not reviewable (Revisal, sec. 505), it was error, under the circumstances, for the judge to refuse an amendment in effect to change the affidavit into the form of a complaint. *Mason v. Stephens*, 369.

7. *Equity—Injunction—Agreement—Superior Court—Incorrect Theory—New Action—Appeal and Error—Costs.*—An agreement in a suit to enjoin the defendant from cutting trees on lands alleged to belong to the plaintiff, by which the defendant was to continue the cutting under a bond to pay damages, awaiting the final result of the action, renders it unnecessary for the original cause to be retained when a

INJUNCTION—*Continued.*

new action has since been brought to recover the damages; but the judge having dismissed the suit asking for injunctive relief upon the wrong theory, the costs of appeal are taxed against both parties to this appeal. *Ibid.*

8. *Railroads—Crossings—Obstructions—Damages—Equity—Injunctions.*—Across a certain point on the defendant's railroad track in a certain town a roadway had existed for seventy-seven years, and the company, to enlarge its yard facilities, lay more tracks, etc., acquired at this place 40 acres of land, resulting in stopping and blocking the roadway, for which the plaintiffs bring their action for damages and injunction. The plaintiffs had previously contracted with the vendor of these lands for hauling timber from a tract on one side of the railroad to the vendor's planing mill on the other side thereof, using for that purpose the roadway in question. *Held:* The defendant was liable in damages to the plaintiffs for obstructing the roadway in this manner, and an injunction forbidding the defendant from obstructing it "by leaving box cars or other obstructions thereon," not extending to shifting cars in the manner allowable by law, etc., was properly granted. *Tate v. R. R.*, 523.

9. *Equity—Administration—Jurisdiction—Same Court—Specific Performance—Injunction—Interpretation of Statutes.*—The plaintiff being a purchaser under the ordinary contract to convey timber, alleges that he is entitled to an extension period under the terms of the contract for cutting, etc., though not appearing upon its face by reason of a mutual mistake in the date thereof, and that he had in time tendered the defendant the consideration specified for the extension of the said period, which the defendant had refused, and that the defendant was then cutting the timber upon the land. *Held:* The plaintiff's action is of an equitable nature, asking specific performance of his contract and an injunction against the continued cutting of the timber by the defendant; and though the technical difference between actions at law and suits in equity have been abolished, and both are administered by the same court, the powers and jurisdiction of the courts of equity are preserved. *Lumber Co. v. Cottingham*, 544.

10. *Injunction — Deeds and Conveyances—Covenants.*—A conveyance of a part of the grantor's lands, adjoining his building, with covenant on the part of the grantee, for himself, his heirs and assigns, that he will erect and perpetually maintain a stairway between the plaintiff's building and one to be erected by himself next to it, is a binding covenant running with the lands, and is enforcible. *Ring v. Mayberry*, 563.

11. *Injunction—Restraining Order—Deeds and Conveyances—Covenants of Grantee—Erection of Stairways—Mandatory Injunction.*—In a suit to restrain the breach of a covenant to maintain a stairway for the use of the plaintiff, an adjoining owner, there was allegation and proof that this stairway had been maintained for a period of years in a building which had been destroyed, and that the defendant was erecting a new building in its place in such manner as to leave it out. *Held:* An order restraining the construction of the building as stated, without leaving open a space for the stairway, was proper, as it was

INJUNCTION—*Continued.*

conducive to the less inconvenience; and the objection of the defendant that a mandatory injunction was the proper remedy to be sought was rendered nugatory. *Ibid.*

12. *Railroads—Easements—Injunction.*—A railroad company in the use and enjoyment of a right of way extending 100 feet each way from the center of its track, sought to enjoin the erection of a brick building by an owner of lands abutting on its easement, to replace a wooden building which had been destroyed, and on a line of a substantial block of buildings which had been erected since the operation of the railroad, and extending over and upon its right of way, leaving a space of 65 feet between the building and the track and also used as a public street of the town for about thirty years. Nothing appearing to show that the plaintiff railroad has any present purpose to use that part of the right of way occupied by the defendant, as stated, or that such occupation will sensibly increase the hazards incident to the operation of the railroad, *it is held* the injunction should not be granted. *R. R. v. Bunting*, 579.

13. *Equity—Injunction.*—The courts cannot enjoin road commissioners in the performance of their duties in the maintenance, construction, and management of the public roads of the county, under legislative authority, imposed by a statute passed in accordance with Art. VII, sec. 7, of the State Constitution; and the objections to the statute in question that the board is a self-perpetuating body because the members are to fill vacancies, etc., without limitation as to the duration, or responsibility to the people for their acts, etc., or that the members are not subject to removal except upon indictment for misfeasance, and then only for the willful failure or refusal to perform a duty, should be addressed to the lawmaking power, and not to the courts. *Hargrave v. Commissioners*, 626.

INSTRUCTIONS. See Appeal and Error, 33; Clerks of Court.

1. *Appeal and Error—Assignments of Error—Instructions—Court's Remarks—Harmless Error.*—While there is a discrepancy in this case on appeal between the defendant's requested prayer for instruction as set out in its assignments of error and in the record, it readily appears that the trial judge modified the instruction requested; and the exception to his statement that he gave the instruction requested is without merit, as it appears from his statement and the entire context that the court intended it for a modification, and the jury so understood it. *Buchanan v. Lumber Co.*, 40.

2. *Trials—Instructions—Appeal and Error—Omission to Charge—Collateral Matters.*—In an action for wrongful death, where the allegations involve and the evidence chiefly relates to the question of negligence of the defendant in permitting an obstruction upon the right of way, knocking the intestate from the running board of the tender of the locomotive, and also involve the doctrines of contributory negligence and the last clear chance, the failure of the court, in his charge to the jury, to advert to a phase of the evidence from which it might be inferred that the intestate may have been inadvertently knocked from the running board by his companions, is not held erroneous, especially when requests for specific instructions thereon had not been preferred. *Ibid.*

INSTRUCTIONS—*Continued.*

3. *Bills and Notes—Infirmities—Instructions—Trials—Questions for Jury.* Where fraud between the original parties to a negotiable instrument has been alleged and shown, and one claiming to be a holder in due course brings his action thereon, it is not error for the trial judge to refuse to instruct the jury, when the plaintiff's evidence, uncontradicted, tends to show that he acquired it in due course without knowledge or notice of the defect, that there was no evidence of such knowledge or implicative facts, for the statute casts the burden, in such instances, on the plaintiff, and the jury, the triers of the facts, may not find them to be as testified; but the plaintiff is entitled to an instruction that the jury should answer the issue in his favor if they find the facts to be as testified, when, as in this case, no adverse inferences may be drawn from the testimony. *Smathers v. Hotel Co.*, 69.

4. *Homicide—Elements of Self-defense—Unlawful Fighting—Trials—Instructions.*—Where self-defense is relied upon on a trial for homicide, with evidence tending to establish it, it is for the jury to determine whether the prisoner acted with reasonable apprehension that he must kill the deceased in order to save his own life or himself from great bodily harm; and should they find that the prisoner acted with such reasonable apprehension exclusively in his own defense, judging his conduct by circumstances as they reasonably appeared to him at the time of the homicide, and that he had not provoked the fight, or was not at fault in bringing it about, they should render a verdict of acquittal. *S. v. Pollard*, 116.

5. *Same—Killing of Officer—Evidence.*—The defendant, on trial for the murder of an officer of the law, was suspected by the latter of keeping a gambling place, he having watched the place for some time, occasioning bad blood between the prisoner and himself. There was evidence tending to show that the deceased was a man of violent temper and dangerous, and had actually threatened to kill the prisoner, and that these things were known to the prisoner; that at the time of the homicide the deceased entered the prisoner's place of business, armed with two pistols, in his pockets, and was ordered out by the prisoner, and also that the deceased had remarked to others upon this occasion that he was not taking any chances that evening; that deceased refused to leave at the prisoner's command, and followed him as he was waiting on a customer, and was again ordered to leave, whereupon the deceased again refused to leave, and cursed the prisoner, throwing his right hand to his right hip, and putting his left foot a little forward, and then the prisoner fired his pistol, when a struggle ensued for the possession of the pistol, in which the pistol was again fired, and under these circumstances the fatal wound was inflicted. *Held:* Reversible error for the judge to charge the jury, among other things, that if they found that the prisoner was willing, under the circumstances, to enter into the fight, he would be guilty of manslaughter, for such a charge leaves out the question whether the deceased unlawfully entered into the fight. *Ibid.*

6. *Homicide—Trials—Instructions—Verdicts—Appeal and Error—Harmless Error.*—On a trial for homicide, where the verdict rendered by the jury convicts the defendant in a less degree, the refusal of the court to give special instructions upon the law, arising from the

INSTRUCTIONS—*Continued.*

evidence, of murder in the second degree is harmless if erroneous. *S. v. Heavener*, 156.

7. *Homicide—Trials—Instructions Given—Instructions Asked—Appeal and Error—Harmless Error.*—Where self-defense is relied on upon a trial for murder, the refusal of the defendant's prayers for instuction as to his reasonable belief that he was in danger, when sufficiently covered in the charge to the jury, is not erroneous. *Ibid.*

8. *Criminal Law — Intent — Deadly Weapon—Malice Presumed—Trials—Instructions.*—From the intentional commission of a criminal offense, without just cause or excuse, the law will presume general malice, which will support a verdict of guilty; and upon trial for a secret assault with a deadly weapon it is not error for the judge to charge the jury that malice would be presumed from the use of the weapon, and immediately thereafter that malice would be presumed from the intentional use thereof. *S. v. Knotts*, 173.

9. *Criminal Law — Admissions — Instructions—Directing Verdict.*—When upon the trial for conspiracy among dealers to raise the price of milk in a certain community the defendants admit entering into the agreement and the consequent raising of the price, it is proper, and not objectionable as directing a verdict, for the judge to relate the admission to the jury and instruct them that thereunder the defendants would be guilty. *S. v. Craft*, 208.

10. *Appeal and Error—Trials—Instructions—Record.*—Objection that the court did not properly advert to the plaintiff's evidence upon a certain phase of this case under the principles declared in *S. v. Hopkins*, 130 N. C., 647, will not be considered on appeal, no special prayers for instructions thereon having been offered, and the charge of the ocurt not appearing in full in the record so as to show that the court had not instructed properly thereon. *S. v. Hannon*, 215.

11. *Trials — Instructions — Requests—Appeal and Error—Presumptions.*—Exceptions to the refusal of the trial judge to give prayers for instruction to the jury, asked, though appearing to be proper upon the evidence in the case, will not be held as error on appeal when the charge of the trial judge does not appear in the record and there are no exceptions thereto; for it will be presumed that the charge as given was a proper and correct one, and substantially covered the request for instruction, the exact language being immaterial. *Guano Co. v. Mercantile Co.*, 223.

12. *Trials—Instructions—Special Request.*—Where the trial judge correctly instructs the jury upon every phase of the controversy, his refusal to give special prayers for instruction, covered in other language in the charge, is not error, though the prayers were correct and applicable propositions of law. *Lewis v. Fountain*, 277.

13. *Assault — Personal Injuries—Self-defense—Trials—Evidence—Instructions.*—Where in an action to recover damages for a personal injury received by the plaintiff in a fight the defendant resisted recovery on the ground that he was acting in self-defense, that he fired upon the plaintiff and inflicted the injury to protect himself or his children from death or bodily harm, it is necessary for the defendant to show

INSTRUCTIONS—*Continued.*

that he acted upon a reasonable apprehension; and the charge of the court in this case *is held* to have been favorable to the defendant, of which he cannot complain. *Ibid.*

14. *Issues — Trials — Instruction, Correct in Part — Appeal and Error.*— Where the trial judge has submitted an erroneous issue upon the last clear chance, to the plaintiff's prejudice, the error is not cured by the charge of the court which lays down the correct principle applicable to the evidence, in one part, and in another part erroneously states it. *Cullifer v. R. R.*, 309.

15. *Evidence, Weight of—Positive Evidence—Trials—Instructions.*—While in proper instances it will not be considered erroneous for the trial judge to charge the jury that more weight should be given to positive than to negative evidence, the rule is very restricted, and does not apply where there is a direct contradiction in the evidence of witnesses on a material fact to which their attention has been directed; and the application of the rule is reversible error where the testimony of this character is conflicting as to whether a check purporting to have been given in full had the appropriate words written on its face at the time it was given and accepted; as in this case "lbr. to date," meaning, in connection with the facts presented, in full for lumber purchased to date. *Rosser v. Bynum*, 340.

16. *Trials—Instructions—Appeal and Error—Harmless Error.*—An erroneous statement of a contention of a party, corrected in the charge of the judge, is harmless error. *Lumber Co. v. Cedar Works*, 344.

17. *Conflict of Laws—Decisions of Other States—Trials—Instructions—Appeal and Error.*—Where the laws of Virginia are alone applicable in an action brought here against a railroad company for the negligent running upon and killing the plaintiff's intestate, and it appears that, from the interpretation of the decisions of that court introduced in evidence by consent, the plaintiff was a trespasser on the defendant's track at that time, to whom the defendant owed the duty only not to willfully injure him after discovering his helpless and perilous condition upon the track, a charge of the court to the jury, laying down different principles of law to govern the jury, is reversible error, though the instructions were correctly given according to the principles obtaining here. *Harrison v. R. R.*, 382.

18. *Surface Waters—Drainage—Ordinary Care—Negligence—Anticipated Rainfalls—Trials—Instructions.*—In this action against a city and a *quasi*-public corporation to recover damages to plaintiff's property alleged to have been caused by the negligence of the defendants in providing an insufficient drain for carrying the water off from his lands from rainstorms which should reasonably have been anticipated in that locality, *it is held* that the instructions of the court to the jury correctly imposed upon the defendants the duty of exercising ordinary care and correctly charged upon the question of their liability for their negligence in not doing so. The charge is approved. *Brinkley v. R. R.*, 428.

19. *Evidence—Deceased—Transactions, etc.—Trials—Instructions—Expressions of Opinion.*—In an action on a note brought by husband and wife against the administrator of the deceased, it is incompetent for

INSTRUCTIONS—*Continued.*

the husband to testify that he was present at the time and saw the deceased receive the money for the note, for this is evidence of a transaction with the deceased by an adverse party in interest, forbidden by the statute; but where this testimony has been given without objection, it is not an expression of opinion upon the evidence for the trial judge to state the law to the jury and remark that he would have ruled it out had it been objected to, for this is only a caution to the jury that they should scrutinize his testimony, and does not cast any imputation upon the truthfulness of the witness. *White v. Guynn*, 434.

20. *Trials—Instructions—Statement of Contentions—Objections and Exceptions—Appeal and Error.*—Objection to the statement by the trial judge of the contentions of the parties, in his charge to the jury, must be called to his attention at the time, so that it can be corrected and conformed to the evidence, and exception thereto taken after judgment will not be considered on appeal. *Nevins v. Hughes*, 477.

21. *Trials — Conflicting Evidence—Questions for Jury—Instructions.*—In this case *it is held* that the evidence is conflicting and the issues were properly submitted to the jury under proper and approved instructions from the court. *Ibid.*

22. *Bills and Notes—Notice of Dishonor—Trials—Verdict—Interpretations —Instructions.*—A verdict of the jury may, in proper instances, be given significance by reference to the pleadings, evidence, and the charge of the court, and therefrom it appears that the jury necessarily found, in this case, that the requisite notice of dishonor for nonpayment or nonacceptance of the negotiable instrument sued on had been given, the charge being in accordance with the language of the statute, Revisal, 2254. *Bank v. Wilson*, 557.

23. *Trials—Instructions—Contentions—Objections and Exceptions—Appeal and Error.*—An exception to the charge of the court is not held for reversible error in this case, the portion objected to being susceptible of the interpretation that it was a statement of the contentions of the appellee. *Ibid.*

24. *Railroads — Negligence — Construction of Railroad Yards — Rules of Safety — Trials — Instructions — Appeal and Error.*—In an action brought against a railroad company for the negligent killing of plaintiff's intestate, alleged to have been caused by a horse becoming frightened at the noise and steam issuing from defendant's steam engine and running upon the intestate, there was further allegation that the defendant's railroad yard was not constructed or laid out properly for the safety of those having business there, and that proper rules for that purpose had not been made for or observed by the defendant's employees there, but without sufficient evidence tending to prove these further allegations. *Held:* A charge of the court interwoven with instructions bearing upon the negligent construction of the railroad yards and the question of proper rules, is misleading and constitutes reversible error. *Witte v. R. R.*, 566.

25. *Trials—Instructions—Requested Prayers—Appeal and Error.*—A charge of the court given in response to appellant's request affords him no proper ground for exception on appeal. *Shaw v. Public-Service Corporation*, 611.

INSTRUCTIONS—*Continued.*

26. *Same—General Charge.*—The refusal to give appellant's instructions in the language of the requests is not erroneous, if it appears that the judge has substantially given them in his own language in the general charge without weakening their legal force and effect, for a substantial compliance therewith is sufficient. *Ibid.*

27. *Trials — Instructions — Contracts—Counterclaim—Appeal and Error—Harmless Error.*—In an action brought by an architect to recover the contract price for plans and specifications furnished for a building, alleged to be due him, which the defendant denies and alleges that certain moneys advanced the plaintiff thereon were agreed to be repaid in the event of his failure to perform the contract, under conflicting evidence a charge of the court, in response to a request from the jury for further instructions, that they had the physical power to divide the amount claimed by the plaintiff is not reversible error, it appearing that the court immediately and correctly charged upon the burden of proof of each of the parties upon the respective issues, and how they should regard the evidence in reaching their conclusions; and it further appearing that the plaintiff's damages had been assessed at a smaller amount than he was entitled to under the evidence, it is error of which the defendant cannot complain on appeal. *Gambier v. Kimball*, 642.

28. *Negligence—Proximate Cause—Trials—Instructions.*—In an action to recover damages arising from the defendant's negligence, and the questions in dispute involve only those of whether the act complained of was negligently done, and if it caused the injury, the judge charged the jury that they must find that the defendant was negligent and that the negligence caused the injury, in order to answer the issue in plaintiff's favor. *Held:* The charge was not objectionable as leaving out the element of proximate cause. *Barnes v. R. R.*, 667.

29. *Trials—Instructions—Objections and Exceptions—Specific Requests.*—Where the charge states correctly, though in general terms, the law applicable to the issues involved in the controversy, exceptions that they were not more specific will not be considered on appeal, in the absence of special requests for instructions that they be made so. *Zollicoffer v. Zollicoffer*, 326.

INSURANCE.

1. *Insurance, Life—Defense—Suicide—Trials—Burden of Proof—Nonsuit.* Where an insurance company interposes the defense of suicide of the insured to avoid recovery by the plaintiff in his action on a life insurance policy, the burden of proof is on the defendant to show, by the greater weight of the evidence, the fact of suicide, and a nonsuit upon the evidence will not be allowed. *Baker v. Insurance Co.*, 87.

2. *Insurance—Automobiles—Stipulations of Policy—Mortgages—Cancellation—Suspended Insurance.*—Where the owner of an unencumbered automobile insures it under a statutory form of policy, stipulating, among other things, that the policy would be void if the interest of the assured be other than unconditional or sole ownership, or if the property be or become encumbered by a chattel mortgage, and thereafter gives a mortgage thereon which is canceled four days before the de-

INSURANCE—*Continued.*

struction of the machine by fire, this loss coming within the terms of the policy, the cancellation of the mortgage revives the original status of the policy, the temporary violation of the stipulation being immaterial, and puts the policy again in force, the effect of the mortgage being to invalidate the policy during the continuance of the lien, or to suspend the obligation of the insurance company during the violation of the stipulation. Revisal, secs. 4806, 4808. *Cottingham v. Insurance Co.*, 259.

3. *Insurance, Fire—Standard Form—How Construed—Interpretation of Statutes.*—The terms of a standard form of policy of fire insurance, though adopted by statute, are construed against the insurer and in favor of the insured. *Ibid.*

4. *Insurance, Fire—Stipulations—Mortgages—Revival of Policy—Inducements to Destroy — Fraudulent Misrepresentations.*—The principle upon which the validity of a policy of fire insurance is revived after a lien on the property, made in violation of its provisions, has been satisfied, cannot be regarded as an inducement of the insured to destroy the property insured, or as false and material representations which will vitiate it. *Schas v. Ins. Co.*, 166 N. C., 55, and that line of cases, cited and distinguished. *Ibid.*

5. *Fraternal Orders — Trials — Evidence—Prima Facie Case—Rules of Order—Burden of Proof.*—Where in an action brought by the beneficiaries under a certificate of life insurance in a fraternal order, the plaintiffs offer evidence of a demand and proof of death of the assured, and introduce the certificate sued on, which upon its face and the evidence entitles the plaintiffs to the relief sought, they make out a *prima facie* case, and place the burden of proof upon the defendant to show the defense of nonpayment of dues or other matter to avoid the policy, if such is relied upon. *Harris v. Jr. O. U. A. M.*, 357.

6. *Fraternal Orders—Rules of Order—Appeal—Beneficiaries—Right of Action—Laches.*—Where the rules of a fraternal insurance association provide for an appeal to the National department of the order upon refusal of the secretary-manager to pay a death claim under its certificate, and the beneficiaries of the policy are given no right of appeal, they have immediate right of recourse to the courts, and are not responsible for the inaction of the local branch of the association or bound by its laches; and under the circumstances of this case *it is held* that, by the lapse of time, the local branch had lost its right of appeal to the National department. *Ibid.*

7. *Insurance—Principal and Agent—Fraud—Evidence—Independent Action.*—Where a judgment has been obtained against an insurance company on one of its policies, allegations and evidence tending to show fraud on the part of the insured in obtaining the policy, or an adjustment between the insured and the company's agent, and the insured had received a part of the amount agreed upon, are legal defenses available in the original action, and have no bearing upon the question of fraud in the procuring and rendition of the judgment sought to be set aside for fraud in an independent action. *Mutual Asso. v. Edwards*, 378.

INSURANCE—*Continued.*

8. *Same—Collusion.*—Where the conduct and misrepresentations of a local agent of the insurer tends only to show that the insurer was thrown off its guard and deprived of its opportunity to make defense in an action upon its policy, in which judgment had been rendered against it, without proof or suggestion of any collusion between the agent and the insured, the result of the agent's misconduct is not attributable to the insured, and furnishes no evidence of fraud in the procurement or rendition of the judgment, necessary to set it aside in an independent action. *Ibid.*

9. *Insurance, Fire—Parol Contract—"Binder"—Written Evidence.*—In the absence of statutory regulation, a parol contract of fire insurance is valid, and a written memorandum thereof, called a binder, is also competent evidence of the agreement entered into between the parties. *Lea v. Insurance Co.*, 478.

10. *Same—Validity of Contract.*—Our statute, by establishing a standard form of fire insurance, does not prevent the binding effect of a parol agreement of insurance, looking to the delivery of the policy according to the form prescribed and evidenced by a written memorandum thereof, called a binder; and when such is shown to have been made in a manner to bind the company, it is in force from that time, and thereafter the insured is responsible for the loss in accordance with the terms of the statutory form of policy. *Ibid.*

11. *Insurance, Fire—Parol Agreement—"Binder"—Contracts—Evidence—Trials.*—Evidence that the insured requested fire insurance in a certain sum on tobacco he had in a certain warehouse from the local agent of the insurer, who agreed thereto, gave a written memorandum or "binder" to that effect, contemplating, according to the custom between the parties, the subsequent delivery of the statutory form of policy, and payment of the premium, is sufficient upon the question of whether a valid contract of insurance had been entered into, under the circumstances of this case. *Ibid.*

12. *Insurance, Fire—Parol Agreement—Principal and Agent—Agent's Authority—Evidence—Trials.*—Where the evidence tends to show that an insurance company customarily sends to its local agents batches of its policies, properly signed by its officials and wanting only the signatures of the local agents to give them validity; that these agents were accustomed to bind the company by parol agreement to insure, giving the insured a written memorandum or "binder" thereof, followed by the delivery of the statutory forms of policies, which were received by the home office without question, it is sufficient upon whether the acts of the agents therein were authorized by the company and binding upon it. *Ibid.*

13. *Insurance, Fire—Principal and Agent—Insured—Private Advantage—Banks and Banking.*—Where the cashier of a bank also acts as agent of a fire insurance company, and charges the premiums for policies against the insured's account at the bank, and then remits them to the insurer, it does not come within the condemnation of *Folb v. Insurance Co.*, 133 N. C., 180, which holds that the insured cannot pay his premiums by satisfying a private debt due him by the agent of the company. *Ibid.*

INSURANCE—*Continued.*

14. *Insurance, Life—Premiums—Payment—Waiver—Evidence.*—The payment of a premium on a life insurance policy, according to its terms, is necessary to keep the insurance in force; and this requisite is not waived when the insurer receives the money for the premium when it is past due, in ignorance of the sickness of the insured, resulting in his death, without issuing a receipt, requests a statement of good health from the insured, and returns the money after his death, shortly thereafter occurring. *Clifton v. Insurance Co.*, 499.

15. *Evidence—Letters — Originals — Notice to Produce—Carbon Copies.*—When the opposing party has been notified to produce the original letters in his possession, at the trial, carbon copies thereof are admissible as evidence when the original ones would be, and when duly proven by the person who wrote them. *Ibid.*

INTENT. See Deeds and Conveyances.

INTEREST. See Bills and Notes.

INTERPLEADER.

1. *Attorney and Client—Contingent Fee—Lands—Compromise—Interpleas—Procedure.*—Where a valid written contract for compensating an attorney has been made, by which the attorney is to receive for his services a certain part of the lands, the subject of the litigation, contingent upon recovery; and the attorney starts the suit and continues to do what is necessary for its prosecution, but is stopped therein by a compromise effected by his client, without his knowledge, by which the client has obtained a part of the land, the attorney is entitled to receive the proportionate part of the land thus obtained, in accordance with his contract of employment, and an interplea in the original cause is the proper procedure for him to pursue in enforcing his demand. *Dupree v. Bridgers*, 424.

2. *Tenants in Common—Proceeds of Sale—Payment of Liens.*—Prior encumbrancers or judgment creditors, whose liens on the interest of an insolvent tenant in common in lands has been docketed before proceedings for partition, may not as interpleaders in the proceedings compel the commissioner, who has sold the lands for division among the tenants, to pay over the share of the proceeds of their judgment debtor to them, to be applied to the satisfaction of their liens. *Jordan v. Faulkner*, 466.

INTERPRETATION. See Deeds and Conveyances.

INTERPRETATION OF STATUTES. See Statutes.

INTOXICATING LIQUORS.

1. *Spirituous Liquors—Possession—Prima Facie Case—Purposes of Sale—Burden of Proof—Reasonable Doubt—Interpretation of Statutes.*—On the trial under an indictment against the defendant for having spirituous liquor on hand for the purpose of sale, contrary to our statute, chapter 44, sec. 2, Public Laws of 1913, the court charged the jury, in effect, that the defendant must not necessarily be convicted of selling the liquor if he had more than one gallon on hand

INTOXICATING LIQUORS—*Continued.*

for the purpose, and correctly charged as to the presumption of defendant's innocence, the effect and meaning of *prima facie* case, as used in the statute, and that the burden of proof was on the State to establish the guilt of the prisoner beyond a reasonable doubt. *Held:* The charge is not open to the objection that the judge told the jury to convict the defendant of a misdemeanor if he had violated any of the provisions of section 2 of the act. *S. v. Davis*, 144.

2. *Intoxicating Liquor — Unlawful Sale — Evidence — Trials — Defense— Good Faith—Questions for Jury.*—Evidence that the defendant delivered intoxicating liquor to another in North Carolina and received money for it is evidence of his guilt, upon a trial for an illegal sale of such liquors, requiring that the case be submitted to the jury; and while the defense is open to him that he had ordered it from beyond the borders of the State, where such transactions are lawful, in good faith, and not as a subterfuge to evade the law, but solely for accommodation and without profit, it is for the jury to determine the truth of the matter upon the evidence under proper instruction from the court. *S. v. Burchfield*, 149 N. C., 541, and that line of cases, cited and distinguished, and the Webb-Kenyon law is held inapplicable to the facts of the case. *S. v. Bailey*, 168.

3. *Intoxicating Liquors — Carriers — Transportation Forbidden — Lawful Use—Interpretation of Statutes.*—The transportation by the carrier of intoxicating liquors into the county of Burke, where such is prohibited for certain purposes, and delivering it to the consignee for his private use, will not make the carrier guilty of the offense created by the statute, the act not prohibiting its importation for personal use. Public Laws 1907, chs. 24 and 806. *S. v. Express Co.*, 207.

ISSUES.

1. *Issues, Sufficiency of.*—The issues submitted to the jury in this case are held sufficient under which to decide all controverted questions and to give each of the parties an opportunity to present his case in every aspect, and no error is found in rejecting other issues tendered by the appellant. *Barefoot v. Lee*, 89.

2. *Issues — Trials — Instruction, Correct in Part — Appeal and Error.* — Where the trial judge has submitted an erroneous issue upon the last clear chance, to the plaintiff's prejudice, the error is not cured by the charge of the court which lays down the correct principle applicable to the evidence, in one part, and in another part erroneously states it. *Cullifer v. R. R.*, 309.

3. *Trials—Issues Sufficient—Appeal and Error.*—Where the issues submitted at the trial are sufficient to present all the matters involved in the controversy, the rejection of those tendered by the appellant will not be held as error. *Zollicoffer v. Zollicoffer*, 326.

4. *Conflict of Laws—Issues.*—An issue framed according to our own laws in an action brought here, but controlled by the laws of another jurisdiction, differing from ours, should be so framed as to be responsive under the laws of the other State. *Harrison v. R. R.*, 382.

5. *Issues—Attorney and Client—Contingent Fee.*—The issues tendered by the plaintiffs in this action, relating to the value of the services of the

ISSUES—*Continued.*

interpleader rendered to the estate of the deceased, as attorney, are held not to be responsive to the inquiry, the proper issues being those relating to the value of such services rendered to one of the heirs at law of the deceased, as a party to the action. *Dupree v. Bridgers*, 424.

6. *Vendor and Purchaser—Breach of Warranty—Counterclaim—Issues.*—On a trial to recover the purchase price of fertilizer sold to a user thereof, where a counterclaim is set up seeking damages for a breach of warranty, separate issues should be submitted, and the issue of damages should exclusively relate to that subject. *Carter v. McGill*, 507.

7. *Trials—Issues, Sufficient—Appeal and Error.*—Issues raised by the pleadings and evidence which are sufficient to present all controverted matters will not be held erroneous on appeal. *Lloyd v. Venable*, 531.

8. *Contracts, Vendor and Vendee—Equity—Mental Incapacity—Intoxication—Cancellation—Fraud—Ratification—Trials—Issues.*—In a suit to set aside a contract for the sale of lands on the ground of mental incapacity of the plaintiff at the time, with evidence that thereafter he paid a part of the purchase price and executed his notes for the balance, an issue as to the mental incapacity of the plaintiff to make the agreement of purchase is insufficient; for in suits of this character equity will afford no relief, in the absence of fraud, or if the complaining party has suffered no disadvantage, or if he has subsequently ratified his acts; and under the circumstances of this case separate and appropriate issues should also have been submitted to the jury. *Cameron v. Power Co.*, 138 N. C., 365, cited and distinguished as an action at law. *Burch v. Scott*, 602.

9. *Contracts — Breach of Warranty — Conditions — Pleadings — Proof — Issues.*—Where a warranty in a contract for the sale of goods requires that notice of a failure of the goods to satisfy the warranty be given the seller in five days, etc., an issue as to the reasonableness of the notice should not be submitted to the jury, in an action on the warranty, in the absence of allegation and proof thereof, and when defendant knew of the breach within the five days. *Frick v. Boles*, 654.

JAILS. See Municipal Corporations.

JUDGMENTS. See Husband and Wife, 2; Mechanics' Liens; Equity; Trials, 6; Estoppel.

1. *Judgments—Proceedings to Set Aside—Motions in the Cause.*—Where a judgment obtained before a justice of the peace is sought to be set aside by the defendant for lack of service of summons, the remedy is by motion in the cause made before the court which had rendered the judgment. *Lowman v. Ballard*, 16.

2. *Same—Limitations as to Time.*—The statutes limiting the time within which motions shall be available to set aside judgment to one year applying to judgments in all respects regular, do not apply where there has been defective service of the summons in the action or entire absence of it. *Ibid.*

JUDGMENTS—*Continued.*

3. *Judgments—Nonsuit—Res Judicata.*—A judgment of nonsuit is not *res judicata* in a subsequent action brought on the same subject matter. *Starling v. Cotton Mills*, 229.

4. *Partition—Owelty — Charge Upon Lands — Personal Judgment — Personal Representatives — Parties.* — Where tenants in common have made a voluntary partition of lands by a division deed, charging one of the shares with owelty, and the owner thereof has since died, devising his lot to his wife, in an action brought to recover judgment for the amount of the owelty and declare the judgment a lien on the land, no personal judgment can be rendered against the defendant or the personal representative of the deceased, and the latter is not a necessary party. *Newsome v. Harrell*, 295.

5. *Judgments—Default and Inquiry—Nonsuit—Appeal and Error.*—Where a judgment by default and inquiry has been taken and at a subsequent term the inquiry is being duly made, it is erroneous for the trial judge to order a nonsuit. *Mason v. Stephens*, 370.

6. *Judgments—Motions—Excusable Neglect—Fraud—Independent Action.* A motion refused and not appealed from, having formerly been made in the original action, to set aside a judgment rendered therein for excusable neglect, the independent action is considered, in this appeal, one to set aside a judgment, taken according to the course and practice of the court, and in all respects regular, upon the ground of fraud. *Mutual Asso. v. Edwards*, 378.

7. *Judgments — Independent Action—Fraud—Proof—Sufficiency.*—To set aside, in an independent action, a judgment on the ground of fraud, the fraud alleged as the basis of the present action must be shown in the procuring or rendition of the judgment, and it is insufficient when it affects only the validity of the original demand unless the plaintiff in the judgment, or some one for whose conduct he is legally responsible, has wrongfully prevented the opposing party from setting up the defense, or the judgment has been rendered in a court where such defense was not available to him. *Ibid.*

8. *Pleadings—Verification—Judgments.*—It is held that the complaint in this case was verified substantially in the words of the statute, and the refusal of the trial judge to render judgment for the defendant on the pleadings was proper. *White v. Guynn*, 434.

9. *Judgments—Excusable Neglect—Findings—Appeal and Error.*—On appeal from the refusal of a motion to set aside a judgment for excusable neglect, the findings of fact by the trial judge are not reviewable, except in cases of gross abuse or where the findings are not supported by any evidence. *Allen v. McPherson*, 435.

10. *Same—Matters of Law.*—Upon motion to set aside a judgment for excusable neglect, where the findings of fact of the trial judge are supported by evidence, whether as a matter of law the neglect was excusable is reviewable on appeal. *Ibid.*

11. *Same—Court's Discretion—Interpretation of Statutes.*—Where under the findings of fact the trial judge correctly concludes that the neglect of a motion to set aside a judgment was not excusable, it concludes the matter; but where he correctly concludes that the neglect

JUDGMENTS—*Continued.*

was excusable, the question of setting aside the judgment is a matter in his discretion, except in cases of gross abuse, and is not reviewable on appeal. Revisal, sec. 513. *Ibid.*

12. *Judgments — Excusable Neglect — Appeal and Error — Meritorious Defense—Findings of Trial Judge.*—Upon appeal from the refusal of the trial court to set aside a judgment against a defendant for excusable neglect, a finding is necessary that there is a meritorious defense which could be set up if the judgment is set aside. *Ibid.*

13. *Judgments—Default and Inquiry—Burden of Proof.*—A judgment by default and inquiry establishes merely the plaintiff's cause of action, carrying the costs, but still leaves the burden of proof on the plaintiff as to the inquiry. *Ibid.*

14. *Judgments—Presumptions — Mortgages — Interpretation of Statutes.*—Revisal, secs. 574, 575, providing that all judgments entered during the term of court shall relate to the beginning of the term, and be deemed to have been then entered, will not apply where it will affect the rights of innocent *bona fide* purchasers for value under a conveyance of lands, and registered during the term of court at which the judgment had been obtained. *Fowle v. McLean*, 537.

15. *Same—Principal and Surety—Equity—Subrogation.*—Judgment having been rendered against the principal on a note and H., one of his sureties, H. and K. mortgaged their interest in certain standing timber, and thereafter judgment was rendered against K. and M., sureties on the same note; the mortgage of H. and K. was registered at the same term of the court at which the second judgment was rendered, but prior in point of time. M. paid the judgment creditor and had the judgment assigned to a third person to his use. The plaintiff was the purchaser at the sale under the mortgage. *Held:* M., the surety who had paid the judgment, is subrogated to the rights of the judgment creditor, and holds a lien prior to that of the mortgage on the interest of H. in the timber, but not on that of K., for as to K. the mortgage is regarded as having been registered before the rendition of the judgment. *Ibid.*

16. *Principal and Surety—Judgments—Payment—Assignment of Judgment —Uses and Trusts.*—A surety may preserve the lien of judgment against the principal and himself by paying the judgment creditor and having the judgment assigned to a third person for his own benefit; and this also applies to a judgment against his cosureties and himself in enforcing an equality of obligation between them. *Ibid.*

17. *Judgments—Default and Inquiry—Contracts—Pleadings—Defenses.*—In an action to recover upon a contract for work done, with allegation that the plaintiff had performed his part in accordance with its terms and a certain stated sum was due him thereunder, it is essential for the defendant to set up in his answer any damages he may claim as arising from the negligence of the plaintiff in his performance of his contract, or in breach thereof; and where upon failure to file answer a judgment by default and inquiry has been entered, it estops the defendant from claiming damages of the character stated. *Plumbing Co. v. Hotel Co.*, 577.

JUDGMENTS—*Continued.*

18. *Judgments—Default and Inquiry—Admissions—Evidence—Counter Demands.*—A judgment by default for the want of an answer is an admission of every material and traversable allegation of the declaration or complaint necessary to the plaintiff's cause of action, and evidence upon the inquiry tending to prove that no right of action existed, or denying the cause of action, is irrelevant and inadmissible. *Ibid.*

JUDGMENT LIENS. See Estates, 28.

JUDGMENT SUSPENDED. See Criminal Law, 8.

JUDICIAL SALES.

1. *Judicial Sales—Destroyed Records—Deeds and Conveyances—Recitals—Secondary Evidence—Trials.*—Recitals in a deed executed in pursuance of a judicial decree or in a sheriff's deed upon execution sale are only secondary evidence of the facts recited, and where it is claimed by the party relying thereon that the court record referred to has been destroyed, the destruction of the original record must be clearly proved by him before the secondary evidence can be regarded. *Thompson v. Lumber Co.*, 226.

2. *Judicial Sales—Executors and Administrators—Docket Entries—Evidence.*—Docket entries relied on by a party to show his title to the lands in dispute, under a deed from an administrator to sell the lands to make assets, are too meager to furnish evidence of the proceedings and record, when they do not show whose administrator the grantor was, nor whose heirs were the defendants, nor refer in any manner to the lands sold under the proceedings. *Ibid.*

3. *Judicial Sales—Deeds and Conveyances—Dead Grantee—Payment by Purchaser—Equitable Title—Heirs at Law—Action—Payment in Fact—Presumptions—Separate Findings.*—A deed executed to a purchaser of lands sold under judgment of court, after his death, is void; but upon proof of the payment of the purchase price bid at the sale an equitable estate would vest in his heirs, upon which they may maintain their action. In this case there being circumstantial evidence that the purchase price was paid, it is suggested that separate findings be had upon the questions of payment in fact and payment by presumption from lapse of time, should the case again be tried. *Ibid.*

4. *Deeds and Conveyances—Judicial Sales—Timber Deeds—Period for Cutting—Remaining Timber—Owners of Land—Subsequent Purchase—Merger.*—After the expiration of the period of time allowed for cutting timber conveyed separate from the land has elapsed the title to the remaining timber thereon revests in the owner of the land; and where at a judicial sale of the timber the commissioner states that interest on the purchase price allowed in the deed for further extension beyond the original period would belong to the present owners of the land, they may not object that no security for this interest was given to them, when the purchasers of the timber at the sale have subsequently purchased the land itself, for then the title to the timber and the land has merged in them. As to whether the statement made by the commissioner at the sale is enforcible, *quære. Shannonhouse v. McMullan*, 239.

JUDICIAL SALES—*Continued.*

5. *Judicial Sales—Commissioner's Deed—Correction by Court—Appeal and Error—Costs.*—A commissioner appointed by the court to sell land involved in the controversy is not a party to the action and has no interest in the subject of it which will give him the right of appeal; and where an appeal of this character has been taken, the costs are taxed against the commissioner personally. *Summerlin v. Morrisey*, 409.

6. *Tenants in Common—Judicial Sales—Sale for Division—Commissioner's Deed.*—The deed of a commissioner to lands owned by tenants in common, given for a division, conveys to the purchaser the same title and estate as owned by the tenants in common, and operates as the deed from each and all of them. *Jordan v. Faulkner*, 466.

JURISDICTION. See Courts, 15; Contempt; Equity.

JURORS.

1. *Appeal and Error—Jurors—Misconduct—Findings of Fact.*—The findings of fact by the trial judge in this case as to the alleged misconduct of a juror is not reviewable. *Lewis v. Fountain, post*, 277. *Cook v. Hospital*, 250.

2. *Jurors—Misconduct Inferential—Court's Discretion—Appeal and Error.* Where it appears that a juror placed himself in surroundings that gave him an opportunity or chance for misconduct in connection with the case, without any evidence that he had in fact been guilty of it, the determination of the trial judge is conclusive on appeal as a matter within his discretion. *Lewis v. Fountain*, 277.

3. *Same—Estoppel.*—Where the appellant knows before verdict rendered that a juror had placed himself in circumstances warranting an inference of misconduct, and, having opportunity, does not then object, he is estopped to impeach the verdict afterwards rendered, on that ground. *Ibid.*

JUSTICES' COURTS. See Courts.

LACHES. See Wills; Insurance, 6; Attorney and Client.

LAST CLEAR CHANCE. See Negligence.

LETTERS. See Evidence.

LIENS. See Mechanics' Liens; Estates; Tenant in Common; Judgments.

LIMITATIONS OF ACTIONS. See Waters, 2.

1. *Corporations—Bills and Notes—Indorser—Notice of Dishonor.*—One who places his signature upon the back of a commercial paper without indication that he signed in any other capacity is deemed an indorser (Revisal, 2212), and is entitled to notice of dishonor; and the entity of a corporation being distinct, the rule applies when its directors indorse the corporate note for accommodation. *Houser v. Faysoux*, 1.

2. *Bills and Notes—Payment by Maker—Indorser—Limitations of Actions.* Payments made by the maker of a commercial paper will not repel the bar of the statute of limitations as to an indorser. *Ibid.*

LIMITATIONS OF ACTIONS—*Continued.*

3. *Deeds and Conveyances—Estates for Life—Remainder—Limitation of Actions—Adverse Possession.*—The grantor of lands, reserving a life estate to himself and for the benefit of his four daughters for their lives, conveyed the remainder to his two sons in fee, who by proper conveyances divided their interest in the lands, expressly referring therein to the reservation of the life estates. Thereafter one of the sons conveyed to the other his estate in the divided lands, and continued to live thereon with his father and sisters until their death. After the death of his father and soon after the death of his last surviving sister, his grantee brought this action for possession of the land, to which he pleaded title by adverse possession and introduced evidence tending only to show that he had lived on the lands with his sisters during their lives and used the rents and profits. *Held:* The evidence was insufficient to be submitted to the jury upon the question of defendant's adverse possession, and judgment should have been entered for the plaintiff. *Brown v. Brown*, 4.

4. *Judgments—Proceedings to Set Aside—Limitations as to Time.*—The statutes limiting the time within which motions shall be available to set aside judgment to one year applying to judgments in all respects regular, do not apply to where there has been defective service of the summons in the action or entire absence of it. *Lowman v. Ballard*, 16.

5. *Limitations of Actions—Deeds and Conveyances—Defective Execution—"Color."*—Adverse possession is sufficient to ripen title under "color" and applies where there is a defect in the execution of the instrument relied on, or it has been improperly admitted to probate. *Power Corporation v. Power Co.*, 219.

6. *Wills—Caveat—Married Women—Interpretation of Statutes—Limitation of Actions.*—The laches which will defeat the right of an heir at law of the deceased to file a caveat to his will will now also defeat the right of such who is a married woman, for she is put to her action by Revisal, sec. 408, though the statute of limitations was not repealed as to married women until 1899 (ch. 78). Under the seven-year statute of 1907 (Pell's Revisal, sec. 3135) a married woman is required to bring her action or file her caveat within three years after becoming discovert. *In re Bateman's Will*, 234.

7. *Waters—Damages—Limitations of Actions.*—Where an upper proprietor has drained, by the use of ditches ultimately emptying through a culvert, under a railroad embankment, an area of his low, swampy lands, and thereafter enlarges the ditches so as to carry such additional quantity of waste as to render the culvert inadequate and pond water upon the lands of the lower proprietor, the latter's cause of action did not accrue until the ditches were so enlarged, and the statute of limitations did not commence to run till then. *Barcliff v. R. R.*, 268.

8. *Same—Continuing Damages—Presumption of Grant—Permanent Damages.*—Where the upper proprietor has caused damages to the lands of the lower proprietor by diverting the surface waters from their natural flow, the latter, in his action, is entitled to recover such damages as accrued within three years prior to the commencement of

LIMITATIONS OF ACTIONS—*Continued.*

the action, unless there is a presumption of a grant from twenty years acquiescence, or permanent damages in an action brought within five years after the act complained of. *Ibid.*

9. *Partition—Owelty—Charge Upon Land—Life Tenant—Limitations of Actions.*—In a division of land by a voluntary deed of partition among tenants in common, subject to the life estate of another, charging one of the parts owelty in a certain sum, the ten-year statute bars the right of recovery for the charge of owelty upon the land and begins to run during the life estate to which the land is subjected. *Newsome v. Harrell*, 295.

10. *Trespass—Limitations of Actions—Separate Tracts of Land—Adverse Possession—Constructive Possession.*—In an action of trespass, where the party in possession claims title under color by adverse possession to two separate and distinct tracts of land under two deeds separately describing them, his possession of the one is not constructive possession of the other, and possession of each will have to be sufficiently shown in order to ripen the title to them both. *Lumber Co. v. Cedar Works*, 344.

11. *Limitations of Actions—Adverse Possession—Color—Outstanding Titles—Purchase—Evidence.*—A party in possession of lands under a deed may buy in an outstanding claim of title to them without acknowledging paramount title in his subsequent grantor or interrupting the continuity of possession under his first deed; and where adverse possession is sufficiently shown under his first deed, for the period of time limited, it will ripen his title under color thereof, unless he has in some way been estopped or precluded from doing so. *Ibid.*

12. *Same—Acts and Declarations—Questions for Jury.*—Where one claiming title to lands has bought in outstanding titles thereto and claims by adverse possession under his first deed, it is competent to show his acts and declarations as evidence of the character of his possession, and it is for the jury to determine upon all the evidence whether his possession continued to be adverse under the first deed and sufficient to ripen his title into a good and sufficient one during the period fixed by the statute. *Ibid.*

13. *Reformation of Instruments — Equity — Right to Reform — Estates—Limitations of Actions—Adverse Possession.*—The right to reform a deed to lands for mutual mistake is not an estate in the lands, and, when corrected, the reformed instrument cannot relate back so as to render seven years possession of the lands theretofore held by the claimant such as to ripen his title therein, as against the right of one having the connected paper title. *Cedar Works v. Lumber Co.*, 391.

14. *Water and Water Courses—Permanent Damages—Limitations of Actions—Trials—Questions for Jury.*—In an action for permanent damages to land alleged to have been caused by a wrongful diversion of the natural flow of surface waters by the upper proprietor, the statute of limitations runs within five years next before the commencement of the action from the time of the commission of the act complained of, which issue is to be determined by the jury, upon conflicting evidence. *Clark v. R. R.*, 415.

LIMITATIONS OF ACTIONS—*Continued.*

15. *Deeds and Conveyances—Contracts to Convey Lands—Bond for Title—Third Persons—"Color"—Adverse Possession—Limitations of Actions.* While the mere possession of the obligee under a bond for title or executory contract to convey lands, with full and sufficient description, will not ordinarily be held as adverse to the obligor, it is otherwise as to third persons who do not claim title under him; and, as to them, the continuance of the possession for the statutory period, under the contract, falls within the definition of "color," and will ripen the title in the claimant. *Knight v. Lumber Co.*, 452.

16. *Deeds and Conveyances—Color—Adverse Possession—Added Possession.*—Under claim of land under color, the statutory period of possession may be shown by continuity thereof of two or more of those under whom the party claims, so that added together they will be sufficient. *King v. McRackan*, 621.

LIQUIDATED DAMAGES. See Damages.

LOGGING ROADS. See Master and Servant, 1.

MAILING. See Evidence, 52.

MALICIOUS PROSECUTION.

1. *Malicious Prosecution—Without Cause—Compensatory Damages—Particular Malice—Punitive Damages.*—Compensatory damages may be recovered in an action for malicious prosecution when the criminal case had knowingly and intentionally been brought by the defendant in the civil action, without legal cause or excuse; but for the recovery of punitive, exemplary, or vindictive damages it must be shown that the defendant had been actuated by particular or actual malice, committing the act complained of willfully, maliciously, or wantonly or that he did so as the result of a reckless indifference to the rights of others. *Motsinger v. Sink*, 548.

2. *Malicious Prosecution—Probable Cause—Presumptions—Malice.*—To recover punitive damages in an action for malicious prosecution, malice and a want of probable cause must be shown; and malice may be inferred from a want of probable cause, though a want of probable cause may not be inferred from malice alone. *Ibid.*

3. *Malicious Prosecution—Probable Cause—Knowledge of Prosecutor—Reasonable Belief.*—In an action to recover damages for malicious prosecution, the want of probable cause for the criminal action must be shown from those facts and circumstances which were known to the prosecutor at the time, and if they afforded such grounds for starting the prosecution as a reasonable man under the circumstances would have acted upon, he would not be liable for damages in the civil action, though he had been inspired by malice and the defendant in the criminal action had been proven to have been innocent of the offense charged. *Ibid.*

4. *Malicious Prosecution — Vendor and Vendee — Mortgaged Property — False Pretense—Probable Cause—Trials — Evidence — Questions for Jury.*—Where the defendant in a criminal action has three separate times been indicted upon as many charges in separate indictments

MALICIOUS PROSECUTION—*Continued.*

alleged to have arisen from the defendant's having disposed of mortgaged property, in this case, a horse, and the defendant has been acquitted or found not guilty of all of the offenses charged against him, and brings his civil action for damages for malicious prosecution, introducing several affidavits and warrants in the criminal prosecution alleging false representations as to the encumbrances, which is denied by the defendant in this action, the prosecutor in the criminal one, with further evidence in his behalf that he was only acting as the agent of another in making the sale and was unaware of the existence of the mortgage. *Held:* The evidence as to probable cause is conflicting and leaves the question for the determination of the jury. *Ibid.*

5. *Same—False Pretense—Intent to Deceive.*—The mere fact that a chattel sold to another was subject to the lien of a registered mortgage does not necessarily make the seller guilty of a false pretense in receiving the purchase money, for if he had acted as the agent of another in making the sale and was unaware of the existing lien of mortgage, the elements of false pretense are lacking, *i. e.*, that the purchaser was knowingly and intentionally misled or caused to part with his money by a false representation of the seller. *Ibid.*

6. *Malicious Prosecution—False Pretense—Debt—Enforcement of Collection—Evidence.*—The fact that the prosecutor in a criminal action had instituted it in order to compel the payment of a debt by the defendant is evidence of a malicious motive in an action brought by the defendant therein against the prosecutor to recover damages for malicious prosecution. *Ibid.*

MANDAMUS.

1. *Corporation Commission—Corporate Acts—Ministerial Duties—Individual Members—Mandamus.*—The Corporation Commission acts as a body and in a corporate capacity, and an action or proceeding to compel that body to perform its ministerial duties must be brought against it in that capacity and not against its members, for its functions are not individual or personal, but corporate. Hence mandamus to compel the refund of taxes alleged to have been paid under an excessive valuation of property will not lie against two of the commissioners, as individuals. *Shoe Co. v. Travis*, 599.

2. *Courts, Power of—Official Acts—Mandamus—Injunction.*—The power of the courts over officials acting under authority of a valid statute cannot extend to enforce disobedience to the act. It is only to enforce their faithful performance of their duties that the courts can supervise them by *mandamus* or injunction. *Hargrave v. Commissioners*, 626.

MAPS. See Evidence.

MARRIAGE. See Divorce.

MARRIAGE LICENSE. See Register of Deeds.

MARRIED WOMEN. See Trusts and Trustees; Husband and Wife; Limitations of Actions; Contracts.

MASTER AND SERVANT.

1. *Master and Servant—Safe Place to Work—Duty of Master—Railroads—Logging Roads.*—The rule that an employer, in the exercise of reasonable care, must provide for his employee a safe place to do his work, and a failure of duty in this respect will constitute negligence, is very insistent in the case of railroads where a breach of such duty is not unlikely to result in serious and often fatal injuries; and logging railroads operated by steam power come within this principle and are held to the same standard of care. *Buchanan v. Lumber Co.*, 40.

2. *Same—Trials—Negligence—Evidence—Questions for Jury.*—In an action against a logging railroad company to recover damages for the wrongful death of the plaintiff's intestate there was evidence tending to show that the intestate, within the custom of all employees of the defendant, and in connection with the discharge of his duties, was riding upon the running board of the tender of the defendant's steam locomotive, and was in some way struck from his position by a limb of a tree 5 to 7 feet long, and 1½ to 2 inches in diameter, stuck into a hole on the right of way and projecting towards the roadbed at an angle of about 45 degrees, which had been thus placed for a week before, throwing him upon the track and the engine, running 3 or 4 miles an hour, running over him at about 70 to 75 feet further along; that the engine was backing at the time, and the engineer was not looking back in the direction the engine was running, and was unobservant of the intestate's danger until it was repeatedly called to his attention by persons along the right of way, whereupon he stopped his engine. *Held:* The evidence was sufficient to be submitted to the jury upon the question of defendant's negligence in permitting the limb to remain in this dangerous location and position, and whether the engineer should have perceived the intestate's danger, after he was struck from the running board, in time to have avoided killing him, under the doctrine of the last clear chance. *Ibid.*

3. *Master and Servant—Railroads—Negligence—Duty of Servant—Contributory Negligence—Proximate Cause—Trials—Questions for Jury.* The plaintiff's intestate was killed by being struck from the running board on the tender of defendant's locomotive by a projection extending from the side of the roadway, with evidence that it had been left there for a week or more, and that at the time the intestate was not holding to a hand rail placed on the tender for his greater safety, and within his easy reach. *Held:* A prayer for instruction tendered by the defendant was properly refused which instructed the jury upon the duty of the intestate, under the rule of the prudent man, to take ordinary precautions for his own safety, leaving out the question as to whether his failure or omission to perform this duty was the proximate cause of the injury, which under the circumstances of this case were properly left to the determination of the jury. *Ibid.*

4. *Master and Servant—Vice-Principal—Negligence—Contributory Negligence—Trials—Evidence—Questions for Jury.*—There being evidence in this action to recover damages against a logging road company for the wrongful death of the plaintiff's intestate, an employee on the defendant's logging road, that the intestate was struck from the running board on the tender of the locomotive by a projection alongside

MASTER AND SERVANT—*Continued.*

the track, which the defendant had negligently permitted to remain there, when he was not holding to the hand bar provided for his greater security, and conflicting evidence as to whether he was in charge of the train at the time and should have observed the danger. it is held that the question of the intestate's contributory negligence was one for the determination of the jury, involving also the existence of proximate cause. *Ibid.*

5. *Master and Servant—Children—Negligence — Trials — Nonsuit.*—In an action to recover for the death of a child 5 years of age, caused by drowning in a reservoir of the defendant cotton manufacturing plant, there was evidence tending to show that the reservoir contained 7 or 8 feet of water, coming within a few inches of the top, and that the intestate fell in while endeavoring to get a drink of water, and met his death; that the reservoir was situated near the mill and the tenement houses of the defendant's employees, in one of which lived the father of the intestate, and where their children usually played, upon a grassy place shaded by trees; that a fence 3½ or 4 feet high had been placed around the reservoir, which had rotted in places, causing openings therein large enough to admit of the passage of the children, through one of which the intestate had gone, upon this occasion, to get water, and that to the top of the wall on which the fence was situated was a gradual upward slope from the children's playground. *Held:* Sufficient to be submitted to the jury upon the issue of defendant's actionable negligence. *Starling v. Cotton Mills*, 229.

6. *Master and Servant—Children—Negligence—Trespasser.*—A 5-year-old child of an employee of a cotton mill, while on the playground used by the children of employees, in attempting to get a cup of water from a reservoir used in connection with the plant, cannot be considered a trespasser, in an action brought by his administrator to recover damages against the defendant for its negligence in not properly safeguarding the reservoir, resulting in the drowning of the intestate. *Ibid.*

7. *Master and Servant—Duty of Master—Safe Place to Work—Negligence.* Where the master fails in his duty to furnish his servant a safe place to work, which is the proximate cause of a personal injury received by him in the course of his employment, the master is answerable in damages. *Williams v. R. R.*, 360.

8. *Same—Railroads—Brakeman—Obstructions Near Track—Contributory Negligence — Trials — Evidence — Nonsuit.*—Where there is evidence that a railroad company has failed to provide a ladder at the end of a box car on its freight train, ordinarily used by its employees to reach the top of its box cars, and its brakeman, in the course of his employment, is prevented from climbing to the top of the car by the overhanging eaves of a car shed, from the position he was in after boarding the train; and that after passing from the shed at a speed of 10 or 12 miles an hour, and while climbing from his position towards the top of the car in the manner left open to him, the act of climbing requiring him to look upward, he was struck from the car by a shanty 7 feet high, 200 feet from the car shed and so close to the track as to render his passage between the car and the shanty impossible; and that the shanty could readily have been previously moved

MASTER AND SERVANT—*Continued.*

or placed by the defendant so as to have permitted the plaintiff to pass in safety. *Held:* Sufficient to be submitted to the jury upon the issue of defendant's actionable negligence in not providing the plaintiff a safe place to work; and that the courts would not hold as a matter of law that the plaintiff was guilty of contributory negligence. *Ibid.*

9. *Railroads—Master and Servant—Accident—Damnum Absque Injuria.*—The plaintiff being employed by the defendant railroad company in a gang to replace the crossties under the rails of the road, relied upon evidence in his action for damages which only tended to show the manner in which the work was done, *i. e.*, the crossties would be placed on the rail on one side of the track, pushed until the end reached the inside line of the other rail, depressed by the plaintiff in the middle of the track, so that it would go under the rail, and shoved into position by the men at the end of the tie, assisted by himself; that while thus being depressed into position his hand was caught between the end of the tie and the rail, causing the injury complained of; that the plaintiff had no explanation to make of the occurrence, except "he had his hand on the tie to bear it down, and it went over and the end flew up and caught his hand." *Held:* The injury was the result of an accident in doing work of a simple nature, not requiring more than ordinary skill and experience, with an unusual effect, almost impossible for the defendant to have guarded against, and a recovery should have been denied as a matter of law. *Lloyd v. R. R.*, 646.

MATERIALMEN. See Mechanics' Liens.

MEASURE OF DAMAGES. See Damages; Statutes.

MECHANICS' LIENS.

1. *Mechanics' Liens—Contractual Relations—Interpretation of Statutes.*—The claimants for liens for material, etc., furnished for building, under Revisal, secs. 2020 and 2021, are not only required to show, in order to establish their liens, that the materials were actually used in its construction, but that they were furnished to some one having contract relations to the work. Revisal, sec. 2019. *Brick Co. v. Pulley*, 371.

2. *Mechanics' Liens—Notice—Contract—Amount Due.*—One who has furnished material used in the construction of the building under contract with the subcontractor, by giving the proper notice to the owner is substituted to the rights of the contractor, and his lien is enforcible against any and all sums which may be due from the owner to him at the time of notice given or which are subsequently earned under the terms and conditions of the contract. Revisal, secs. 2019, 2020, 2021. *Ibid.*

3. *Same—Status of Contract.*—One furnishing material to a subcontractor, which is used in a building, who gives to the owner the notice required by statute, before payment made to the contractor, acquires a right to enforce his statutory lien, regardless of the state of the account between the contractor and the subcontractor. *Ibid.*

MECHANICS' LIENS—*Continued.*

4. *Mechanics' Liens — Contractor — Personal Judgment — Principal and Agent—Interpretation of Statutes.*—The statutory lien on a building being only enforcible to the extent of the amount due the contractor by the owner at the time of receiving the required notice, etc., a personal judgment against the contractor for materials furnished his subcontractor cannot be rendered against the original contractor unless it is established that he has been guilty of some breach of duty, under the statute, working to the claimant's prejudice, or an agency of purchase rendering him personally responsible has been otherwise established. *Ibid.*

5. *Vendor and Purchaser—Possession of Purchaser—Payment Upon Condition—Libel—Other Liens—Title—Liability of Purchaser.*—A sale of a boat having been made upon agreement that the purchaser take immediate possession and the check for purchase price be retained in the hands of a third person until the seller had canceled of record a certain mortgage on the property. *Held:* The title to the boat passed to the purchaser upon his taking possession, and upon the cancellation of the mortgage the seller was entitled to the purchase price, notwithstanding the boat had been libeled in the meanwhile and a lien thereon for damages to its cargo, while in the purchaser's possession, had been established by judgment of the court. *Brinn v. Steamboat Line*, 390.

6. *Liens — Materialmen — Notice to Owner—Subcontractor—Contractor—Status with Owner.*—Where the furnisher of material to a subcontractor has notified the owner and perfected his lien as required by the statute, secs. 2019, 2020, 2021, and it appears by admission in the pleadings in an action to enforce the lien that the owner of the building is still indebted to the principal contractor in a sufficient sum, this sum is applicable to the plaintiff's demand regardless of the state of accounts between the contractor and the subcontractor. *Brick Co. v. Pulley, ante*, 371. *Powell v. Lumber Co.*, 632.

MERGER. See Evidence; Deeds and Conveyances, 16.

MINORS. See Negligence.

MISTAKES. See Reformation.

MORTGAGES. See Malicious Prosecution; Vendor and Purchaser, 5; Pleadings; Insurance.

1. *Mortgages—Assignment—Intent—Trusts—Power of Sale.*—It is necessary that the assignment of a note and mortgage on real estate should operate upon the land described in the mortgage in order that the power of sale, which is appendant or appurtenant to the legal title, may pass to the assignee; otherwise the legal title, with the power of sale, will remain in the mortgagee, and the assignment will only operate to transfer the note, which carries with it the security of the mortgage. *Weil v. Davis*, 298.

2. *Mortgages—Assignment—Inartificially Drawn—Intent.*—In construing an assignment of a note and a mortgage security of real estate the courts will regard the entire instrument to ascertain and uphold the intent of the grantor, as in other conveyances; and where the intent

MORTGAGES—*Continued.*

to assign the title to the lands with power of sale clearly appears from such construction, it will not be defeated because the assignment has been inartificially drawn. *Ibid.*

3. *Same—Power of Sale—Purchaser—Legal Title.*—An assignment of a note and mortgage on land to a trustee, expressly referring to the lands described in the mortgage as a part of the consideration and as "the premises therein conveyed," using words of inheritance in connection with the thing conveyed, with the assignor's covenant of seizin, viz., that he is seized "of the premises in fee and has the right to convey the same," also expressly setting forth that "the grant shall carry full power and authority to sell the lands and apply the proceeds to the payment of the debt," etc. *Held:* The intent of the assignor as gathered from the language employed was not only to assign the mortgage as a security, but also to convey to the assignee the legal title to the same extent and as fully as was conveyed to him, the assignor, in the mortgage, and necessarily included the power of sale; and when the sale was made, in accordance with the provisions of the mortgage, and the law, the purchaser acquired a good title. *Ibid.*

4. *Mortgages, Chattel — Conditional Sale — Parol Agreements.* — A parol mortgage or conditional sale of a chattel is valid and enforcible. *Brown v. Mitchell*, 312.

5. *Mortgages—Foreclosure—Mortgagee—Trusts.*—The right of a mortgagee to foreclose under a power of sale given in mortgage of lands, recognized here, and regulated by our statute, to some extent (Revisal, secs. 1040-1042 *et seq.*), requires in its exercise the utmost degree of good faith, the mortgagee being regarded as a trustee for the owner as well as the creditor. *Owens v. Mfg. Co.*, 397.

6. *Same—Assignee of Mortgage—Voidable Sales—Purchasers.*—Where the mortgagee of land purchases at his own sale, either directly or indirectly, the transaction, as between the parties and at the election of the mortgagor, is ineffective as a foreclosure, without the necessity of showing actual fraud, and continues the relationship of mortgagor and mortgagee under the terms of the instrument; and this principle applies to the assignee of the mortgage, or the debts secured by it, when it is shown that he or his agent or attorney was in control or charge of the sale. *Ibid.*

7. *Mortgages — Foreclosure — Voidable Sales—Mortgagee in Possession—Waste—Equity—Accounting.*—Where the foreclosure under a mortgage is rendered ineffectual by the purchase of the lands by the mortgagee, or his assignee, at the foreclosure sale, who has taken over the property and holds it, he is held to account to the mortgagor for spoil and waste done upon the lands which he has committed or intentionally authorized, while in his possession. *Ibid.*

8. *Mortgages—Voidable Sales—Waste—Accord and Satisfaction—Trials—Questions for Jury.*—The question of accord and satisfaction by the mortgagor's accepting a reconveyance of the land by the mortgagee in possession, under the circumstances of this case, was properly submitted to the jury under conflicting evidence and a correct instruction from the court. *Ibid.*

MORTGAGES—*Continued.*

9. *Bills and Notes—Mortgages—Registration—Void Notes.*—Where a note is delivered upon conditions which are not fulfilled, and the note is consequently void, a mortgage given upon lands securing the note is also void as between the original parties, and the fact that the mortgage was recorded cannot avail anything. *Foy v. Stephens*, 438.

10. *Mortgages—Power of Sale—Conversion—Damages.*—Where a mortgage of real and personal property contains no power of sale as to the latter, a seizure and sale thereof by the mortgagee amounts to a conversion, making him liable for their actual value, and also for the value of his use of the chattels. *Warren v. Susman*, 457.

11. *Mortgages — Trusts and Trustees — Sales — Mortgagee a Purchaser—Equity—Election.*—The mortgagee with relation to the mortgaged premises is regarded as a trustee for the mortgagor, and at the sale of foreclosure, under a power contained in the instrument, is not permitted to speculate upon his trust or make an unfair profit out of it; and when he has become the purchaser at his own sale, it is optional with the mortgagor to have the transaction set aside and the property returned to the trust fund; and if the trustee insists upon the validity of the sale and has conveyed the property to a third person, who, as he insists, is an innocent purchaser for value and has acquired an absolute title, the mortgagor may recover the value of the land thus conveyed or a fair compensation for the breach of the trust. *Ibid.*

12. *Same—Principal and Agent.*—Where one acting as an agent for the mortgagee has purchased the mortgaged property at a foreclosure sale on behalf of his principal, the same equities apply as where the mortgagee himself has become the purchaser. *Ibid.*

13. *Same—Appeal and Error.*—Where a mortgagee has bid in the mort gaged property at his foreclosure sale, and in the mortgagor's action against him for the breach of his trust in so doing, the trial proceeds only upon the theory that a fair compensation or the value of the property can be recovered, with allegation and proof sufficient to sustain it, instead of the restoration of the property itself to the mortgagor, the Supreme Court, on appeal by the mortgagee from an adverse judgment, will pass upon the case as it was tried in the lower court. *Ibid.*

14. *Mortgages—Trusts and Trustees—Sales—Mortgagee a Purchaser—Equities.*—While in exceptional cases a mortgagee may be permitted to bid in mortgaged property at his own foreclosure sale to avoid loss to himself and the mortgagor, it must be done in good faith and in recognition of the mortgagor's right to avoid the sale, if he elects to do so; and where the mortgaged property consists of land and mules, the inadequate price, brought by the latter, to pay the debt, will not alone justify the mortgagee in bidding in the land at his own foreclosure sale, and deny to the mortgagor his right to declare the sale void. *Ibid.*

15. *Deeds and Conveyances—Mortgages—Foreclosure Sales—Purchasers for Value—Trials—Evidence—Verdict, Directing—Burden of Proof.*—The plaintiff claims a one-half interest in the lands in dispute from the

MORTGAGES—*Continued.*

ancestor of both parties to the action, who acquired title by deed given at a foreclosure sale which was not registered, the mortgage appearing of record to have been canceled, but the time not stated; and the defendant claims by a subsequent deed from the mortgagor, as a purchaser for value; and it is held for error that the trial judge charged the jury upon the evidence to answer the issue in defendant's favor, the burden of proof being on the defendant to show he was such purchaser by the preponderance of the evidence, and the character of his testimony being inconsistent and improbable under the circumstances narrated by him; and it is further held that the registration of the deed obtained at the foreclosure sale was not necessary to the title to the lands, as between the parties. *Hughes v. Fields*, 520.

16. *Judgments—Presumptions—Mortgages — Interpretation of Statutes.* — Revisal, secs. 574, 575, providing that all judgments entered during the term of court shall relate to the beginning of the term, and be deemed to have been then entered, will not apply where it will affect the rights of innocent *bona fide* purchasers for value under a conveyance of lands, and registered during the term of court at which the judgment had been obtained. *Fowle v. McLean*, 537.

17. *Mortgages — Purchasers for Value — Preëxisting Debt.*—The principle that a mortgage given for a present loan of money constitutes the mortgagee a purchaser for value generally obtains in reference to mortgages and deeds of trust to secure past indebtedness. Revisal, secs. 961-964. *Ibid.*

18. *Same—Principal and Surety—Equity—Subrogation.*—Judgment having been rendered against the principal on a note and H., one of his sureties, H. and K. mortgaged their interest in certain standing timber, and thereafter judgment was rendered against K. and M., sureties on the same note; the mortgage of H. and K. was registered at the same term of the court at which the second judgment was rendered, but prior in point of time. M. paid the judgment creditor and had the judgment assigned to a third person to his use. The plaintiff was the purchaser at the sale under the mortgage. *Held:* M., the surety who had paid the judgment, is subrogated to the rights of the judgment creditor, and holds a lien prior to that of the mortgage on the interest of H. in the timber, but not on that of K., for as to K. the mortgage is regarded as having been registered before the rendition of the judgment. *Ibid.*

19. *Mortgages—Bills and Notes—Stipulations by Mortgagor—Acceptance by Mortgagee—Estoppel.*—Where the seller of lands has drafted and sent to the purchaser a note secured by a mortgage thereon, who by interlineation in both excludes personal liability and returns them to the seller, who keeps them without objection, forecloses the mortgage, applies the proceeds of sale to the note, and then sues for the balance due, he will not be permitted to retain the benefits of the transaction and repudiate the contract in part; for having accepted the papers with the material change therein, he will be estopped, in the absence of fraud, by his own acts of acquiescence. *Chilton v. Groome*, 639.

MOTIONS. See Judgments, 1; Appeal and Error, 5; Indictment, 9.

MUNICIPAL CORPORATIONS. See Health.

1. *Railroads—Bond Issues—Township Subscriptions—Principal and Agent —County Commissioners — Conditional Subscription — Unauthorized Acts.*—Under a statute authorizing the submission to the voters of townships, etc., along the line of a proposed railroad, the proposition to subscribe in bonds to the undertaking, declaring the county commissioners to be the agents of the townships for the purposes of the act, which was accordingly done, but upon conditions expressed in writing between the railroad company and a trust company, advertised before the election in connection with the proposition to subscribe, that the bonds should be held by the trust company and delivered to the board of county commissioners for cancellation should the railroad not be in operation to a stated extent in three years, between certain points on another railroad or railroads, *it is held* that the condition upon which the issuance of the bonds was approved by the voters became binding between the parties thereto, and though the county commissioners were acting as the corporate and governmental agents of the voters, they were without authority to alter, in any substantial particular, the proposition as submitted and approved, and therefore their act in further extending the time for the completion of the road beyond that specified was ineffectual. *McCracken v. R. R.*, 62.

2. *Railroads—Bond Issues—Township Subscriptions—Contracts—Estoppel.* Where there is nothing in a statute authorizing counties, townships, etc., to submit to the qualified voters therein the proposition of subscribing to a proposed railroad, which prohibits the vote being taken upon certain lawful conditions, not expressed in the statute, and the railroad company had theretofore entered into a written agreement with a trustee that the bonds should be held by it and delivered upon the stated conditions, which were of importance in voting upon the question proposed, the railroad company, having agreed to the conditions contained in the contract, is estopped to question their validity. *Ibid.*

3. *Railroads — Counties and Towns—Bond Issues—Conditional Subscription—Contracts—Equity—Time of the Substance—Conditions Precedent—Enforcement.*—Where a statute authorizes the submission to the voters of townships along the line of a proposed railroad the question of subscribing thereto, and creates the board of county commissioners agents of the townships for the purpose, and the voters have approved the proposition upon condition, among other things, that the proposed railroad should be in operation within three years, the period stated is of the substance of the contract, and will be strictly enforced, whether regarded as a condition precedent or subsequent, without power of county commissioners to change or modify it; and the principles of equity relating to relief against forfeitures or penalties have no application; and *it is further held*, the condition provided in this case was a condition precedent, where strict performance may be insisted on. *Ibid.*

4. *Contracts—Conditions—Part Performance—Equity—Money Expended.* Under the facts of this case *it is held* that the defendant railroad company is not entitled to consideration in equity upon the grounds that it had expended money upon a proposed railroad to which certain

MUNICIPAL CORPORATIONS—*Continued.*

townships had voted to subscribe, upon certain conditions, which the defendant had failed to perform, among them, that the road should be operated from certain points within three years. *Ibid.*

5. *Municipal Corporations — Ordinances — Railroads — Stopping Trains—Penalties—Rights and Remedies—Interpretation of Statutes.*—Where a particular offense is created by a valid statute or town ordinance, which is otherwise lawful, and the penalty for its commission is prescribed, the court is confined to that particular remedy, to the exclusion of others; and where a town ordinance regulating the running of trains within its borders prescribes that "no railroad company nor engineer in charge of any train of any railroad company shall . . . block any street crossing for a longer period than ten minutes, and any engineer in charge of any train or locomotive of any railroad company violating any provision of this section shall be fined not more than $10 for each and every offense," etc., the remedy, by the clearly expressed intent of the ordinance, is confined to imposing the penalty upon the engineer, who, having charge of the train, has committed the offense specified. *S. v. R. R.*, 103.

6. *Municipal Corporations—Cities and Towns—Insanitary Lockup—Damages—State Offense—Liability.*—The act of a city's chief of police in causing the incarceration of one violating the laws of the State, and not of the city, in the insanitary lockup of the city, when unauthorized on the part of the city, does not make the latter responsible in damages for a consequent injury to the health of the prisoner; the right of action existing only against the chief of police. *Hobbs v. Washington*, 293.

7. *Municipal Corporation — Cities and Towns — Theft of Boat — State Offense.*—The theft of a boat upon a river from the wharf of a city is an offense against the State, and the thief, after arrest, should be incarcerated in the county jail, and not in the city lockup. *Ibid.*

8. *Municipal Corporations — Police Officers—Unlawful Arrest—Warrants for Arrest.*—The arrest of a person by an officer without a warrant is allowed upon emergency (Revisal, secs. 3176-8), but a warrant must be procured as soon thereafter as possible (Revisal, sec. 3182); and, under the circumstances of this case, it appearing that this was not done, the officer responsible for the arrest is personally answerable in damages. *Ibid.*

9. *Municipal Corporations—Cities and Towns—Streets—Public Uses—Private Rights.*—The public streets of a city are dedicated to the public and for public use, and though subject to the control and management of the city authorities, they have not the power, generally speaking, to grant an easement or right other than of a public nature. *Guano Co. v. Lumber Co.*, 337.

10. *Same—Nuisance—Injunction.*—Where a private enterprise has been given by a city the right to erect and use an electric trolley or hoist, for transporting its wares across a public street, 12 feet above the ground, and a permanent injunction is sought by the plaintiff, with evidence tending to show it was a serious detriment to his business in the use of the street, having the effect of frightening horses and dangerous to others using the street, *it is held* that such use of the

MUNICIPAL CORPORATIONS—*Continued.*

street is a nuisance, that the evidence raises a serious question, and that a restraining order should be continued to the final hearing. *Ibid.*

11. *Cities and Towns—Paving Streets—Street Railways—Cost of Paving—Direct Liability — Interpretation of Statutes.*—Where legislative authority is given a city to pave its streets and to assess one-third of the cost against the property owners on each side thereof, with the further provision that whenever a railroad or street railway is located thereon it may be required to grade and pave that portion of the street to a certain width, etc., constituting the cost a charge against the railroad, etc., to be collected by appropriate action, the charge against the company should be regarded as a primary liability which will relieve the owners upon the street where the railway is located, as well as the city, of that part of the expense. *Morris v. Hendersonville*, 400.

12. *Cities and Towns—Streets—Moving Houses—Wire Companies—Overhead Obstructions—Damages.*—The plaintiff attempted to move a house he had purchased, along the streets of an incorporated town, from one location to another, under the provisions of an ordinance of the town and by permission of the proper authorities, and also under promises of the local manager of a telephone company, operating its overhead wires and cables on the street, that the company would arrange for the passage of the house where the wires of the company would otherwise prevent. The failure of the company to fulfill its promise except at a heavy expense to the plaintiff prevented him from passing the cables and wires of the company and forced him to sell the house, to be used in a different place, at a loss. *Held:* The telephone company was answerable in damages. Discussion of advisability of requiring telephone and telegraph companies to place their wires underground. *Weeks v. Telephone Co.*, 468.

13. *Municipal Corporations — Condemnation—Statutory Authority—Unauthorized Acts.*—A municipal corporation may not exercise the power of eminent domain in acquiring lands of private owners for street purposes unless the same is expressly conferred by statute or by clear or necessary implication from its terms. *Lloyd v. Venable*, 531.

14. *Same—Damages—Compensation.*—Where a municipal corporation has taken the lands of a private owner for street purposes under an unauthorized attempt to acquire it by condemnation, the latter may waive the tort and resort to his common-law action for compensation. *Ibid.*

15. *Same—Tort—Waiver.*—Where a municipal corporation has assumed to take lands of a private owner for street purposes without his consent or legislative authority for condemnation, the latter may waive the tortious entry and want of power to condemn, and recover upon an implied *assumpsit*, on the part of the town, to pay a just and reasonable compensation. *Ibid.*

16. *Municipal Corporations—Unauthorized Acts—Condemnation—Statutory Authority—Consent of Owner.*—The express or implied consent of the owner of lands that they may be taken by a municipality for street

MUNICIPAL CORPORATIONS—*Continued.*

purposes will have the force and effect of a transfer to the municipality of the property thus taken; and where he sues to recover compensation therefor he will not be heard to assert otherwise. *Ibid.*

17. *Municipal Corporations—Condemnation—Unauthorized Acts—Evidence —Value of Lands—Appeal and Error—Harmless Error.*—In this action to recover damages of a municipality for the unlawful appropriation of the plaintiff's lands for street purposes, testimony of a price offered by a witness for plaintiff's land, if not competent as substantive evidence, was only admitted for the purpose of contradicting him or impeaching his estimate of its value, and is not held as reversible error on defendant's appeal. *Ibid.*

18. *Trials — Issues, Sufficient — Appeal and Error.*—Issues raised by the pleadings and evidence which are sufficient to present all controverted matters will not be held erroneous on appeal. *Ibid.*

19. *Municipal Corporations—Condemnation—Unauthorized Acts — Compensation—Agreement—Estoppel—Appeal and Error.*—The defendant, a municipal corporation, which had attempted to appropriate a part of the plaintiff's land for street purposes by condemnation without legislative authority, cannot rely, on appeal, upon an agreement alleged to have been made with the plaintiff, as an estoppel, when it appears that the question as to the existence of an agreement was properly decided by the jury in the plaintiff's favor. *Ibid.*

20. *Municipal Corporations—Condemnation—Appropriation Unauthorized— Compensation—Measure of Damages.*—The measure of damages to the plaintiff for the unlawful appropriation of a part of the lands for street purposes by a municipal corporation is the value of the lands taken, subject to the diminution in value to the remainder or the difference in value before and after the street was opened. *Ibid.*

21. *Parties—Court's Discretion—Tort-Feasors—Municipal Corporations— Excavation—Degrees of Liability.*—Where a municipality permits a property owner to excavate along the sidewalk of its streets, who, while the excavation is being dug, surrounds it with a fence, which gives way while a pedestrian is leaning thereon, who, being injured, brings his action against the city alone for alleged negligence in permitting a dangerous condition to exist, the negligent act of the property owner would be antecedent, in point of time, to that of the city, in failing to exercise a proper degree of supervisory care; and the liability of the city is secondary to that of the property owner who caused the excavation to be made. *Guthrie v. Durham*, 573.

22. *Water Companies—Contracts with City—Rights of Citizens—Fire Damage.*—A citizen whose property has been destroyed by fire may recover damages of a water corporation for a breach of its contract with the city "to afford a supply of water for the use of the citizens—and protection from fire," when the damages were proximately caused thereby. *Gorrell v. Water Co.*, 124 N. C., 328, cited and sustained. *Morton v. Water Co.*, 582.

23. *Same — Decisions — Corporation Charter — Implied Provisions.* — The right of a citizen and taxpayer to recover for the loss of his property by fire caused by the failure of a water corporation to perform its

MUNICIPAL CORPORATIONS—*Continued.*

contract with the city to furnish a supply of water for fire protection, impliedly incorporates within the provisions of its charter the law then existing; and in this action for damages for destruction by fire, it appearing that *Gorrell v. Water Co.*, 124 N. C., 328, had been decided some two years before the defendant had acquired its charter, it acquired its charter rights subject to the doctrine therein announced by the Supreme Court. *Ibid.*

24. *Water Companies — Contract with City — Breach—Damage by Fire—Other Fires.*—Where a citizen sues a water company for damages from fire alleged to have been caused by the failure of the defendant to supply the agreed quantity of water for fire protection under a contract with the city, and the evidence thereon is conflicting, it is competent for the plaintiff to show that the defendant had failed to thus supply water at other fires which had occurred under ordinary and usual conditions. *Ibid.*

25. *Municipal Corporations — Cities and Towns — Governmental Duties — Health — Negligence—Personal Injury—Damages.*—Negligent acts of the employees of a municipality which cause personal injuries are not ordinarily actionable against the city, when done in pursuance of authority conferred on the city by law for the public benefit; and where such employees have collected trash and garbage from the premises of its citizens, and burn the trash on the city lot, and the dress of a child, left with other children on the lot, catches fire, resulting in her death, the negligence of the employees in charge, if any, arises from the performance by the city of a governmental function for the preservation of health, and there being no statutory liability imposed upon the city in such matters, it cannot be held to respond in damages in an action to recover them. *Hines v. Rocky Mount*, 162 N. C., 409, where the wrongful acts are held to amount to a taking of private property in injuring the value of lands, etc., cited and distinguished. *Snider v. High Point*, 608.

MUTUAL BENEFIT. See Insurance.

MUTUAL MISTAKE. See Contracts; Equity.

NECESSARIES. See Contracts, 6, 7.

NEGLIGENCE. See False Imprisonment; Waters; Telegraphs; Electric Companies.

1. *Vendor and Purchaser—Breach of Warranty—New Consideration—Bailment—Negligence.*—The purchaser of a sideboard received and paid for it, and thereafter, discovering defects therein, agreed with the seller that the latter should take the property back and make it as warranted, and while the article was in the possession of the seller for that purpose it was destroyed by fire. *Held:* The title to the property remained in the purchaser, and its return to the seller made the latter a bailee for hire, upon a mutual consideration moving between the parties in adjustment of the matters in dispute arising from an alleged breach of the seller's warranty of the sideboard, making him liable to the purchaser for ordinary negligence in not taking care of the article, under the rule of the ordinarily prudent man. The law relating to the mutual rights of bailor and bailee,

NEGLIGENCE—*Continued.*

with respect to negligence, benefits received, and the care required by the latter under varying circumstances, discussed by WALKER, J. *Hanes v. Shapiro*, 24.

2. *Bailment—Destruction of Property—Negligence—Damages.*—Ordinarily the liability of a bailee depends upon the question of his negligence, where the property has been destroyed while in his possession; and when his negligence has been properly established, he is liable in damages to the bailor for the full amount thereof, when the latter is not in fault. *Ibid.*

3. *Bailment—Damages—Negligence—Proximate Cause.*—Negligence of a bailee, which makes him responsible in damages to the bailor for the loss or destruction of the property, is defined generally as a breach of his duty to exercise commensurate care under the surrounding circumstances, and to be actionable, it must proximately result in the injury for which damages are claimed. Slight, ordinary, and gross negligence discussed and defined by WALKER, J. *Ibid.*

4. *Telegraphs — Commerce — Stipulations on Message—Limitation of Liability — Negligence — State's Decisions.*—Where a telegraph company receives a telegram for transmission from another state via a point in this State to its destination here, and attempts to deliver it by telephone, the only means of wire communication between the latter points, which could reasonably have been done in time to have avoided the injury complained of, it is liable for its negligence in that respect; and the latter transaction being intrastate, the decisions of our own courts are alone applicable which declares to be invalid a printed stipulation on the message, that a recovery beyond $50 could not be had unless an extra charge had been paid for having the telegram repeated, etc. And *it is further held* that had the message been an interstate transaction, the result would be the same, under authority of *Tel. Co. v. Milling Co.*, 218 U. S., 406. *Young v. Telegraph Co.*, 36.

5. *Master and Servant—Railroads—Negligence—Duty of Servant—Contributory Negligence—Proximate Cause—Trials—Questions for Jury.* The plaintiff's intestate was killed by being struck from the running board on the tender of defendant's locomotive by a projection extending from the side of the roadway, with evidence that it had been left there for a week or more, and that at the time the intestate was not holding to a handrail placed on the tender for his greater safety, and within his easy reach. *Held:* A prayer for instruction tendered by the defendant was properly refused which instructed the jury upon the duty of the intestate, under the rule of the prudent man, to take ordinary precautions for his own safety, leaving out the question as to whether his failure or omission to perform this duty was the proximate cause of the injury, which under the circumstances of this case were properly left to the determination of the jury. *Buchanan v. Lumber Co.*, 40.

6. *Master and Servant—Vice-Principal—Negligence—Contributory Negligence—Trials—Evidence—Questions for Jury.*—There being evidence in this action to recover damages against a logging road company for the wrongful death of the plaintiff's intestate, an employee on the

NEGLIGENCE—*Continued.*

defendant's logging road, that the intestate was struck from the running board on the tender of the locomotive by a projection alongside the track, which the defendant had negligently permitted to remain there, when he was not holding to the hand bar provided for his greater securing, and conflicting evidence as to whether he was in charge of the train at the time and should have observed the danger, *it is held* that the question of the intestate's contributory negligence was one for the determination of the jury, involving also the existence of proximate cause. *Ibid.*

7. *Master and Servant—Children—Negligence—Trials—Nonsuit.*—In an action to recover for the death of a child 5 years of age, caused by drowning in a reservoir of the defendant cotton manufacturing plant, there was evidence tending to show that the reservoir contained 7 or 8 feet of water, coming within a few inches of the top, and that the intestate fell in while endeavoring to get a drink of water, and met his death; that the reservoir was situated near the mill and the tenement houses of the defendant's employees, in one of which lived the father of the intestate, and where their children usually played, upon a grassy place shaded by trees; that a fence 3½ or 4 feet high had been placed around the reservoir, which had rotted in places, causing openings therein large enough to admit of the passage of the children, through one of which the intestate had gone, upon this occasion, to get water, and that to the top of the wall on which the fence was situated was a gradual upward slope from the children's playground. *Held:* Sufficient to be submitted to the jury upon the issue of defendant's actionable negligence. *Starling v. Cotton Mills,* 229.

8. *Master and Servant—Children—Negligence—Trespasser.*—A 5-year-old child of an employee of a cotton mill, while on the playground used by the children of employees, in attempting to get a cup of water from a reservoir used in connection with the plant, cannot be considered a trespasser, in an action brought by his administrator to recover damages against the defendant for its negligence in not properly safeguarding the reservoir, resulting in the drowning of the intestate. *Ibid.*

9. *Contributory Negligence—Children—Trials—Questions of Law.*—Under the circumstances of this case *it is held* that a 5-year-old boy is too young to be guilty of contributory negligence. *Ibid.*

10. *Railroads—Killing of Animals—Interpretation of Statutes—Negligence —Presumptions—Legal Excuse.*—Unless some legal excuse is shown for not bringing an action against a railroad company for the killing of the plaintiff's cow by the defendant's train within six months from the time of the killing, there is no presumption of negligence on the defendant's part under the statute, Revisal, sec. 2645; and the statement of some one not having authority to speak for the railroad company, that it was not necessary to bring the action within the period of time stated, is not a sufficient or legal excuse for the delay. *Fleming v. R. R.,* 248.

11. *Railroads—Killing of Animals—Interpretation of Statutes—Negligence —Evidence — Rebuttal—Trials—Nonsuit.*—The presumption of negli-

NEGLIGENCE—*Continued.*

gence on the part of a railroad company in killing an animal on its track by its train may be rebutted; and where the plaintiff has introduced, as his own witness, the defendant's engineer who was on the engine at the time of the killing, and who testifies, in effect, that with proper care the killing of the animal could not have been avoided under the circumstances, particularizing the details, and there being no further evidence in the plaintiff's behalf, a judgment of nonsuit is properly allowed. *Ibid.*

12. *Railroads—Killing of Animals—Negligence—Expressions of Opinion—Res Gestæ.*—The expression of an unidentified person that the defendant railroad company had been guilty of negligence in running upon and killing with its train the defendant's cow, made after the occurrence, is incompetent as tending to show that the killing was negligently done, as his privity with defendant and his authority to bind it had not been shown, and as it was a statement of a past transaction, and not a part of the *res gestæ*. *Ibid.*

13. *Negligence—Contributory Negligence—Last Clear Chance.*—Where in an action to recover damages for a personal injury received by being run upon by the train of defendant railroad company, contributory negligence of the plaintiff is shown, under evidence justifying it, an issue as to the last clear chance should be submitted to the determination of the jury, and it is error for the trial judge to so modify an issue tendered by the plaintiff that it limits the inquiry to the time after the perilous condition of the plaintiff was discovered. *Cullifer v. R. R.*, 309.

14. *Master and Servant—Duty of Master—Safe Place to Work—Negligence.* Where the master fails in his duty to furnish his servant a safe place to work, which is the proximate cause of a personal injury received by him in the course of his employment, the master is answerable in damages. *Williams v. R. R.*, 360.

15. *Same—Railroads—Brakeman—Obstructions Near Track—Contributory Negligence — Trials — Evidence — Nonsuit.*—Where there is evidence that a railroad company has failed to provide a ladder at the end of a box car on its freight train, ordinarily used by its employees to reach the top of its box cars, and its brakeman, in the course of his employment, is prevented from climbing to the top of the car by the overhanging eaves of a car shed, from the position he was in after boarding the train; and that after passing from the shed at a speed of 10 or 12 miles an hour, and while climbing from his position towards the top of the car in the manner left open to him, the act of climbing requiring him to look upward, he was struck from the car by a shanty 7 feet high, 200 feet from the car shed and so close to the track as to render his passage between the car and the shanty impossible; and that the shanty could readily have been previously moved or placed by the defendant so as to have permitted the plaintiff to pass in safety. *Held:* Sufficient to be submitted to the jury upon the issue of defendant's actionable negligence in not providing the plaintiff a safe place to work; and that the courts would not hold as a matter of law that the plaintiff was guilty of contributory negligence. *Ibid.*

NEGLIGENCE—*Continued.*

16. *Carriers of Passengers—Intention to Become a Passenger.*—One who has gone into a passenger station of a railroad company and is waiting for the coming of his train, in the room provided for the purpose, with the intent to become a passenger thereon, is entitled to the rights of a passenger. *Leggett v. R. R.*, 366.

17. *Carriers of Passengers—Negligence—Passenger Depots—Duty of Carrier—Safety of Passenger—Lights at Night.*—Common carriers are held to a high degree of care in providing, at their passenger stations, places and conditions by which passengers may board and alight from their trains in safety; and where a passenger received an injury at night, while attempting to board his train from an unguarded platform at a passenger depot, along which the track runs, the failure of the carrier to provide sufficient light is evidence of its actionable negligence. *Ibid.*

18. *Carriers of Passengers—Passenger Depots—Lights at Night—Contributory Negligence—Trials—Questions for Jury.*—Under the circumstances of this case, the mere fact that a passenger attempted to board defendant's train at night from an insufficiently lighted platform cannot be held to bar his recovery as a matter of law, on the question of his contributory negligence. *Beard v. R. R.*, 143 N. C., 136; *Darden v. Plymouth*, 166 N. C., 492, cited and applied. *Ibid.*

19. *Negligence—Wrongful Death—Cause of Death—Trials—Questions for Jury.*—In an action by an administrator to recover damages for the negligent killing of his intestate, when the evidence is conflicting as to whether the injury complained of caused the death, the issue of fact therein raised is for the determination of the jury. *Ibid.*

20. *Contracts to Convey—Mistake—Negligence.*—Where both parties to a contract to convey lands honestly supposed that a large body of timber was growing thereon, when in fact it was on an adjoining tract of land and the supposed purchaser brings his action to recover the damages he has sustained for the inability of the vendor to make the deed contemplated by the contract, and it appears that the vendor had informed the purchaser, at the time, that he was personally unacquainted with the boundaries, and that his title had come to him by devise or descent, and the title deeds were in the possession of others, *it is held* that, under the facts stated, the principle of culpable negligence will not apply to the vendor so as to deny him the defense that no agreement had been made, and to avoid the payment of the damages sought in the action. *Lumber Co. v. Boushall*, 501.

21. *Railroads—Negligence—Pedestrians—Helpless Condition—Trials—Evidence—Questions for Jury.*—In an action against a railroad company to recover for the wrongful death of plaintiff's intestate (Revisal, sec. 59), there was evidence that the intestate was last seen, intoxicated, going towards his home on the defendant's railroad track, on a bright moonlight night, and that the defendant's train thereafter passed going the same direction, with its engine equipped with an old-fashioned headlight and without ringing the bell or giving other warning of its approach, though its track at that place was through a populous portion of a town and customarily used by pedestrians; that from the injuries to the body of the deceased, etc., and from

NEGLIGENCE—*Continued.*

flesh and blood along the track, the body had been rolled along under the train across a 40-foot trestle, the severed head being at one end of the trestle and the body at the other end, and articles he had been carrying home being strewn along the side of the track; that the engine was equipped with a V-shaped cowcatcher, the bottom of which was about 8 inches from the ground. *Held:* Evidence sufficient to be submitted to the jury upon the question of whether the intestate at the time he was killed was down and helpless upon the track, and the actionable negligence of the defendant's engineer in not seeing him in time to have avoided killing him in the exercise of proper care. *Barnes v. R. R.*, 512.

22. *Railroads — Electric Headlights—Negligence—Pleadings—Trials—Burden of Proof—Interpretation of Statutes.*—It is negligence for a railroad company not to equip its locomotives with electric headlights (Pell's Revisal, sec. 2617, a), with the burden on the company to plead and prove that it had one in use at the time complained of or that its use was excepted by the statute, when relevant to the inquiry. *Ibid.*

28. *Railroads — Negligence — Construction of Railroad Yards — Rules of Safety — Trials — Instructions — Appeal and Error.*—In an action brought against a railroad company for the negligent killing of plaintiff's intestate, alleged to have been caused by a horse becoming frightened at the noise and steam issuing from defendant's steam engine and running upon the intestate, there was further allegation that the defendant's railroad yard was not constructed or laid out properly for the safety of those having business there, and that proper rules for that purpose had not been made for or observed by the defendant's employees there, but without sufficient evidence tending to prove these further allegations. *Held:* A charge of the court interwoven with instructions bearing upon the negligent construction of the railroad yards and the question of proper rules, is misleading and constitutes reversible error. *Witte v. R. R.*, 566.

29. *Negligence—Circumstantial Evidence—Sufficiency.*—Where negligence is alleged as the basis of an action it may be proven by circumstantial evidence, and while it must do more than raise a possibility or conjecture, the plaintiff is entitled to have it submitted to the jury if, after a fair consideration, the more reasonable probability is in favor of the plaintiff's contention. *McRainey v. R. R.*, 570.

30. *Same—Railroads—Fires.*—In an action to recover damages for loss by fire alleged to have originated from a spark from the locomotive of defendant railroad company igniting combustible matter upon its rights of way and then passing to the plaintiff's lands, evidence of the defendant's negligence is sufficient to be submitted to the jury which tends to show that defendant's train passed the place about three hours before the fire was first seen, the fire had burned slowly two or three hundred yards in a swamp, and finally passing through to the plaintiff's lands, going in the direction of the wind and widening out from the defendant's roadway and indicating it had originated thereon; and that the only other evidence of a fire in that locality was a small one in the woods five or six days before. *Ibid.*

NEGLIGENCE—*Continued.*

31. *Municipal Corporations — Cities and Towns — Governmental Duties— Health — Negligence—Personal Injury—Damages.*—Negligent acts of the employees of a municipality which cause personal injuries are not ordinarily actionable against the city, when done in pursuance of authority conferred on the city by law for the public benefit; and where such employees have collected trash and garbage from the premises of its citizens, and burn the trash on the city lot, and the dress of a child left with other children on the lot catches fire, resulting in her death, the negligence of the employees in charge, if any, arises from the performance by the city of a governmental function for the preservation of health, and there being no statutory liability imposed upon the city in such matters, it cannot be held to respond in damages in an action to recover them. *Hines v. Rocky Mount*, 162 N. C., 409, where the wrongful acts are held to amount to a taking of private property in injuring the value of lands, etc., cited and distinguished. *Snider v. High Point*, 608.

32. *Railroads—Master and Servant—Accident—Damnum Absque Injuria.*— The plaintiff being employed by the defendant railroad company in a gang to replace the crossties under the rails of the road, relied upon evidence in his action for damages which only tended to show the manner in which the work was done, *i.e.*, the crossties would be placed on the rail on one side of the track, pushed until the end reached the inside line of the other rail, depressed by the plaintiff in the middle of the track, so that it would go under the rail, and shoved into position by the men at the end of the tie, assisted by himself; that while thus being depressed into position his hand was caught between the end of the tie and the rail, causing the injury complained of; that the plaintiff had no explanation to make of the occurrence, except "he had his hand on the tie to bear it down, and it went over and the end flew up and caught his hand." *Held:* The injury was the result of an accident in doing work of a simple nature, not requiring more than ordinary skill and experience, with an unusual effect, almost impossible for the defendant to have guarded against, and a recovery should have been denied as a matter of law. *Lloyd v. R. R.*, 646.

33. *Carriers of Goods—Negligence—Damage to Shipment Repaired—Measure of Damages.*—Where a shipment of buggies has been damaged by the negligence of the carrier, and it appears that the manufacturer has repaired the damage as a personal matter between it and the consignee, it is error for the trial judge in the latter's action to confine the measure of damages to the difference between the market value of the buggies at the time they were delivered to the defendant for shipment and their market value when the repairs had been made; for the plaintiff is entitled to recover the reasonable cost of repairing the buggies had the manufacturer charged therefor, interest on the purchase price, together with such other damage as he may have proximately sustained by reason of the defendant's negligence; the difference between the value of the buggies when received by the carrier for shipment and their value when tendered to the consignee upon his demand for them being the rule of damages. *Little v. R. R.*, 658.

NEGLIGENCE—*Continued.*

34. *Carriers of Passengers — Freight Trains — Negligence — Contributory Negligence — Trials — Evidence.*—Evidence that a passenger on a freight train seated himself upon a seat provided for passengers and was violently thrown from his seat by the sudden and unexpected movement of the train is insufficient upon the issue of contributory negligence; and as the defendant is held to a high degree of care consistent with the operation of trains of this character, the fact that the injury occurred in the manner stated affords sufficient evidence of defendant's actionable negligence to sustain a verdict in plaintiff's favor on that issue. *Barnes v. R. R.*, 667.

35. *Negligence—Proximate Cause—Trials—Instructions.*—In an action to recover damages arising from the defendant's negligence, and the questions in dispute involve only those of whether the act complained of was negligently done, and if it caused the injury, the judge charged the jury that they must find that the defendant was negligent and that the negligence caused the injury, in order to answer the issue in plaintiff's favor. *Held:* The charge was not objectionable as leaving out the element of proximate cause. *Ibid.*

NEGOTIABLE INSTRUMENTS. See Bills and Notes.

NEW TRIALS.

1. *New Trials — Newly Discovered Evidence—Cumulative Evidence.*—Evidence which is only cumulative and contradictory of the testimony of a witness of the opposing party to the action is not sufficient upon which to obtain a new trial for newly discovered evidence. *Land Co. v. Bostic*, 99.

2. *Appeal and Error—Homicide—New Trials—Prejudicial Error—Immaterial Evidence.*—Upon a trial for homicide, when it appears that the prisoner and deceased became suddenly engaged in a fight, in the former's store, and that the prisoner shot and killed the deceased with a pistol which he drew from his pocket, testimony of a witness that the prisoner kept his pistol in a showcase near which the firing commenced will not be held as reversible error, as it cannot be considered that testimony of this slight character could have influenced the jury in deciding the main issue as to the guilt of the prisoner, or that a different result would follow upon another trial. *Semble:* The evidence admitted was competent under the circumstances of this case, and, furthermore, being objected to after it had been received and there being no ruling thereon by the trial judge, its admission cannot be held as error on appeal. *S. v. Heavener*, 156.

3. *New Trials—Newly Discovered Evidence—Court's Discretion—Appeal and Error.*—The refusal of the trial judge to grant a motion for a new trial, based on newly discovered evidence, is a matter addressed to his discretion, and is not reviewable on appeal. *Fleming v. R. R.*, 248.

4. *Vendor and Purchaser—Contract—Delivery—Measure of Damages—Evidence—Market—Quotations.*—In an action against the seller of several hundred barrels of potatoes, for a breach of contract in failing to deliver them, it is competent, upon the measure of damages, for the plaintiff, as a witness, to give his opinion of the price of the

NEW TRIALS—*Continued.*

potatoes, based on information delivered from competent sources, such as market reports published in newspapers relied on by the financial world, etc., and his testimony that the potatoes were worth at least $3 or more a barrel is competent as to the value definitely stated. *Ferebee v. Berry*, 281.

NEWLY DISCOVERED EVIDENCE. See Appeal and Error, 58, 59.

NONSUIT. See Trials.

NOTICE. See Bills and Notes; Telegraphs, 1; Evidence.

NOTICE OF DISHONOR. See Bills and Notes, 17, 18, 19.

OPINIONS. See Evidence, 9.

ORDINANCES. See Health; Municipal Corporations.

OWELTY. See Partition.

PARENT AND CHILD.

1. *Parent and Child—Services Rendered by Child—Agreement to Compensate.*—Services rendered by an adult child to her parent living with her are presumed to be gratuitous; but this presumption may be rebutted and overcome by proper proof that they were given and received in expectation of pay or compensation, extending to instances in which the child supported and cared for the parent under an express or implied promise that the compensation shall be provided for in the last will and testament of the recipient. *Patterson v. Franklin*, 75.

2. *Same—Wills—Consideration by Devise—Breach of Contract—Quantum Valebat.*—Where an adult child renders services in the care and support of her aged parent under an agreement between them that the parent should in consideration thereof devise certain lands to the child, and the services are accordingly rendered by the child until the parent voluntarily leaves the home of the child, and rendered it impossible to perform his part of the contract, by conveying the lands to others, a right of action presently accrues to the child, who has performed his part of the contract, and he may recover for the reasonable value of the services rendered. *Ibid.*

PAROL EVIDENCE. See Contracts; Statute of Frauds.

PARTIES. See Husband and Wife, 2.

1. *Insufficient Parties—Appeal and Error—Practice.*—It appearing that certain heirs at law should be made parties, this case is remanded, to that end. *Haar v. Schloss*, 97.

2. *Counties—School Districts—Bond Issues—Board of Education—Parties.* In an action to restrain the issuance of bonds for local public school purposes and the levy of a special tax therefor, under an act authorizing the county commissioners to submit the proposition to the voters of the locality at the request of the county board of education, the latter board to issue the bonds and the former one to levy the special tax, the board of education is a necessary and indispensable party. *Casey v. Dare County*, 285.

PARTIES—*Continued.*

3. *Partition—Owelty—Charge Upon Lands—Personal Judgment—Personal Representatives—Parties.*—Where tenants in common have made a voluntary partition of lands by a division deed, charging one of the shares with owelty, and the owner thereof has since died, devising his lot to his wife, in an action brought to recover judgment for the amount of the owelty and declare the judgment a lien on the land, no personal judgment can be rendered against the defendant or the personal representative of the deceased, and the latter is not a necessary party. *Newsome v. Harrell*, 295.

4. *Appeal and Error—Process—Parties.*—Where an action is commenced in the court of a justice of the peace and summons is erroneously served on one as agent for a certain corporation, and on appeal to the Superior Court an order is entered to make the corporation a party, but summons is not accordingly served, a judgment rendered against the corporation will be set aside on appeal unless the corporation defendant has entered an appearance, denied liability, or in some manner has waived the lack of proper service. *Hassell v. Steamboat Co.*, 296.

5. *Executors and Administrators — Deeds and Conveyances — Recitals — Lost Records — Evidence — Parties — Statutes—Appeal and Error.*—When the court records are shown to have been lost or destroyed, the recitals in the deed of an administrator, executor, etc., are made "*prima facie* evidence of the existence, validity, and binding force of the decree, order, or judgment, or other record, referred to or recited in the deed," by Revisal, sec. 341; and the statute also makes the deed, record, and decree valid and binding as to all persons mentioned or described therein; and where the title to a party is made to depend upon a deed of this character, and the trial judge rules that the deed could not be considered in evidence, though the loss of the records therein recited could be shown, it erroneously deprives the party of his rights to develop his case, and an appeal to the Supreme Court will directly lie. *Pinnell v. Burroughs*, 315.

6. *Same—Parties—Presumptions.*—In this action to recover lands the defendant relied for title upon a deed made by an executor in proceedings to sell lands of the decedent to make assets to pay his debts, reciting that the present plaintiff "and others were defendants" in the proceedings; and under the admissions in the pleadings *it is held* that not only the plaintiff, but the others mentioned in the deed, were the heirs of the deceased, they being the brothers and sisters of the plaintiff, and raised a presumption, *prima facie* at least, that they were necessary parties in the former action and bound by the judgment therein. *Ibid.*

7. *Husband and Wife—Married Women—Actions—Parties.*—Chapter 109, Public Laws of 1911, known as the Martin Act, in conferring on married women the right of freedom of contract, carries with it the privilege of suing and being sued alone. *Royal v. Southerland*, 405.

8. *Deeds and Conveyances — Contracts to Convey Timber—Trials—Defective Title—Parties—Evidence.*—Where the title to lands of the plaintiff, in controversy, depends upon a judgment in certain former proceedings for their sale, and defendant introduces evidence that a

PARTIES—*Continued.*

party to that proceeding had filed in the clerk's office a petition to set aside the sale on the ground that he had been made a party thereto without his authority, which was not served and which is relied on as evidence of a defective title, it is competent to show by witnesses, who were present when the petition was prepared and knew its contents, that the petitioner had authorized his joinder as a party to the proceedings for the sale of the lands. *Timber Co. v. Lumber Co.*, 454.

9. *Tenants in Common—Partition—Judgment Creditors—Parties.*—A partition sale, in the absence of statute laws, does not free the lands from preëxisting liens, and judgment creditors of one of the tenants are not necessary parties to the proceedings. *Jordan v. Faulkner*, 466.

10. *Same—Proceeds of Sale—Payment of Liens.*—Prior encumbrancers or judgment creditors, whose liens on the interest of an insolvent tenant in common in lands has been docketed before proceedings for partition, may not as interpleaders in the proceedings compel the commissioner, who has sold the lands for division among the tenants, to pay over the share of the proceeds of their judgment debtor to them, to be applied to the satisfaction of their liens. *Ibid.*

11. *Parties—Courts—Discretion.*—The refusal of the trial court to make parties not necessary to the controversy rests within the discretion of the trial judge, which is not reviewable. *Guthrie v. Durham*, 573.

12. *Same—Tort-Feasors—Separate Degree of Liability.*—Where two tort-feasors are sued for damages arising from an act for which one of them is primarily liable, and subject to an action for the commission of the same tort by the other one, who is secondarily liable, it being the policy of the law to determine controversies of this character in one action rather than in two, it is reversible error, when the plaintiff has brought his action against the one secondarily liable, to refuse, at the instance of the defendant or of both tort-feasors, to permit the one primarily liable to become a party defendant and set up and show his defense for the benefit of them both. *Ibid.*

13. *Same—Contribution.*—While ordinarily there is no contribution between tort-feasors, and a recovery against one joint feasor sued alone will not permit a recovery by him against the other, this principle will not apply when their liability for the act committed is not in the same degree, one of them being a primary liability and the other a secondary one; for when the action is solely against the one secondarily liable, he has not the same incentive for resisting a recovery. *Ibid.*

14. *Parties—Court's Discretion—Tort-Feasors—Municipal Corporations—Excavation—Degrees of Liability.*—Where a municipality permits a property owner to excavate along the sidewalk of its streets, who, while the excavation is being dug, surrounds it with a fence, which gives way while a pedestrian is leaning thereon, who, being injured, brings his action against the city alone for alleged negligence in permitting a dangerous condition to exist, the negligent act of the property owner would be antecedent, in point of time, to that of the city,

PARTIES—*Continued.*

in failing to exercise a proper degree of supervisory care; and the liability of the city is secondary to that of the property owner who caused the excavation to be made. *Ibid.*

PARTITION. See Tenants in Common.

1. *Partition — Owelty—Charge Upon Land—Life Tenant—Limitation of Actions.*—In a division of land by a voluntary deed of partition among tenants in common, subject to the life estate of another, charging one of the parts owelty in a certain sum, the ten-year statute bars the right of recovery for the charge of owelty upon the land and begins to run during the life estate to which the land is subjected. *Newsome v. Harrell*, 295.

2. *Partition—Owelty—Charge Upon Lands—Personal Judgment—Personal Representatives—Parties.*—Where tenants in common have made a voluntary partition of lands by a division deed, charging one of the shares with owelty, and the owner thereof has since died, devising his lot to his wife, in an action brought to recover judgment for the amount of the owelty and declare the judgment of a lien on the land, no personal judgment can be rendered against the defendant or the personal representative of the deceased, and the latter is not a necessary party. *Ibid.*

PARTNERSHIPS.

Partnerships—Trusts and Trustees—Deeds and Conveyances—Misrepresentation by Partner—Fraud—Intent—Evidence.—Where two persons enter into a partnership for the purchase of lands, and one of them, acting for both, purchases at a less price than he had represented to the other, who in ignorance thereof pays his part, the acts of the purchasing partner are fraudulent upon the other and entitle him to recover the amount in excess of his obligation which he has been called upon to pay; and testimony as to a fraudulent intent is immaterial. *Chilton v. Groome*, 639.

PENALTY. See Railroads.

PENALTY STATUTES. See Statutes.

PHOTOGRAPHS. See Evidence, 3.

PLEADINGS. See Equity; Judgments, 17.

1. *Pleadings—Principal and Agent—Deputy—Acts of Agent—Demurrer.*—Where the complaint alleges that the defendant is the fish commissioner of the State and that his deputy, attended with persons to assist him, removed the plaintiff's fishing nets and deprived him of his property, etc., erroneously believing the nets were setting west of a certain line, in violation of law, a demurrer is bad which attempts to raise the question of liability of the fish commissioner for the acts of his deputy, it being a fair inference that the deputy was acting under his orders and instructions. *Webb v. LeRoy*, 236.

2. *Pleadings — Principal and Agent — Deputy — Acts of Agent — Charge Against Principal.*—Allegations in an action against the State Fish Commissioner for damages, that the action of his deputy was wrongful in seizing the plaintiff's fish nets, etc., and that the commissioner

PLEADINGS—*Continued.*

wrongfully converted them to his own use, are direct charges of a personal responsibility of the commissioner himself for the wrongs alleged. *Ibid.*

3. *Trials—Nonsuit—Counterclaim—Pleadings—Notes—Payment — Chattel Mortgage.*—In an action upon a note with chattel mortgage security, where payment of the note is alleged in defense, the effect of the allegation of payment is not one setting up a counterclaim, or raising an issue thereof, the payment of the note automatically canceling the mortgage security, and plaintiff's motion for voluntary nonsuit should be granted when made in time. *Cahoon v. Brinkley*, 257.

4. *Deeds and Conveyances—Conditions Subsequent—Breach—Pleadings—Demurrer.*—The allegations of the complaint in this action to recover lands for the breach of a condition subsequent, brought by the heirs at law of the grantor, imply that the grantor remained in possession during her life and that the plaintiffs have had the possession since her death, and upon the said allegations, considered as a whole, the Court will not hold, as matter of law, that there had been a waiver by the grantor, or the plaintiffs, her heirs at law, of the breach of the condition subsequent, upon which the conveyance had been made to the ancestor of the defendants, under whom they claim. *Brittain v. Taylor*, 271.

5. *Pleadings—Conflict of Laws—Demurrer—Trials—Questions for Jury.*—Where the complaint alleges a cause of action under the laws of this State for the negligent killing of plaintiff's intestate by a railroad company, and that the act complained of was caused in an adjoining State, the issue that under the laws of that State no cause of action has been stated cannot be raised by demurrer *ore tenus;* and when the issue is raised by the answer, it is determined here in accordance with the practice of our courts. *Harrison v. R. R.*, 382.

6. *Same—Evidence.*—Where a complaint alleges a cause of action for the negligent killing by a railroad company of the plaintiff's intestate, occurring in another State, and it is contended by the defendant that under the laws of that State there is insufficient evidence that its train struck and killed the deceased, the fact must be determined by the rules of evidence obtaining here. *Ibid.*

7. *Same—Jurisdiction—Trials.*—Where the complaint alleges a cause of action against a railroad company for the negligent killing of plaintiff's intestate occurring in another State, and the defendant pleads the law of that State in bar of recovery, the measure of duty owed by the defendant to the intestate and its liability for negligence must be determined according to the law of that State. *Ibid.*

8. *Pleadings—Verification—Judgments.*—It is held that the complaint in this case was verified substantially in the words of the statute, and the refusal of the trial judge to render judgment for the defendant on the pleadings was proper. *White v. Guynn*, 434.

9. *Pleadings—Demurrer.*—Upon demurrer to a complaint every reasonable intendment and presumption must be taken in favor of the pleader; and however inartificially the complaint may be drawn, the demurrer should not be sustained if by a reasonable interpretation of the pleading a good cause of action is alleged. *Foy v. Stephens*, 438.

PLEADINGS—*Continued.*

10. *Same—Defective Statement.*—An amendment should be allowed to a complaint which defectively states a good cause of action, rather than dismiss the action upon demurrer. *Ibid.*

11. *Pleadings—Demurrer—Deeds and Conveyances—Collateral Agreements—Cancellation—Conditions—Bills and Notes.*—In an action to invalidate a transaction in the sale of land the complaint alleged that the defendant represented the entire tract to contain 5,000 acres, showing a plat thereto, and the deed was delivered and certain cash payments made to a third party and notes given in payment of the purchase price, to be held by him upon condition that the land should be found to contain the acreage represented and that the title should be found to be an indefeasible fee simple by investigation and certificate of a certain named attorney; that the tract was found to contain 3,315 acres, of which 2,109 acres were held and claimed by superior titles, and that the attorney reported the title to the whole tract defective. The plaintiffs offered to execute a reconveyance of the land and prayed an injunction against the negotiation and transfer of the note, alleging irreparable injury otherwise; that the money be repaid to them, and that the note be delivered for cancellation. *Held:* The complaint alleged a good cause of action, and a demurrer thereto was bad. *Ibid.*

12. *Deeds and Conveyances—Fraud—Intent — Pleadings — Amendments.*—In order to set aside a conveyance of land for fraud, the representations must not only have been false, and knowingly so, by the party making them, but with the intent to deceive, and positively alleged in the complaint, and not by implication; but under the circumstances of this case *it is held* that the plaintiff intended to charge a fraudulent intent, and an amendment should be allowed if this defense is relied on by him. *Ibid.*

13. *Trusts—Pleadings—Amendments—Inconsistent Causes — Estoppel.*—In an action brought by a mortgagor to set aside a foreclosure sale whereat the mortgagee became the purchaser, the plaintiff prayed for his relief that the property thus sold be restored to the trust fund, and the defendant resisted the equity sought, alleging that the sale was valid, and, further, that title to the property had since been acquired by an innocent purchaser for value. The court, without objection, allowed plaintiff to amend and set up his equitable right to compensation for the breach of trust by the mortgagee. *Held:* The plaintiff was not concluded by the relief prayed for in the original complaint from setting up his equity in his amendment thereto, under the doctrine of election between inconsistent causes of action; and the defendant, by its answer and not objecting to the issues raised or to the proceedings at the trial under the amendment, is estopped to rely upon that equitable principle on appeal. The Court further held that the mortgagor was not required to take chances on the result of the issue as to the third party being an innocent purchaser for value, and the doctrine of election, therefore, did not apply. *Warren v. Susman*, 457.

14. *Contracts—Failure to Agree—Deeds and Conveyances—Timber—Part Payment—Damages—Offsets—Pleadings—Appeal and Error—Costs.*—Where it appears that the parties to the action have mistakenly sup-

PLEADINGS—*Continued.*

posed that they had entered into a valid contract to convey lands, the plaintiff claiming damages for the inability of the defendant to convey the title he was supposed to have contracted to convey and the defendant demanding specific performance; that the plaintiffs have paid a certain sum of money and had cut timber upon the lands. *Held:* The plaintiff is entitled to recover the sum he has paid, with interest, and on repleader by defendant the latter is entitled, as an offset, to the value of the timber cut as it stood on the ground; and in this case cost is taxed against defendant in the lower court, and cost on appeal is divided. *Lumber Co. v. Boushall,* 501.

15. *Vendor and Purchaser—Breach of Warranty—Counterclaim—Issues.*—On a trial to recover the purchase price of fertilizer sold to a user thereof, where a counterclaim is set up seeking damages for a breach of warranty, separate issues should be submitted, and the issue of damages should exclusively relate to that subject. *Carter v. McGill,* 507.

16. *Pleadings—Amendments—Court's Discretion—Appeal and Error.*—An exception to an amendment allowed in the discretion of the trial judge, which does not change the issues raised by the pleadings, will not be considered on appeal unless this discretionary power has been abused; and the same rule applies when the issues are changed, unless it appears that the appellant has been prejudiced in not being able to secure and introduce his evidence. *Morton v. Water Co.,* 582.

17. *Pleadings—Tax Lists—Impeaching Evidence.*—Where the complaint in an action to recover damages for property destroyed alleges that its valuation for taxation is the true one, the tax list thereof is competent to contradict the plaintiff's testimony at the trial, and the ordinary rule does not apply. *Ibid.*

18. *Pleadings—Amendments—Description of Lands—Court's Discretion—Appeal and Error.*—An amendment of the complaint, in an action to recover lands, to make the description therein conform to that of the deed under which the plaintiff claims, is not reviewable in this case, there being no evidence that the trial judge had therein abused the discretion reposed in him. *King v. McRackan,* 621.

19. *Contracts—Breach of Warranty—Conditions—Pleadings—Proof—Issues.* Where a warranty in a contract for the sale of goods requires that notice of a failure of the goods to satisfy the warranty to be given the seller in five days, etc., an issue as to the reasonableness of the notice should not be submitted to the jury, in an action on the warranty, in the absence of allegation and proof thereof, and when defendant knew of the breach within the five days. *Frick v. Boles,* 654.

POSSESSION. See Cocaine.

PRE-EXISTING DEBT. See Mortgages.

PRINCIPAL. See Homicide, 4.

PRINCIPAL AND AGENT. See Municipal Corporations; Usury; Pleadings; Attachment; Mechanics' Liens; Insurance; Mortgages.

1. *Corporations—Officers—Subsequent Declarations—Principal and Agent—Evidence.*—After the president and superintendent of a water cor-

PRINCIPAL AND AGENT—*Continued.*

poration have been permitted to testify in its behalf as to the condition of the plant, in an action by a citizen to recover damages for a fire loss, it is competent for the plaintiff to show on their cross-examination, and by other witnesses, declarations, made by them after the fire, to contradict their testimony; for declarations of this character do not fall within the prohibition as to declarations of ordinary agents made after the act complained of. *Morton v. Water Co.*, 582.

2. *Trials—Evidence—Principal and Agent—Corroboration.—Held* in this case that a hypothetical question asked an expert witness was correctly framed upon the evidence; that a question asked was admissible for the purpose of contradiction or impeaching the credibility of a witness; and that certain other testimony was competent as not falling within the rule relating to declarations or statements of an agent after the fact. *Shaw v. Public Service Corporation*, 611.

3. *Principal and Agent—General Agent—Restrictions—Notice.*—A general agent is one who is authorized to act for his principal in all matters concerning a particular business or employment of a particular nature, and he may usually bind his principal as to all acts within the scope of such agency; and as to third persons dealing with the agent, this real and apparent authority are the same and not subject to restrictions of a private nature placed thereon by the principal, unless they are known to such person, or the act or power in question is of such unusual character as to put a man of reasonable business prudence upon inquiry as to the existence of the particular authority claimed. *Powell v. Lumber Co.*, 632.

4. *Liens—Principal and Agent—General Agent—Scope of Authority—Ratification.*—The scope of the implied authority of a general agency may be extended by reason of acts indicating authority which the principal has approved or knowingly, or, at times, negligently permitted the agent to do in the course of his employment. *Ibid.*

5. *Principal and Agent—Acts of Agent—Evidence of Agency.*—While ordinarily the existence or extent of an agency may not alone be shown either by the declarations or acts of a supposed agent, it is otherwise where his acts, in the course of his employment, and indicative of his authority, are of such character and circumstance, or so often repeated, as to permit a fair and reasonable inference that they were approved or knowingly permitted by the principal; for in such way they become relevant on the question of authority expressly conferred. *Ibid.*

6. *Same—General Agency.*—In an action brought by a materialman against the contractor to recover the price for goods furnished to a subcontractor for the building on the credit alone of the former, alleged to have been authorized by his agent, which authority was denied, there was evidence tending to show that the alleged agent was the superintendent in charge of the work, with authority to hire, pay, or discharge the workmen of both the contractor and subcontractor; that two payments had been made the plaintiff by the contractor, one on the order of the subcontractor and the other by the contractor's agent. *Held:* Evidence sufficient for the consideration of the jury to ascertain the fact of agency of the superintendent, though also spoken

PRINCIPAL AND AGENT—*Continued.*

of as the foreman, to bind the contractor, his alleged principal, to the payment of the materialman, as coming within his implied authority to do so as a general agent, and as a ratification of his acts by the alleged principal, notwithstanding the principal's explanation of the circumstances under which the payments were made. *Ibid.*

7. *Executors and Administrators—Implied Authority—Liability of Agent—Knowledge of Purchaser.*—While an unauthorized person assuming to act as agent of another is liable in damages to the one dealing with him in good faith, as upon an implied warranty of authority, the doctrine does not obtain when the third person deals with knowledge of the want of authority of the supposed agent; and where damages are sought personally against an executor for his failure to perform a contract or option to convey lands of his testator, signed by him as executor, and purporting to assume no personal liability, the proposed purchaser takes with knowledge that the law implies no agency, and recovery will be denied. *Hedgecock v. Tate*, 660.

PRINCIPAL AND SURETY. See Husband and Wife.

1. *Principal and Surety—Equity—Subrogation.*—Judgment having been rendered against the principal on a note and H., one of his sureties, H. and K. mortgaged their interest in certain standing timber, and thereafter judgment was rendered against K. and M., sureties on the same note; the mortgage of H. and K. was registered at the same term of the court at which the second judgment was rendered, but prior in point of time. M. paid the judgment creditor and had the judgment assigned to a third person to his use. The plaintiff was the purchaser at the sale under the mortgage. *Held:* M., the surety who had paid the judgment, is subrogated to the rights of the judgment creditor, and holds a lien prior to that of the mortgage on the interest of H. in the timber, but not on that of K., for as to K. the mortgage is regarded as having been registered before the rendition of the judgment. *Fowle v. McLean*, 537.

2. *Principal and Surety—Judgments—Payment—Assignment of Judgment—Uses and Trusts.*—A surety may preserve the lien of judgment against the principal and himself by paying the judgment creditor and having the judgment assigned to a third person for his own benefit; and this also applies to a judgment against his cosureties and himself in enforcing an equality of obligation between them. *Ibid.*

3. *Principal and Surety — Contribution—Insolvency—Jurisdiction—Property.*—The liability of sureties among themselves is controlled by the equitable principle of equality arising out of a common risk, and in case of insolvency or nonresidence these rights are adjusted by reference to the number of sureties who are solvent or who have property available to process within the jurisdiction of the court. *Ibid.*

PRIVATE RIGHTS. See Municipal Corporations.

PROBATES. See Corporations, 3; Statutes; Deeds and Conveyances, 40, 41.

PROCESS. See Attachment.

1. *Process — Service—Methods Prescribed—Interpretation of Statutes.*—Where a statute provides for service of summons or notices in the

PROCESS—*Continued.*

progress of a cause by certain persons or designated methods, the specified requirements must be complied with in order to make a valid service of the process. *Lowman v. Ballard*, 16.

2. *Same—Telephones—Interpretation of Statutes.*—Revisal, sec. 439, providing that the summons in an action "shall be served . . . by the sheriff or other officer reading the same to the party or parties named as defendant, and such reading shall be a legal and sufficient service," was originally enacted by the Legislature of 1876-77, and at a time when the telephone, as a general means of communication was not in existence, and when the only method of service of process contemplated or provided for was the reading of the summons by the sheriff or other officer in the personal presence of the party to be served, contemplating the exhibition of the process to the party and affording him and the officer greater assurance, on the one hand, of its validity, and, on the other, that the person was the one designated. Hence, service of summons over a telephone line, the parties being necessarily separated and the method not contemplated by the statute, is not valid. *Ibid.*

3. *Appeal and Error—Process—Parties.*—Where an action is commenced in the court of a justice of the peace and summons is erroneously served on one as agent for a certain corporation, and on appeal to the Superior Court an order is entered to make the corporation a party, but summons is not accordingly served, a judgment rendered against the corporation will be set aside on appeal unless the corporation defendant has entered an appearance, denied liability, or in some manner has waived the lack of proper service. *Hassell v. Steamboat Co.*, 296.

PROOF. See Pleadings, 19.

PROXIMATE CAUSE. See Negligence, 5; Questions for Jury, 1.

PUBLICATION. See Contempt.

PUNITIVE DAMAGES. See Malicious Prosecution.

PURCHASER FOR VALUE. See Deeds and Conveyances, 40, 41.

QUANTUM VALEBAT. See Contracts, 2.

QUESTIONS AND ANSWERS. See Appeal and Error, 34.

QUESTIONS FOR COURT. See Courts, 20; Trials, 56.

QUESTIONS OF LAW. See Trials, 34.

QUESTIONS FOR JURY. See Trials.

1. *Master and Servant—Railroads—Negligence—Duty of Servant—Contributory Negligence—Proximate Cause—Trials—Questions for Jury.* The plaintiff's intestate was killed by being struck from the running board on the tender of defendant's locomotive by a projection extending from the side of the roadway, with evidence that it had been left there for a week or more, and that at the time the intestate was not holding to a hand rail placed on the tender for his greater safety, and within his easy reach. *Held:* A prayer for instruction tendered by

QUESTIONS FOR JURY—*Continued.*

the defendant was properly refused which instructed the jury upon the duty of the intestate, under the rule of the prudent man, to take ordinary precautions for his own safety, leaving out the question as to whether his failure or omission to perform this duty was the proximate cause of the injury, which under the circumstances of this case were properly left to the determination of the jury. *Buchanan v. Lumber Co.*, 40.

2. *Master and Servant—Vice-Principal—Negligence—Contributory Negligence—Trials—Evidence—Questions for Jury.*—There being evidence in this action to recover damages against a logging road company for the wrongful death of the plaintiff's intestate, an employee on the defendant's logging road, that the intestate was struck from the running board on the tender of the locomotive by a projection alongside the track, which the defendant had negligently permitted to remain there, when he was not holding to the hand bar provided for his greater security, and conflicting evidence as to whether he was in charge of the train at the time and should have observed the danger, *it is held* that the question of the intestate's contributory negligence was one for the determination of the jury, involving also the existence of proximate cause. *Ibid.*

RAILROADS. See Master and Servant.

1. *Municipal Corporations—Ordinances—Railroads — Stopping Trains — Penalties—Rights and Remedies—Interpretation of Statutes.*—Where a particular offense is created by a valid statute or town ordinance, which is otherwise lawful, and the penalty for its commission is prescribed, the court is confined to that particular remedy, to the exclusion of others; and where a town ordinance regulating the running of trains within its borders prescribes that "no railroad company nor engineer in charge of any train of any railroad company shall . . . block any street crossing for a longer period than ten minutes, and any engineer in charge of any train or locomotive of any railroad company violating any provisions of this section shall be fined not more than $10 for each and every offense," etc., the remedy, by the clearly expressed intent of the ordinance, is confined to imposing the penalty upon the engineer, who, having charge of the train, has committed the offense specified. *S. v. R. R.*, 103.

2. *Railroads—Killing of Animals—Interpretation of Statutes—Negligence —Presumptions—Legal Excuse.*—Unless some legal excuse is shown for not bringing an action against a railroad company for the killing of the plaintiff's cow by the defendant's train within six months from the time of the killing, there is no presumption of negligence on the defendant's part under the statute, Revisal, sec. 2645; and the statement of some one not having authority to speak for the railroad company, that it was not necessary to bring the action within the period of time stated, is not a sufficient or legal excuse for the delay. *Fleming v. R. R.*, 248.

3. *Railroads—Killing of Animals—Interpretation of Statutes—Negligence —Evidence—Rebuttal—Trials—Nonsuit.*—The presumption of negligence on the part of a railroad company in killing an animal on its track by its train may be rebutted; and where the plaintiff has intro-

RAILROADS—*Continued.*

duced, as his own witness, the defendant's engineer who was on the engine at the time of the killing, and who testifies, in effect, that with proper care the killing of the animal could not have been avoided under the circumstances, particularizing the details, and there being no further evidence in the plaintiff's behalf, a judgment of nonsuit is properly allowed. *Ibid.*

4. *Railroads—Killing of Animals—Negligence—Expressions of Opinion—Res Gestæ.*—The expression of an unidentified person that the defendant railroad company had been guilty of negligence in running upon and killing with its train the defendant's cow, made after the occurrence, is incompetent as tending to show that the killing was negligently done, as his privity with defendant and his authority to bind it had not been shown, and as it was a statement of a past transaction, and not a part of the *res gestæ*. *Ibid.*

5. *Master and Servant—Railroads—Brakeman—Obstructions Near Track—Contributory Negligence—Trials—Evidence—Nonsuit.*—Where there is evidence that a railroad company has failed to provide a ladder at the end of a box car on its freight train, ordinarily used by its employees to reach the top of its box cars, and its brakeman, in the course of his employment, is prevented from climbing to the top of the car by the overhanging eaves of a car shed, from the position he was in after boarding the train; and that after passing from the shed at a speed of 10 or 12 miles an hour, and while climbing from his position towards the top of the car in the manner left open to him, the act of climbing requiring him to look upward, he was struck from the car by a shanty 7 feet high, 200 feet from the car shed and so close to the track as to render his passage between the car and the shanty impossible; and that the shanty could readily have been previously moved or placed by the defendant so as to have permitted the plaintiff to pass in safety. *Held:* Sufficient to be submitted to the jury upon the issue of defendant's actionable negligence in not providing the plaintiff a safe place to work; and that the courts would not hold as a matter of law that the plaintiff was guilty of contributory negligence. *Williams v. R. R.*, 360.

6. *Cities and Towns—Paving Streets—Street Railways—Cost of Paving—Direct Liability—Interpretation of Statutes.*—Where legislative authority is given a city to pave its streets and to assess one-third of the cost against the property owners on each side thereof, with the further provision that whenever a railroad or street railway is located thereon it may be required to grade and pave that portion of the street to a certain width, etc., constituting the cost a charge against the railroad, etc., to be collected by appropriate action, the charge against the company should be regarded as a primary liability which will relieve the owners upon the street where the railway is located, as well as the city, of that part of the expense. *Morris v. Hendersonville*, 400.

7. *Railroads—Negligence—Pedestrians—Helpless Condition—Trials—Evidence—Questions for Jury.*—In an action against a railroad company to recover for the wrongful death of plaintiff's intestate (Revisal, sec. 59), there was evidence that the intestate was last seen, intoxicated, going towards his home on the defendant's railroad track, on a

RAILROADS—*Continued.*

bright moonlight night, and that the defendant's train thereafter passed going the same direction, with its engine equipped with an old-fashioned headlight and without ringing the bell or giving other warning of its approach, though its track at that place was through a populous portion of a town and customarily used by pedestrians; that from the injuries to the body of the deceased, etc., and from flesh and blood along the track, the body had been rolled along under the train across a 40-foot trestle, the severed head being at one end of the trestle and the body at the other end, and articles he had been carrying home being strewn along the side of the track; that the engine was equipped with a V-shaped cowcatcher, the bottom of which was about 8 inches from the ground. *Held:* Evidence sufficient to be submitted to the jury upon the question of whether the intestate at the time he was killed was down and helpless upon the track, and the actionable negligence of the defendant's engineer in not seeing him in time to have avoided killing him in the exercise of proper care. *Barnes v. R. R.*, 512.

8. *Railroads—Electric Headlights—Negligence—Pleadings—Trials — Burden of Proof—Interpretation of Statutes.*—It is negligence for a railroad company not to equip its locomotives with electric headlights (Pell's Revisal, sec. 2617, a), with the burden on the company to plead and prove that it had one in use at the time complained of or that its use was excepted by the statute, when relevant to the inquiry. *Ibid.*

9. *Railroads—Crossings—Obstructions—Damages—Equity—Injunctions.*—Across a certain point on the defendant's railroad track in a certain town a roadway had existed for seventy-seven years, and the company, to enlarge its yard facilities, lay more tracks, etc., acquired at this place 40 acres of land, resulting in stopping and blocking the roadway, for which the plaintiffs bring their action for damages and injunction. The plaintiffs had previously contracted with the vendor of these lands for hauling timber from a tract on one side of the railroad to the vendor's planing mill on the other side thereof, using for that purpose the roadway in question. *Held:* The defendant was liable in damages to the plaintiffs for obstructing the roadway in this manner, and an injunction forbidding the defendant from obstructing it "by leaving box cars or other obstructions thereon," not extending to shifting cars in the manner allowable by law, etc., was properly granted. *Tate v. R. R.*, 523.

10. *Same — Preliminary Negotiations — Notice—Evidence—Merger—Deeds and Conveyances.*—In negotiating for the sale of lands to a railroad company to be acquired by it for laying more tracks and extending its yard in a town, the vendor refused to make the sale if the company should, in making the extension, obstruct a roadway that for a great number of years had crossed the railroad track at that place, to which the proper official of the company replied, by letter, that there were only two ways in which it could be done, by condemnation or by consent of the supervisors of public roads. The roadway in question had not been dedicated to public use or accepted as such by the proper public officials. Theretofore the vendor of the lands had contracted with the plaintiffs to deliver timber at his mills, with

RAILROADS—*Continued.*

which the obstruction of the roadway would interfere, who bring their action for damages and an injunction. *Held:* Though the negotiations leading up to the transaction merged in the deed to the lands accordingly acquired by the defendant railroad company, the letters of the defendant were competent to show that there was a road across its track at the point named which it agreed that it would not attempt to obstruct, except in the manner stated. *Ibid.*

11. *Railroad Crossings—Obstructions—Roads and Ways—Public Rights—Interpretation of Statutes.*—By statutory construction it is held, under the circumstances of this case, that an "established road or way" which a railroad company may not obstruct in crossing it with its tracks extends to those whose use is of a private nature, and not necessarily those dedicated to a public use. Revisal, secs. 2569, 2601, 3753, 2681, 2567 (5). And in such instances, where the rights of a railroad and the rights of the public to the use of their roads or ways conflict, the former must give place to the latter. *Ibid.*

12. *Railroad—Public and Private Ways—Grade Crossings—Corporation Commission.*—Authority is conferred by statute [Rev., 1097 (10)] upon the Corporation Commission to abolish grade crossings by a railroad company when by the operation of the railroads they become dangerous or inconvenient to the public traveling along their highways or private ways. *Ibid.*

13. *Railroads — Relief Departments — Benefits — Negligence — Damages — Credits.*—Where under the regulations of a railroad company its employee has been forced to enter its relief department, and thereafter is injured through its negligence and has received the benefits of the department, the defendant is only entitled to a credit for the moneys or benefits its employee has thus received when the recovery is in a larger sum; and the acceptance of such benefits does not bar his right of action. *Herring v. R. R.*, 555.

14. *Railroads — Negligence — Construction of Railroad Yards — Rules of Safety — Trials — Instructions — Appeal and Error.*—In an action brought against a railroad company for the negligent killing of plaintiff's intestate, alleged to have been caused by a horse becoming frightened at the noise and steam issuing from defendant's steam engine and running upon the intestate, there was further allegation that the defendant's railroad yard was not constructed or laid out properly for the safety of those having business there, and that proper rules for that purpose had not been made for or observed by the defendant's employees there, but without sufficient evidence tending to prove these further allegations. *Held:* A charge of the court interwoven with instructions bearing upon the negligent construction of the railroad yards and the question of proper rules, is misleading and constitutes reversible error. *Witte v. R. R.*, 566.

15. *Negligence—Railroads—Fires.*—In an action to recover damages for loss by fire alleged to have originated from a spark from the locomotive of defendant railroad company igniting combustible matter upon its right of way and then passing to the plaintiff's lands, evidence of the defendant's negligence is sufficient to be submitted to the jury which tends to show that defendant's train passed the place

RAILROADS—*Continued.*

about three hours before the fire was first seen, the fire had burnt slowly two or three hundred yards in a swamp, and finally passing through to the plaintiff's lands, going in the direction of the wind and widening out from the defendant's roadway and indicating it had originated thereon; and that the only other evidence of a fire in that locality was a small one in the woods five or six days before. *McRainey v. R. R.*, 570.

16. *Railroads—Easements—Right of Occupation—Use of Owner of Lands.* A railroad company may occupy its right of way to its full extent whenever the proper management and business necessities of the road, in its own judgment, may require it, with the right of the owner of the land to use and occupy the part not thus used by the railroad, in a manner not inconsistent with its full and proper enjoyment of the easement; and when the railroad has entered into the enjoyment of its easement, its further appropriation and use thereof may not be destroyed and sensibly impaired by reason of the occupation of the owner or other person. *R. R. v. Bunting*, 579.

17. *Same—Injunction.*—A railroad company in the use and enjoyment of a right of way extending 100 feet each way from the center of its track, sought to enjoin the erection of a brick building by an owner of lands abutting on its easement, to replace a wooden building which had been destroyed, and on a line of a substantial block of buildings which had been erected since the operation of the railroad, and extending over and upon its right of way, leaving a space of 65 feet between the building and the track and also used as a public street of the town for about thirty years. Nothing appearing to show that the plaintiff railroad has any present purpose to use that part of the right of way occupied by the defendant, as stated, or that such occupation will sensibly increase the hazards incident to the operation of the railroad, *it is held* the injunction should not be granted. *Ibid.*

18. *Railroads — Rights of Way — Easements — Property Rights—Railroad Purposes.*—A railroad company has no right or authority to rent out its right of way to an individual for strictly personal or private business purposes, and not necessary for the enjoyment of its easement for railroad purposes. *Coit v. Owenby*, 166 N. C., 136, cited, approved, and discussed. *Ibid.*

19. *Railroads—Master and Servant—Accident—Damnum Absque Injuria.*—The plaintiff being employed by the defendant railroad company in a gang to replace the crossties under the rails of the road, relied upon evidence in his action for damages which only tended to show the manner in which the work was done, *i. e.*, the crossties would be placed on the rail on one side of the track, pushed until the end reached the inside line of the other rail, depressed by the plaintiff in the middle of the track, so that it would go under the rail, and shoved into position by the men at the end of the tie, assisted by himself; that while thus being depressed into position his hand was caught between the end of the tie and the rail, causing the injury complained of; that the plaintiff had no explanation to make of the occurrence, except "he had his hand on the tie to bear it down, and it went over and the end flew up and caught his hand." *Held:* The injury was the result of an accident in doing work of a simple nature, not re-

RAILROADS—*Continued.*

quiring more than ordinary skill and experience, with an unusual effect, almost impossible for the defendant to have guarded against, and a recovery should have been denied as a matter of law. *Lloyd v. R. R.*, 646.

RATIFICATION. See Divorce.

RECORDER'S COURT. See Courts, 8.

RECORDS. See Appeal and Error, 21, 44; Evidence, 16, 17.

REFERENCE. See Contempt.

REFORMATION.

1. *Reformation of Instruments—Equity—Mutual Mistake—Lapse of Time —Evidence Lost.*—Courts of equity will reform and correct a deed upon the ground of mutual mistake of the parties, in proper instances; but its jurisdiction should be cautiously exercised by the courts, and the relief should be denied except in clear cases, particularly when the parties to the deed are dead and the evidence relating to the transaction has been lost by lapse of time; and an unexplained delay for an unreasonable time, with the adverse party in possession (in this case, for twenty years), will deny the right to the party seeking it. *Cedar Works v. Lumber Co.*, 391.

2. *Reformation of Instruments — Equity — Mutual Mistake — Deeds and Conveyances — Connected Paper Title — Color — Evidence.*—The fact that a party seeking to reform a deed for mutual mistake does so to enable him to set up adverse possession under color thereof against a party having the true and connected title will have weight in equity against the relief prayed for. *Ibid.*

3. *Reformation of Instruments — Equity — Right to Reform — Estates— Limitations of Actions—Adverse Possession.*—The right to reform a deed to lands for mutual mistake is not an estate in the lands, and, when corrected, the reformed instrument cannot relate back so as to render seven years possession of the lands theretofore held by the claimant such as to ripen his title therein, as against the rights of one having the connected paper title. *Ibid.*

4. *Reformation of Instruments — Equity — Lost Deeds — Evidence.*—The principles obtaining in actions for the reëxecution of lost deeds do not apply to suits to reform conveyances of land for mutual mistake. *Ibid.*

REGISTER OF DEEDS.

Register of Deeds—Marriage License—Persons Under 18—Written Consent—Stepfather.—Revisal, sec. 2088, requiring the register of deeds, before issuing a license for the marriage of a person under 18 years of age, to obtain the written consent of the father or mother, etc., construed to be in the order named (*Littleton v. Haar*, 158 N. C., 566), does not include within its terms the stepfather of the applicant; and where the father is dead, the written consent of the mother meets the statutory requirement. *Owens v. Munden*, 266.

REGISTRAR. See Elections.

REGISTRATION. See Corporations; Mortgages; Deeds and Conveyances, 41.

REHEARING. See Courts, 4.

RELEASE. See Torts.

RELIEF DEPARTMENT. See Railroads.

REMAINDER. See Estates.

REMARKS OF COUNSEL. See Appeal and Error, 31.

RES GESTÆ. See Evidence.

RES IPSA. See Evidence, 69.

RES JUDICATA. See Judgments, 3.

REVISAL.

SEC.

59. In this action against a railroad to recover for wrongful death, the evidence was sufficient to take the case to the jury. *Barnes v. R. R.*, 512.

87. Funeral expenses of wife, having had separate estate, is chargeable to husband as a necessary expense. *Bowen v. Daugherty*, 242.

177. The real property of a deceased adopted child goes to its natural father in preference to the adopting one. *Edwards v. Yearby*, 663.

341. When court records are shown to have been lost or destroyed, deeds of executor, etc., are *prima facie* evidence of existence, etc., of recited degree, etc. *Pinnell v. Burroughs*, 315.

394 (2). Statute runs from time culvert to carry off water became insufficient and caused damage to land. *Savage v. R. R.*, 241.

408. Laches of a married woman may defeat her right to caveat a will. *In re Bateman's Will*, 234.

439. Service of summons by telephone is not legal. *Lowman v. Ballard*, 16.

505. It was error for the trial judge, in this case, to refuse an amendment to change an affidavit into a complaint. *Mason v. Stephens*, 369.

513. Except when there is gross abuse of discretion, where trial judge correctly concludes neglect was excusable, it is not reviewable on appeal. *Allen v. McPherson*, 435.

535. Charge in this case not held to be an intimation of opinion. *S. v. Rogers*, 112.

574-5. Judgments do not relate to the commencement of term to affect registration of *bona fide* conveyances of land. *Fowle v. McLean*, 537.

584. Superior Courts may review proceedings of inferior courts by *certiorari*, etc. *S. v. Tripp*, 150.

591. When, upon notification, the trial judge does not settle case on appeal in time to docket under rule, the appellant should docket the

REVISAL—*Continued.*

SEC.

record proper and move for *certiorari*. *Transportation Co. v. Lumber Co.*, 60.

762. Publication of summons in justice of the peace attachment for absence of nonresident defendant may be made more than thirty days after service of attachment. *Mills v. Hansel*, 651.

939 *et seq.* Power of judge to summarily punish for contempt authors of reports and publications about matters past no longer exists. *In re Brown*, 417.

979. Registered deed with defective probate will be treated as unregistered as to innocent third parties. *King v. McRackan*, 621.

1040-42. Utmost good faith required of mortgagee in foreclosure of mortgage; he is regarded as trustee. *Owens v. Mfg. Co.*, 397.

1097 (10). Legislative authority is conferred on Corporation Commission to abolish railroad grade crossing. *Tate v. R. R.*, 523.

1445. Requirement that justice of peace summons be returned in thirty days from issuance does not apply to levy in attachment. *Mills v. Hansel*, 651.

1556. An estate *per autre vie* is descendible to the heirs of the owners. *Brown v. Brown*, 4.

1560. Mental incapacity renders marriage voidable, subject to ratification when husband has been deceived therein. *Watters v. Watters*, 411.

1583. Under this section, the common-law rule that a conveyance of land to another with remainder to heirs of grantor conveys the fee does not obtain. *Thompson v. Batts*, 333.

1631. Testimony of transactions, etc., with deceased by third and uninterested party not objectionable. *Zollicoffer v. Zollicoffer*, 326.

2019-20-21. Where materialmen furnish subcontractor and notify owner owing the contractor a sufficient sum, it is applicable to demand, irrespective of status of account between contractor and subcontractor. *Powell v. Lumber Co.*, 632.

2019-20-21. Contractual relations must be shown to establish mechanics' liens; and in proper instances they are enforcible against moneys due contractor. *Brick Co. v. Pulley*, 371.

2083. Mental incapacity renders marriage voidable, subject to ratification when husband has been deceived therein. *Watters v. Watters*, 411.

2088. The order specified in which consent to marry a person under 18 does not apply to stepfather. *Owens v. Munden*, 266.

2107. Deed not probated as required by this section is invalid. *Singleton v. Cherry*, 402.

2112-13. As to whether one signing commercial paper may show he signed otherwise than as indorser, *quære*. *Bank v. Wilson*, 557.

2201. One acquiring negotiable instrument regular upon its face, for value before maturity, is *prima facie* holder in due course. *Smathers v. Hotel Co.*, 69.

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SEC.

2205. Notice of fraud to invalidate title by holder of negotiable instrument must be actual notice, or such as to amount to bad faith. *Smathers v. Hotel Co.*, 69.

2206. Where fraud in procurement of negotiable instrument is alleged, the holder must show *bona fides*. *Smathers v. Hotel Co.*, 69.

2212. One signing commercial paper without indicating other capacity is deemed an indorser and entitled to notice of dishonor; and this applies to directors of corporations. *Houser v. Fayssoux*, 1.

2567 (5). Roads need not necessarily be dedicated to public use within intent of this section. *Tate v. R. R.*, 523.

2569. Road need not necessarily be dedicated to public use within intent of this section. *Tate v. R. R.*, 523.

2601. Roads need not necessarily be dedicated to public use within intent of this section. *Tate v. R. R.*, 523.

2617a. (Pell's). Failure of railroad to equip locomotives with electric headlights is negligence. *Barnes v. R. R.*, 512.

2681. Roads need not necessarily be dedicated to public use within intent of this section. *Tate v. R. R.*, 523.

3135 (Pell's). A married woman is required to bring action or caveat a will within three years after discovert. *In re Bateman's Will*, 234.

3176-8. Officer arresting upon emergency without warrant must procure one as soon thereafter as possible. *Hobbs v. Washington*, 293.

3182. Officer arresting upon emergency without warrant must procure one as soon thereafter as possible. *Hobbs v. Washington*, 293.

3254. A charge plain, intelligible, and explicit is sufficient. *S. v. Knotts*, 173.

3254-5. Indictment for burning ginhouse and proof of charring is sufficient. *S. v. Rogers*, 112.

3336. "Ginhouse" means same as "cotton gin" under this section. *S. v. Rogers*, 112.

3341. "Ginhouse" means the same as "cotton gin" under this section. *S. v. Rogers*, 112.

3346. *Semble*, notice to one tenant in common, or waiver thereof by him, is sufficient under this section. *Stanland v. Rourk*, 568.

3355. The crime of willful abandonment not indictable if relationship renewed in two years. *S. v. Hannon*, 215.

3445. Evidence of effect of fertilizer upon crops may be competent when warranty relates only to ingredients used therein. *Guano Co. v. Live Stock Co.*, 442.

3753. Roads need not necessarily be dedicated to public use within intent of this section. *Tate v. R. R.*, 523.

3957. Evidence of effect of fertilizer upon crops may be competent when warranty relates only to ingredients used therein. *Guano Co. v. Live Stock Co.*, 442.

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SEC.

4806. Termination of violation of stipulation in policy insuring automobile revives the policy. *Cottingham v. Insurance Co.*, 259.

4808. Termination of violation of stipulation in policy insuring automobile revives the policy. *Cottingham v. Insurance Co.*, 259.

RULE IN SHELLEY'S CASE. See Estates.

RULES OF COURT. See Appeal and Error, 6.

SAFE PLACE TO WORK. See Master and Servant.

SALES. See Judicial Sales; Mortgages.

SCHOOLS.

1. *Counties—School Districts—Bond Issues—Board of Education—Parties.*—In an action to restrain the issuance of bonds for local public school purposes and the levy of a special tax therefor, under an act authorizing the county commissioners to submit the proposition to the voters of the locality at the request of the county board of education, the latter board to issue the bonds and the former one to levy the special tax, the board of education is a necessary and indispensable party. *Casey v. Dare County*, 285.

2. *Counties—School Districts—Bond Issues—Registration—Elections—Interpretation of Statutes.*—Where a statute authorizing the proposition to issue bonds to be submitted to the voters provides that the voters in the district "shall be required to register in accordance with the registration laws governing the election of the members of the General Assembly before being permitted to vote in said election," a new registration is not required; for the statute authorizes the use of the registration books used in the last general election of the members of the General Assembly. *Ibid.*

3. *Bond Issues—Equity—Injunction—Elections — Registrar — Appeal and Error.*—In this action to restrain the issuance of bonds for local public school purposes the exception of the plaintiff that no registrar acted therein as required by law is not sustained by the evidence, and though the trial judge overruled the exception, but made no finding on the matters raised thereby, the exception is not sustained on appeal. *Ibid.*

4. *Bond Issues—Registrar—Irregularities, Effect of—Equity—Injunction—Legal Majority.*—Where the plaintiffs seek to restrain to the hearing the issuance of bonds for local public school purposes, for irregularities of the registrar in permitting names to be stricken from the registration books by unauthorized persons, and in being temporarily absent, it is necessary for them to show, in order to obtain the injunctive relief, that these irregularities changed the result of the election, the question thus presented being whether the proposition had been carried by the requisite legal majority. *Ibid.*

5. *Schools—Bond Issues — Taxation—Constitutional Law—Injunction—Construction and Equipment—Vote of People—Maintenance.*—The validity of bonds carried at an election within a designated district for

SCHOOLS—*Continued.*

the construction and equipment of a "farm-life school" therein, and in accordance with the statute authorizing it, is not affected by the failure of the statute to provide for its maintenance; and while school purposes are not necessaries within the meaning of our Constitution, Art. VII, sec. 7, and require that taxation for such purpose must be submitted to the voters, a provision of the statute providing that for the maintenance of the school the county commissioners shall make an appropriation in a certain sum under certain conditions, which provision is unconstitutional, affords no ground for an injunction against the issuance of the bonds, not made contingent on the appropriation. *Moran v. Commissioners*, 289.

6. *Schools—Taxation — Bond Issues — Appropriations — Vote of People—Constitutional Law.*—Where a statute provides that the issuance of bonds for the construction of a farm-life school be submitted to the voters of a certain district, and for an appropriation from the State's funds for the maintenance of the school, upon condition that the county also appropriate a like amount for that purpose, the question of the constitutionality of the appropriations made without the approval of the voters does not affect the validity of the bonds. *Semble*, the appropriation of the State's funds, under such circumstances, would be valid if the contingency were complied with. *Ibid.*

7. *Schools, Public—Charges for Tuition—Constitutional Law.*—The mere fact that a school, erected and maintained for the public in its district, is authorized by the statute to charge tuition for children from other parts of the State does not affect the validity of the statute, as such schools are recognized as public, and not private schools. *Whitford v. Comrs.*, 159 N. C., 160, cited and applied. *Ibid.*

SECRET ASSAULT. See Criminal Law, 14, 16.

SELF-DEFENSE. See Homicide.

SERVICES RENDERED. See Parent and Child.

SHERIFF. See Attachment.

SOLVENT CREDIT. See Bills and Notes.

SPECIFIC PERFORMANCE. See Contracts, 27.

SPIRITUOUS LIQUORS. See Intoxicating Liquors.

STATUTES. See Limitations of Actions; Intoxicating Liquors, 3; Indictment; Waters; Inheritance Tax.

1. *Process — Service — Methods Prescribed—Interpretation of Statutes.*—Where a statute provides for service of summons or notices in the progress of a cause by certain persons or designated methods, the specified requirements must be complied with in order to make a valid service of the process. *Lowman v. Ballard*, 16.

2. *Same—Telephones—Interpretation of Statutes.*—Revisal, sec. 439, providing that the summons in an action "shall be served . . . by the sheriff or other officer reading the same to the party or parties named as defendant, and such reading shall be a legal and sufficient service,"

STATUTES—*Continued.*

was originally enacted by the Legislature of 1876-77, and at a time when the telephone, as a general means of communication was not in existence, and when the only method of service of process contemplated or provided for was the reading of the summons by the sheriff or other officer in the personal presence of the party to be served, contemplating the exhibition of the process to the party and affording him and the officer greater assurance, on the one hand, of its validity, and, on the other, that the person was the one designated. Hence, service of summons over a telephone line, the parties being necessarily separated and the method not contemplated by the statute, is not valid. *Ibid.*

3. *Courts — Improper Remarks — Interpretation of Statutes—Appeal and Error.*—Remarks made by the judge in the course of a trial involving the genuineness of signatures of the indorsers of a note, in regard to plaintiff's calling upon the principal, who had not been introduced, to testify, is reversible error, under our statute, which forbids the court from expressing or intimating an opinion upon the evidence. *Bank v. McArthur*, 48.

4. *Evidence—Handwritings — Comparisons—Standards—Interpretation of Statutes.*—In controversies involving the genuineness of handwritings, our statute, by clear implication, excludes the examination of any papers but those shown to be genuine as standards or models of the true handwriting for comparison with the writings in dispute. *Ibid.*

5. *Bills and Notes—Due Course—Presumptions—Interpretation of Statutes.*—One who acquires a negotiable instrument, regular upon its face, for value before maturity, is *prima facie* taken to be a holder in due course, nothing else appearing. Revisal, sec. 2201. *Smathers v. Hotel Co.*, 69.

6. *Bills and Notes—Infirmities in Instrument—Holder—Burden of Proof —Notice—Bad Faith—Interpretation of Statutes.*—When it is alleged and shown in an action upon a note brought by the holder, claiming to have acquired it in due course, that the instrument had been procured by fraud between the original parties, the burden is then upon him to show that he had acquired it *bona fide*, without notice of any infirmity in the instrument or defect in the title of the person who negotiated it to him (Revisal, sec. 2206), the notice required to invalidate his title being "actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Revisal, sec. 2205. *Ibid.*

7. *Cities and Towns—Health—Ordinance—Statutes—Interpretation—Presumptions.*—In construing an ordinance or statute relating to public health it will be assumed that the lawmaking power intended to remedy an evil and not to restrict unnecessarily the use of property or the engaging in any lawful business, and ordinances of this character should be strictly construed to that end, giving effect, if possible, to every word and phrase. Hence, an ordinance reading, "No person shall keep hides, guano, etc., . . . to the annoyance of any citizen or the detriment of the public health, within 400 feet of the dwelling house of any citizen of the city," does not make the mere keeping of the commodities named within the distance specified a violation

STATUTES—*Continued.*

thereof, unless it is shown that the act complained of was to the "annoyance" of a citizen "or a detriment to the public health." *S. v. Supply Co.*, 101.

8. *Municipal Corporations — Ordinances — Railroads—Stopping Trains—Penalties—Rights and Remedies—Interpretation of Statutes.*—Where a particular offense is created by a valid statute or town ordinance, which is otherwise lawful, and the penalty for its commission is prescribed, the court is confined to that particular remedy, to the exclusion of others; and where a town ordinance regulating the *running* of trains within its borders prescribes that "no railroad company nor engineer in charge of any train of any railroad company shall . . . block any street crossing for a longer period than ten minutes, and any engineer in charge of any train or locomotive of any railroad company violating any provisions of this section shall be fined not more than $10 for each and every offense," etc., the remedy, by the clearly expressed intent of the ordinance, is confined to imposing the penalty upon the engineer, who, having charge of the train, has committed the offense specified. *S. v. R. R.*, 103.

9. *Indictment—Criminal Law—Unlawful Burning—Ginhouse—Interpretation of Statutes.*—An indictment for "willfully and feloniously setting fire to a certain ginhouse, the property of W. B. H., with intent to burn and destroy the same," is sufficient for conviction of the offense charged under Revisal, secs. 3336, 3341, the word "ginhouse" meaning the same as "cotton gin"; and where the punishment inflicted was within the limits prescribed by either section, it becomes immaterial under which section the conviction was had. *S. v. Rogers*, 112.

10. *Same—Evidence—"Charring."*—Where the defendant has been tried and convicted under an indictment charging that he willfully and feloniously set fire to a certain "ginhouse," etc., *it is held* that the evidence of "charring" is sufficient proof of "burning" to sustain the sentence; and *it is further held* that the motion in arrest of judgment was properly denied under the circumstances, the objection relating to informalities and refinement, and the defendant having been fully informed of the charge against him. Revisal, secs. 3254, 3255. *Ibid.*

11. *Courts—Expression of Opinion—Speeches to Jury—Interpretation of Statutes—Appeal and Error.*—In this case it is held that the remarks of the trial judge made with reference to the argument of defendant's counsel in his address to the jury were not an intimation of opinion upon the facts, and not held for error. Revisal, sec. 535. *Ibid.*

12. *Spirituous Liquors—Possession—Prima Facie Case—Purposes of Sale—Burden of Proof—Reasonable Doubt—Interpretation of Statutes.*—On the trial under an indictment against the defendant for having spirituous liquor on hand for the purpose of sale, contrary to our statute, chapter 44, sec. 2, Public Laws of 1913, the court charged the jury, in effect, that the defendant must not necessarily be convicted of selling the liquor if he had more than one gallon on hand for the purpose, and correctly charged as to the presumption of defendant's innocence, the effect and meaning of *prima facie* case, as used in the statute, and that the burden of proof was on the State to establish

STATUTES—*Continued.*

the guilt of the prisoner beyond a reasonable doubt. *Held:* The charge is not open to the objection that the judge told the jury to convict the defendant of a misdemeanor if he had violated any of the provisions of section 2 of the act. *S. v. Davis*, 144.

13. *Appeal and Error — Fragmentary Appeals — Directing Verdict "Not "Guilty"—Order Striking Out Entry—Mistrial—Discretion of Court—Interpretation of Statutes.*—Where the judge has ordered the entry to be made by the clerk of a verdict of not guilty on the trial of a criminal case, for a variance between the offense charged in the indictment and the proof, but conceiving his action to be erroneous, he then, in the presence of the jury, still sitting on the case, directs the clerk to strike out the entry and, withdrawing a juror, directs a mistrial, *it is held* that the order of the judge striking out the verdict of not guilty left the case in exactly the same attitude it was before the entry of such verdict, and the withdrawal of a juror and order of mistrial, being in the discretion of the court, except in capital cases, are not reviewable. *S. v. Ford*, 165.

14. *Indictment — Conspiracy — Competition — Systematic Abuse—Common Law—Interpretation of Statutes.*—An indictment charging that the employees of a rival company in the sale of lawful commodities had combined together to break up their competitor's business by systematically following its salesmen from house to house and place to place and to so abuse, vilify, and harass them as to deter them in their lawful business and to break up their sales; that they falsely represented that their rival company was composed of a set of thieves and liars, endeavoring to cheat and defraud the people, etc., charges a conspiracy indictable at common law, which is not restricted or abridged by statute, 33 Edward I, or repealed by chapter 41, Laws 1913; and a motion to quash the indictment should not be granted. *S. v. Van Pelt*, 136 N. C., 633, cited and distinguished. *S. v. Dalton*, 204.

15. *Criminal Law—Conspiracy to Raise Price—Common Law—Statutory Offense — Interpretation of Statutes — Appeal and Error—Harmless Error.*—A conspiracy among dealers to raise the price of a necessary article of food being indictable under the common law, it is not reversible error for the trial judge to exclusively so regard it in the conduct of the trial and erroneously instruct the jury that it was not a statutory offense, though in fact it was so made by chapter 41, Laws 1913, secs. 1, 2, and 3. *S. v. Craft*, 208.

16. *Wills — Caveat—Married Women—Interpretation of Statutes—Limitations of Actions.*—The laches which will defeat the right of an heir at law of the deceased to file a caveat to his will will now also defeat the right of such who is a married woman, for she is put to her action by Revisal, sec. 408, though the statute of limitations was not repealed as to married women until 1899 (ch. 78). Under the seven-year statute of 1907 (Pell's Revisal, sec. 3135) a married woman is required to bring her action or file her caveat within three years after becoming discovert. *In re Bateman's Will*, 234.

17. *Estates—Creditors—Distributions—Interpretation of Statutes.*—Revisal, sec. 87, is only designed to recognize priorities among the creditors

STATUTES—*Continued.*

of the deceased and to establish the order of payment between claimants who have valid debts against the deceased, and was never intended to create a liability which did not otherwise exist. *Bowen v. Daugherty*, 242.

18. *Contracts — Married Women — Separate Estate—Necessaries—Funeral Expenses — Husband's Liability — Interpretation of Statutes.*—If the wife, having a separate estate, predecease her husband, and the latter dies with property amply sufficient to pay his debts and funeral expenses, and those of his wife for necessaries, and leaves a will disposing of all of his property, the funeral and other necessary expenses of the wife are chargeable to the husband's estate, as an expense for which he is liable under the common law and in preference to the beneficiaries under the husband's will, in the absence of proof that the wife had in some way assumed personal liability therefor. Ch. 109, Laws 1911; Revisal, sec. 87. *Ibid.*

19. *Railroads—Killing of Animals—Interpretation of Statutes—Negligence —Presumptions—Legal Excuse.*—Unless some legal excuse is shown for not bringing an action against a railroad company for the killing of the plaintiff's cow by the defendant's train within six months from the time of the killing, there is no presumption of negligence on the defendant's part under the statute, Revisal, sec. 2645; and the statement of some one not having authority to speak for the railroad company, that it was not necessary to bring the action within the period of time stated, is not a sufficient or legal excuse for the delay. *Fleming v. R. R.*, 248.

20. *Railroads—Killing of Animals—Interpretation of Statutes—Negligence —Evidence — Rebuttal — Trials—Nonsuit.*—The presumption of negligence on the part of a railroad company in killing an animal on its track by its train may be rebutted; and where the plaintiff has introduced, as his own witness, the defendant's engineer who was on the engine at the time of the killing, and who testifies, in effect, that with proper care the killing of the animal could not have been avoided under the circumstances, particularizing the details, and there being no further evidence in the plaintiff's behalf, a judgment of nonsuit is properly allowed. *Ibid.*

21. *Insurance, Fire—Standard Form—How Construed—Interpretation of Statutes.*—The terms of a standard form of policy of fire insurance, though adopted by statute, are construed against the insurer and in favor of the insured. *Cottingham v. Insurance Co.*, 259.

22. *Register of Deeds—Marriage License—Persons Under 18—Written Consent—Stepfather.*—Revisal, sec. 2088, requiring the register of deeds, before issuing a license for the marriage of a person under 18 years of age, to obtain the written consent of the father or mother, etc., construed to be in the order named (*Littleton v. Haar*, 158 N. C., 566), does not include within its terms the stepfather of the applicant; and where the father is dead, the written consent of the mother meets the statutory requirement. *Owens v. Munden*, 266.

23. *Counties—School Districts—Bond Issues—Registration—Elections—Interpretation of Statutes.*—Where a statute authorizing the proposition to issue bonds to be submitted to the voters provides that the voters

STATUTES—*Continued.*

in the district "shall be required to register in accordance with the registration laws governing the election of the members of the General Assembly before being permitted to vote in said election," a new registration is not required; for the statute authorizes the use of the registration books used in the last general election of the members of the General Assembly. *Casey v. Dare County*, 285.

24. *Statutes — Deceased Persons — Transactions and Communications.*— Transactions and communications between a deceased person and a third party not interested in the event of the action are not objectionable, as evidence, under our statute, Revisal, sec. 1631. *Zollicoffer v. Zollicoffer*, 326.

25. *Estates—Remainders—Deeds and Conveyances—Interpretation of Statutes.*—A conveyance of land in contemplation of marriage, and in lieu of dower, to M., "to descend to the heirs of the body of the said M. in fee simple, the issue of such marriage, and on failure of issue to revert to the heirs of" the grantor, providing also for the year's support of the grantee and that she shall receive a child's part of his personal estate. *Held:* The grantor, from the construction of the instrument, did not anticipate that he would survive his wife, or that there was a possibility of reverter to him; and that the "reverter" to his heirs, under Revisal, 1583, meant to his children after the death of his wife and the nonhappening of the stated contingency. *Thompson v. Batts*, 333.

26. *Evidence—Nonsuit—Interpretation of Statutes.*—In an action by an employee of a railroad company for damages for a personal injury alleged to have been negligently inflicted, a motion to nonsuit upon the evidence on the ground that the plaintiff was guilty of contributory negligence, since the enactment of chapter 6, Public Laws of 1913, cannot be sustained. *Williams v. R. R.*, 360.

27. *Mechanics' Liens—Contractual Relations—Interpretation of Statutes.*— The claimants for liens for material, etc., furnished for building, under Revisal, secs. 2020 and 2021, are not only required to show, in order to establish their liens, that the materials were actually used in its construction, but that they were furnished to some one having contract relations to the work. Revisal, sec. 2019. *Brick Co. v. Pulley*, 371.

28. *Mechanics' Liens—Notice—Contract—Amount Due.*—One who has furnished material used in the construction of the building under contract with the subcontractor, by giving the proper notice to the owner is substituted to the rights of the contractor, and his lien is enforcible against any and all sums which may be due from the owner to him at the time of notice given or which are subsequently earned under the terms and conditions of the contract. Revisal, secs. 2019, 2020, 2021. *Ibid.*

29. *Bills and Notes—Solvent Credits—Payment of Taxes—Interpretation of Statutes.*—A possessory action to recover a horse secured by chattel mortgage, brought by the assignee of the mortgage note against one to whom the mortgagor had sold the horse, is not an action upon the note upon which the statute requires that the taxes be given in and paid before the owner may be permitted to sue thereon. Revenue Act, Laws of 1911 and 1913. *Hyatt v. Holloman*, 386.

STATUTES—*Continued.*

30. *Same—Postponement of Action—Payment Into Court.*—Where the assignee of a note has failed to list or pay taxes thereon as a solvent credit, his right of recovery by appropriate action is only postponed until the taxes are paid; and his paying into court a sufficient amount for his taxes after the time fixed therefor by the statute has passed permits him to proceed to judgment. *Ibid.*

31. *Cities and Towns—Paving Streets—Street Railways—Cost of Paving—Direct Liability—Interpretation of Statutes.*—Where legislative authority is given a city to pave its streets and to assess one-third of the cost against the property owners on each side thereof, with the further provision that whenever a railroad or street railway is located thereon it may be required to grade and pave that portion of the street to a certain width, etc., constituting the cost a charge against the railroad, etc., to be collected by appropriate action, the charge against the company should be regarded as a primary liability which will relieve the owners upon the street where the railway is located, as well as the city, of that part of the expense. *Morris v. Hendersonville*, 400.

32. *Husband and Wife—Deed to Husband—Separate Property—Probate—Interpretation of Statutes.*—Chapter 109, Laws of 1911, known as the Martin Act, providing that a married woman may contract and deal with reference to her real and personal property as if she were a *feme sole*, does not alter the effect of Revisal, sec. 2107, requiring certain findings and conclusions by the probate officer to a conveyance of her lands directly to her husband, and her deed not probated accordingly is void. *Singleton v. Cherry*, 402.

33. *Husband and Wife—Wife's Separate Property—Suretyship of Wife—Direct Obligations—Interpretation of Statutes.*—A wife by becoming surety on the obligations of her husband creates a direct and separate liability to the creditor of the husband which makes her personally responsible, under chapter 109, Public Laws of 1911, known as the Martin Act, without requiring the statutory formalities necessary to the validity of certain contracts made directly between the wife and her husband. *Royal v. Southerland*, 405.

34. *Husband and Wife—Married Women—Actions—Parties.*—Chapter 109, Public Laws of 1911, known as the Martin Act, in conferring on married women the right of freedom of contract, carries with it the privilege of suing and being sued alone. *Ibid.*

35. *Divorce — Marriage—Mental Incapacity—Voidable Contracts—Ratification—Interpretation of Statutes.*—Where one of the contracting parties to a marriage is mentally incapable in law, at the time, to make the contract, it does not *ipso facto* render the ceremony void, but it is only voidable until set aside by an appropriate action, which will not be decreed when it appears that the party seeking the relief has not been misled or in any manner deceived at the time and has knowingly continued the relationship for years, resulting in the birth of several children of the marriage, for therein he will be held to have ratified the contract of marriage. Revisal, secs. 1560, 2083. *Watters v. Watters*, 411.

STATUTES—*Continued.*

36. *Divorce—Subsequent Incapacity—Interpretation of Statutes.*—Insanity afterwards afflicting a party to a contract of marriage is not a ground for divorce. Revisal, secs. 1560, 2083. *Ibid.*

37. *Divorce—Void Marriages—Interpretation of Statutes.*—Construing Revisal, secs. 1560, 2083, together, *it is held* that the only marriages that are void *ab initio* are those within the proviso of section 2083, *i.e.*, where one of the parties was a white person and the other a Negro or an Indian or of Negro or Indian descent to the third generation, inclusive, or bigamous marriages. *Ibid.*

38. *Contempt of Court—Statutes—Constitutional Law.*—While a statute is unconstitutional which unduly interferes with the inherent power of the Superior Courts to summarily hear matters in contempt of court and punish the offenders, objection may not be taken to Revisal, ch. 17, secs. 939, *et seq.*, on this ground, the provisions being in accordance with the modern doctrine; and having reference to the history of this statute, the context and the language employed, the authority expressly given therein with reference to constructive contempts arising by means of publication, etc., is construed and upheld as written, that the power to punish summarily for defamatory reports and publications, etc., about a matter that is past and ended, no longer exists. *In re Brown*, 417.

39. *Judgments—Excusable Neglect—Court's Discretion—Interpretation of Statutes.*—Where under the findings of fact the trial judge correctly concludes that the neglect of a motion to set aside a judgment was not excusable, it concludes the matter; but where he correctly concludes that the neglect was excusable, the question of setting aside the judgment is a matter in his discretion, except in cases of gross abuse, and is not reviewable on appeal. Revisal, sec. 513. *Allen v. McPherson*, 435.

40. *Vendor and Purchaser—Contracts—Dealers—Fertilizers—Express Warranty of Analysis—Evidence—Effect on Crops—Interpretation of Statutes.*—Where fertilizers sold to a dealer are warranted only to contain ingredients according to a certain analysis, but not as to results, evidence of the effect of the fertilizer upon the crop is competent in an action upon the breach of warranty of sale when properly limited to the inquiry as to whether, under relevant and proper conditions, the ingredients of the fertilizers were according to the formula guaranteed, notwithstanding our statutes, Revisal, secs. 3445, 3957, making the analysis of fertilizers certified by the Department of Agriculture *prima facie* evidence of their contents. *Guano Co. v. Live Stock Co.*, 442.

41. *Vendor and Purchaser—Fertilizer—Breach of Warranty—Damages—Penalty Statutes.*—A user of fertilizer is not deprived of his right to recover general damages for a breach of warranty of its grade by Revisal, sec. 3945, which penalizes the violation of its provisions. *Carter v. McGill*, 507.

42. *Railroads—Electric Headlights—Negligence—Pleadings—Trials—Burden of Proof—Interpretation of Statutes.*—It is negligence for a railroad company not to equip its locomotives with electric headlights (Pell's Revisal, sec. 2617, a), with the burden on the company to

STATUTES—*Continued.*

plead and prove that it had one in use at the time complained of or that its use was excepted by the statute, when relevant to the inquiry. *Barnes v. R. R.*, 512.

43. *Railroad Crossings—Obstructions—Roads and Ways—Public Rights—Interpretation of Statutes.*—By statutory construction *it is held*, under the circumstances of this case, that an "established road or way" which a railroad company may not obstruct in crossing it with its tracks extends to those whose use is of a private nature, and not necessarily those dedicated to a public use. Revisal, secs. 2569, 2601, 3753, 2681, 2567 (5). And in such instances, where the rights of a railroad and the rights of the public to the use of their roads or ways conflict, the former must give place to the latter. *Tate v. R. R.*, 523.

44. *Judgments — Presumptions — Mortgages—Interpretation of Statutes.*—Revisal, secs. 574, 575, providing that all judgments entered during the term of court shall relate to the beginning of the term, and be deemed to have been then entered, will not apply where it will affect the rights of innocent *bona fide* purchasers for value under a conveyance of lands, and registered during the term of court at which the judgment had been obtained. *Fowle v. McLean*, 537.

45. *Mortgages — Purchasers for Value — Preëxisting Debt.*—The principle that a mortgage given for a present loan of money constitutes the mortgagee a purchaser for value generally obtains in reference to mortgages and deeds of trust to secure past indebtedness. Revisal, secs. 961-964. *Ibid.*

46. *Equity—Administration—Jurisdiction—Same Court—Specific Performance—Injunction—Interpretation of Statutes.*—The plaintiff being a purchaser under the ordinary contract to convey timber, alleges that he is entitled to an extension period under the terms of the contract for cutting, etc., though not appearing upon its face by reason of a mutual mistake in the date thereof, and that he had in time tendered the defendant the consideration specified for the extension of the said period, which the defendant had refused, and that the defendant was then cutting the timber upon the land. *Held:* The plaintiff's action is of an equitable nature, asking specific performance of his contract and an injunction against the continued cutting of the timber by the defendant; and though the technical difference between actions at law and suits in equity have been abolished, and both are administered by the same court, the powers and jurisdiction of the courts of equity are preserved. *Lumber Co. v. Cottingham*, 544.

47. *Bills and Notes—Notice of Dishonor—Verdict—Indorser—Surety—Interpretation of Statutes.—Semble:* That one writing his name on the back of a negotiable instrument may not show by parol evidence that he signed otherwise than as an indorser, "unless he clearly indicates by appropriate words his intention to be bound in some other capacity" (Revisal, secs. 2112, 2113); but it having been found by the jury under the pleadings, evidence, and correct instructions from the court, that such person was given due notice of dishonor, on which grounds he alone seeks to avoid liability, the question is not necessary to decide. *Bank v. Wilson*, 557.

STATUTES—*Continued.*

48. *Bills and Notes—Notice of Dishonor—Trials—Verdict—Interpretation—Instructions.*—A verdict of the jury may, in proper instances, be given significance by reference to the pleadings, evidence, and the charge of the court, and therefrom it appears that the jury necessarily found, in this case, that the requisite notice of dishonor for nonpayment or nonacceptance of the negotiable instrument sued on had been given, the charge being in accordance with the language of the statute, Revisal, 2254. *Ibid.*

49. *Deeds and Conveyances—Defective Probate—Registration—Purchaser for Value.*—The registration of a deed to lands having a defective probate will be dealt with and treated as if unregistered, to the extent that the same may affect registered deeds made to the same lands to purchasers for value, since 1885. Revisal, sec. 979. *King v. McRackan*, 621.

50. *Counties — Roads — Necessary Expense—Statutes—Power of Courts.*—The question as to whether a legislative act, providing for an issuance of bonds, passed in accordance with Art. II, sec. 14, of the State Constitution, sufficiently safeguards the rights of the citizen as to the assessment of damages for land to be taken by the road commission in improving the roads of a county will not be considered in an action brought by the taxpayers to restrain the commissioners from exercising the authority given them, and can only be raised by the landowner when the occasion occurs. *Hargrave v. Commissioners*, 626.

51. *Same—Injunction.*—The courts cannot enjoin road commissioners in the performance of their duties in the maintenance, construction, and management of the public roads of the county, under legislative authority, imposed by a statute passed in accordance with Art. VII, sec. 7, of the State Constitution; and the objections to the statute in question that the board is a self-perpetuating body because the members are to fill vacancies, etc., without limitation as to the duration, or responsibility to the people for their acts, etc., or that the members are not subject to removal except upon indictment for misfeasance, and then only for the willful failure or refusal to perform a duty, should be addressed to the lawmaking power, and not to the courts. *Ibid.*

52. *Supreme Court — Decisions — Estoppel—Statutes.*—The Supreme Court having by numerous decisions held that an act of the Legislature authorizing a bond issue for public roads is valid if conforming to Art. II, sec. 14, of the State Constitution, without submitting the proposition to a vote of the people, and in construing acts involving proportionately to population and property value no greater amount of bonds than are here in controversy, is estopped to apply a different rule to the facts on this appeal. *Ibid.*

53. *Attachment—Summons—Returnable Thirty Days—Justices' Courts—Interpretation of Statutes.*—In attachment and publication on a nonresident defendant before a justice of the peace, where defendant's property within the jurisdiction of the court has been levied on, a summons is not required; and therefore the requirements of Revisal, sec. 1445, that the summons must be made returnable not more than thirty days after its issuance is inapplicable. *Mills v. Hansel*, 651.

STATUTES—*Continued.*

54. *Same—After Thirty Days.*—When personal service of summons in attachment cannot be made for the absence from the court's jurisdiction of a nonresident defendant having property therein, publication of summons is sufficient if made after the expiration of thirty days after service of attachment—in this case, one day thereafter—computed from the time of granting the attachment. Revisal, sec. 762. *Ibid.*

55. *Descent and Distribution—Adopted Father—Natural Father—Interpretation of Statutes.*—Revisal, sec. 177, providing for the adoption of infant children for life or a lesser term, in dealing with the question of devolution and transfer of real property by descent and distribution, confers the hereditable qualities on the child only, and not on the adopting parent; and where such child by adoption dies seized of realty, without leaving brother or sister, and the property is claimed by both the adopted and natural father, the law confers it upon the latter under our general statutes of descents, Revisal, ch. 30, rule 6. *Edwards v. Yearby*, 663.

56. *Descent and Distribution—Suggested Changes—Legislative Power.*—The rules of devolution and transfer of property by descent and distribution come entirely within the province of the Legislature, to which must be addressed any suggested changes. *Ibid.*

STATUTE OF FRAUDS. See Contracts.

Statute of Frauds—Direct Obligation—Interest.—The statute of frauds has no application where the one sought to be charged has credit extended to him as an original obligation, and on a transaction in which he has a pecuniary interest. *Powell v. Lumber Co.*, 632.

STATUTE OF USES. See Estates, 4, 7; Trusts and Trustees.

STREETS. See Cities and Towns.

STREET RAILWAY. See Railroads.

SUBCONTRACTORS. See Mechanics' Liens.

SUBROGATION.

Judgments—Principal and Surety—Equity—Subrogation.—Judgment having been rendered against the principal on a note and H., one of the sureties, H. and K. mortgaged their interest in certain standing timber, and thereafter judgment was rendered against K. and M., sureties on the same note; the mortgage of H. and K. was registered at the same term of the court at which the second judgment was rendered, but prior in point of time. M. paid the judgment creditor and had the judgment assigned to a third person to his use. The plaintiff was the purchaser at the sale under the mortgage. *Held:* M., the surety who had paid the judgment, is subrogated to the rights of the judgment creditor, and holds a lien prior to that of the mortgage on the interest of H. in the timber, but not on that of K., for as to K. the mortgage is regarded as having been registered before the rendition of the judgment. *Fowle v. McLean*, 537.

SUICIDE. See Insurance.

SUMMONS. See Attachment.

SURETY. See Bills and Notes, 17.

TAXATION. See Schools; Inheritance Tax; Counties.

TAXES. See Bills and Notes.

TAX LISTS. See Evidence, 66.

TELEGRAPHS. See Municipal Corporations.

1. *Telegraphs—Notice of Importance of Messages—Subsequent Communications to Agent—Evidence.*—In an action against a telegraph company for its failure to promptly transmit and deliver a message reading, "Am coming today; have conveyance at station," it is competent for the plaintiff to show as notice to the company of its importance that after the message had been received for transmission, but before it was in fact sent, he informed the operator at the receiving office that he was sick as the reason for sending the message; and the assurance of the defendant's agent at the time, that the message had been delivered, when it had not been, is not controlling. *Young v. Telegraph Co.*, 36.

2. *Telegraphs — Commerce—Stipulations on Message—Limitation of Liability—Negligence—State's Decisions.*—Where a telegraph company receives a telegram for transmission from another State via a point in this State to its destination here, and attempts to deliver it by telephone, the only means of wire communication between the latter points, which could reasonably have been done in time to have avoided the injury complained of, it is liable for its negligence in that respect; and the latter transaction being intrastate, the decisions of our own courts are alone applicable which declare to be invalid a printed stipulation on the message, that a recovery beyond $50 could not be had unless an extra charge had been paid for having the telegram repeated, etc. And *it is further held* that had the message been an interstate transaction, the result would be the same, under authority of *Tel. Co. v. Milling Co.*, 218 U. S., 406. *Ibid.*

3. *Telegraphs—Written Demand—"Sixty Days"—Valid Stipulations.*—The stipulation printed on the back of a telegraph blank requiring that any claim for damages must be presented to the company in writing within sixty days after filing the message, is a reasonable and valid one. *Bennett v. Telegraph Co.*, 496.

4. *Same—Sufficient Compliance.*—It is a sufficient compliance with the stipulation printed on the back of a telegram requiring that a claim for damages must be presented to the company in writing within sixty days, when the plaintiff, the sendee of the message, promptly notifies the agent at the terminal point that he would bring suit for the delay, and afterwards writes the agent at the receiving point that he "would make demand on the company for $5,000 for nondelivery of the telegram sent to him at R. on 29 April, 1912," it further appearing that this had been the only message sent to him, and that all of the communications occurred within the sixty days stipulated for by the company. *Ibid.*

5. *Same—Parol Evidence—Notice to Produce Original.*—In an action to recover damages of a telegraph company for its negligent failure to deliver a message relating to sickness, the court permitted the plain-

TELEGRAPHS—*Continued.*

tiff to testify as to the contents of a letter written to defendant's agent within the sixty days (after notification to the defendant and its failure to produce the original letter) that he "would make demand on it for $5,000 for nondelivery of the telegram sent to him at R. on 29 April, 1912," but rejected testimony as to what the message was about, or its nature. *Held:* The ruling of the court excluding this evidence was erroneous. *Ibid.*

6. *Damages — Written Demand — Telegraphs—Mailing Letter—Presumptions.*—The mailing of a letter properly addressed is presumptive evidence that it was received by the addressee within a reasonable time, which applies, in this case, to a letter making demand upon a telegraph company for damages arising from its negligent delay in delivering a telegram to the sendee. *Ibid.*

7. *Telegraphs—Delivery Limits—Service Message—Extra Charge—Refusal of Sender to Pay or Guarantee—Sender's Instructions.*—Where the sendee of a telegram announcing the death and time of burial of a deceased person is beyond the reasonable free delivery limits of the telegraph company, at the terminal office, in this case 3 miles, it is the duty of the agent of the company, upon ascertaining the fact, to wire the information back to the sending office, where the sender should be so notified, with request for guarantee or payment of the special charges required for the extra service in delivering the message; and when the sender refuses to do so, but instructs that the message be mailed from the terminal office to the addressee, which is accordingly done, and this alone causes the addressee to arrive too late for the funeral, the latter may not recover actual or compensatory damages, in his action against the company, for his inability to have been then present. *Smith v. Telegraph Co.*, 515.

8. *Same—Conflicting Evidence—Sender's Statement—Impeaching Evidence.* Where the agent of the sender of a message has been notified that the sendee was beyond the free delivery limits of the telegraph company's terminal office, in accordance with information given in a service message sent from that place, and the evidence is conflicting as to whether he guaranteed the extra charge required for its delivery or instructed that the telegram be mailed to the addressee from the terminal office; and he has testified that he had sent two messages to different people, and that he had given these instructions about the other message, it is competent, as tending to contradict his testimony, to introduce as evidence his written statement previously given, that he had been notified that the message in question had not been delivered for the reasons stated; that the addressee was not expected to come; and that the company was not to blame, as it had followed his instructions in mailing the telegram. *Ibid.*

TELEPHONES. See Process, 2.

TENANTS IN COMMON. See Waiver.

1. *Tenants in Common—Judicial Sales—Sale for Division—Commissioner's Deed.*—The deed of a commissioner to lands owned by tenants in common, given for a division, conveys to the purchaser the same title and estate as owned by the tenants in common, and operates as the deed from each and all of them. *Jordan v. Faulkner*, 466.

TENANTS IN COMMON—*Continued.*

2. *Tenants in Common—Partition—Judgment Creditors—Parties.*—A partition sale, in the absence of statute laws, does not free the lands from preëxisting liens, and judgment creditors of one of the tenants are not necessary parties to the proceedings. *Ibid.*

3. *Same—Proceeds of Sale—Payment of Liens.*—Prior encumbrancers or judgment creditors, whose liens on the interest of an insolvent tenant in common in lands has been docketed before proceedings for partition, may not as interpleaders in the proceedings compel the commissioner, who has sold the lands for division among the tenants, to pay over the share of the proceeds of their judgment debtor to them, to be applied to the satisfaction of their liens. *Ibid.*

4. *Burning of Woods—Statutory Notice—Tenants in Common—Waiver—Verdict—Appeal and Error.*—Where contrary to the provisions of Revisal, sec. 3346, the owner sets fire to the woods on his own lands and injures the adjoining lands of tenants in common, without having given them prior written notice of two days required by the statute, and relies upon the waiver of one of the tenants, in possession and control, as binding upon them all. *Semble:* The waiver of notice by this tenant would be binding upon them all; but this question does not arise for decision in this case, the jury having found upon conflicting evidence that there had been no waiver of the notice by him. *Stanland v. Rourk*, 568.

TIMBER DEEDS. See Deeds and Conveyances; Contracts.

TORT-FEASORS. See Parties, 14.

TORTS. See Waiver.

Trials—Nonsuit—Joint Tort-Feasors—Release of One—Release Pro Tanto. In an action against two defendants, A. and B.—against A. for wrongfully cutting timber on plaintiff's land and against B. for receiving a part of it and not paying therefor, it is error for the trial judge to enter judgment of nonsuit in A.'s case, because the case of B. had been compromised and nonsuit entered as to him, for a release of that demand could only be a release of A. *pro tanto*. *Mason v. Stephens*, 370.

TRESPASS. See Limitations of Actions, 10.

TRESPASSER. See Negligence, 8.

TRIALS. See New Trials; Instructions; Evidence; False Imprisonment.

1. *Bailment — Negligence—Trials—Evidence—Prima Facie Case—Burden of Proceedings—Burden of the Issue.*—A bailee of goods is required to deliver the goods to the bailor in the condition they were in when received, or in accordance with the terms of the bailment, and if he fails to do so, he is liable unless he can show that his inability arises without fault on his part; and while the burden of proof continues to rest on the bailor in his action to recover damages for injury to or the destruction of the property while in the bailee's possession, a *prima facie* case is made out against the latter by showing the fact of bailment and that the property had not been redelivered accordingly, which may be met by the defendant's showing he was not in default;

TRIALS—*Continued.*

whereupon the duty of going forward again shifts to the plaintiff; for this duty may rest first on one party and then on the other, while the burden of establishing the issue in his favor continues throughout with the plaintiff. *Hanes v. Shapiro*, 24.

2. *Trials — Instructions — Appeal and Error — Omission to Charge—Collateral Matters.*—In an action for wrongful death, where the allegations involve and the evidence chiefly relates to the question of negligence of the defendant in permitting an obstruction upon the right of way, knocking the intestate from the running board of the tender of the locomotive, and also involve the doctrines of contributory negligence and the last clear chance, the failure of the court, in his charge to the jury, to advert to a phase of the evidence from which it might be inferred that the intestate may have been inadvertently knocked from the running board by his companions is not held erroneous, especially when requests for specific instructions thereon had not been preferred. *Buchanan v. Lumber Co.*, 40.

3. *Bills and Notes—Infirmities in Instrument—Holder—Burden of Proof—Notice—Bad Faith—Interpretation of Statutes.*—When it is alleged and shown in an action upon a note brought by the holder, claiming to have acquired it in due course, that the instrument had been procured by fraud between the original parties, the burden is then upon him to show that he had acquired it *bona fide*, without notice of any infirmity in the instrument or defect in the title of the person who negotiated it to him (Revisal, sec. 2206), the notice required to invalidate his title being "actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Revisal, sec. 2205. *Smathers v. Hotel Co.*, 69.

4. *Same — Instructions — Trials — Questions for Jury.*—Where fraud between the original parties to a negotiable instrument has been alleged and shown, and one claiming to be a holder in due course brings his action thereon, it is not error for the trial judge to refuse to instruct the jury, when the plaintiff's evidence, uncontradicted, tends to show that he acquired it in due course without knowledge or notice of the defect, that there was no evidence of such knowledge or implicative facts, for the statute casts the burden, in such instances, on the plaintiff, and the jury, the triers of the facts, may not find them to be as testified; but the plaintiff is entitled to an instruction that the jury should answer the issue in his favor if they find the facts to be as testified, when, as in this case, no adverse inferences may be drawn from the testimony. *Ibid.*

5. *Husband and Wife—Judgment—Estoppel in Pais—Moneys Received—Credits—Trials—Questions for Jury.*—In proceedings brought by the wife to recover the value of her services rendered to her aged parent, under a valid agreement that such services would be compensated for by him, and her husband has set up this claim in an arbitration in which the wife was not a party, relating to his account as guardian of the father, and has been paid a certain sum under the arbitration purporting to be in full of his wife's demand, and has paid it over to her, though the wife was a witness in the proceeding to arbitrate, there is nothing in her conduct which could operate as an estoppel

TRIALS—*Continued.*

in pais, and the question of her recovery should be submitted to the jury, regarding the money she has received as a payment *pro tanto*, should she succeed in recovering a larger sum. *Patterson v. Franklin*, 75.

6. *Trials—Issues of Fact—Judgments—Costs.*—This controversy presents issues of fact as to a dividing line between the lands of the parties, and the plaintiff was properly taxed with costs, the verdict establishing the line in accordance with the defendant's contention. *O'Neal v. Dunston*, 80.

7. *Trials—Instructions—Issues of Fact.*—This case involves only an issue of fact as to the location of a boundary line between the parties from a fixed point given in the deed, and the instructions being correct, no error found. *Gregory v. Wallace*, 81.

8. *Insurance, Life—Defense—Suicide—Trials—Burden of Proof—Nonsuit.* Where an insurance company interposes the defense of suicide of the insured to avoid recovery by the plaintiff in his action on a life insurance policy, the burden of proof is on the defendant to show, by the greater weight of the evidence, the fact of suicide, and a nonsuit upon the evidence will not be allowed. *Baker v. Insurance Co.*, 87.

9. *Trials—Evidence—Female Witnesses—Credibility—Appeal and Error.*—A statement made by the judge to the jury in this case, that a woman as a witness is not entitled "to more credit than a man," *is held* to be without error. *Barefoot v. Lee*, 89.

10. *Vendor and Purchaser — Sale Not Consummated—Trials—Evidence—Verdicts—Mortgages.*—In an action to recover the possession of two mules, where the evidence was conflicting whether the defendant bought them on trial or on credit, the controversy presented an issue of fact, which being found in the plaintiff's favor, the title to the mules did not pass to the defendant or to his vendee; and hence there were no features of a conditional sale presented, requiring registration as to third persons. *Land Co. v. Bostic*, 99.

11. *Vendor and Purchaser—Evidence of Sale—Acceptance of Check—Trials—Questions for Jury.*—In this action to recover the possession of certain mules, which is resisted on the ground that the defendant had purchased them on a credit, a letter written by the defendant to the plaintiff was introduced in evidence by the former, saying that it inclosed a check for $25 which was "a payment on the mules bought." *Held:* The statement in the letter is not sufficiently definite to be controlling on the question, and only afforded relevant evidence on the issue. *Ibid.*

12. *Trials—Evidence—Corroboration.*—Where a witness has testified to certain material matters, it is competent for another witness to testify what the former witness had said to him, it being corroborative of the witness who has testified. *S. v. Rogers*, 112.

13. *Trials—Speeches to Jury—Improper Argument—Appeal and Error.*—Upon his argument to the jury the counsel for the defendant, being tried for unlawfully setting fire to a ginhouse, told of his having gone on the prosecutor's premises, and of his own knowledge of facts and circumstances relating to the locality, which had not been testified

TRIALS—*Continued.*

to, and were at variance with the testimony of one of the State's witnesses. The prisoner's counsel excepted to certain language used by the solicitor in reply, and under the circumstances of this case *it is held* that the prisoner's counsel cannot be heard to complain; and the Supreme Court reminds counsel that from respect for the occasion they should abstain from controversy of this character; and the courts, that they should prohibit them. *Ibid.*

14. *Homicide—Principal—Abettor—Evidence—Trials—Questions for Jury* Where two defendants are on trial for the same homicide, and the deed was committed by one of them in the presence of the other, either actual or constructive, who has encouraged and abetted the killing, the latter is guilty of the same degree of crime as the one whose act directly caused the homicide; and where the evidence tends to show that A. and B. had ill-will toward C.; that A. assaulted C., urged on by B., who had an open knife in his hand; whereupon C. in turn assaulted A., then left the room where the fight occurred, followed by B., with his drawn knife, and that A. attempted to follow, but was detained by a third person; that a very few minutes thereafter C. was found dead in an adjoining room from a knife cut near the region of the heart, in the presence of B., and the evidence being sufficient to sustain a verdict of the guilt of B. of murder in the second degree, *it is held* that it is also sufficient to sustain a verdict of guilty in the same degree against A. The principle of law relating to principals of the first and second degree in crime, and of accessories, discussed by WALKER, J. *S. v. Powell*, 134.

15. *Homicide—Trials—Evidence—Continuous Transactions.*—Upon the trial for a homicide, *it is held* that the testimony of a witness relating the various occurrences between the prisoners and the deceased is competent as *pars rei gestæ*, they being one continuous transaction, each event being inseparable from the other. *Ibid.*

16. *Criminal Law—Work on Roads—Defense—Certificates of Performance —Trial—Evidence—Questions for Jury.*—Where upon trial for unlawfully failing to work the roads a defendant pleads not guilty, and introduces a certificate that he had performed this service from August, 1913, to August, 1914, and the evidence on the part of the State tended to prove that the defendant was notified to work in August, 1914, a conflict of evidence on the material fact arises as to whether the certificate covered the time when the defendant was notified to work; and a request that the court charge the jury that they return a verdict of not guilty upon the whole evidence is properly refused. *S. v. Thomas*, 146.

17. *Criminal Law — Work on Road—Overseer—Notice—Agreements—Admissions—Trials.*—The defendant being tried for unlawfully failing to work on the public road under a sufficient indictment, a witness testified, without objection, that he was overseer of that section, and *it is held* that it was competent for him to further testify that the defendant lived on that particular road, and that upon giving him the notice required, and telling him of the day appointed and where to go, he had agreed to do so, the agreement of defendant being in the nature of an admission that the service was due by him. *Ibid.*

TRIALS—*Continued.*

18. *Homicide—Self-defense—Prisoner's Apprehensions—Comparative Physique—Trials—Evidence—Questions for Jury.*—Upon a trial for homicide, where it appears that the prisoner and the deceased entered willingly into the fight, and that the prisoner shot and killed the deceased when the latter was following him apparently unarmed and striking him with his hand, it is competent for a witness in behalf of the State, a physician who had professionally attended the deceased, to testify that the deceased had had tuberculosis for several months before his death, accompanied by a cough and loss of voice, the prisoner having pleaded self-defense and testified that the deceased was taller than he was, and weighed more, it being for the jury to determine whether the deceased, in his physical condition, was apparently weak or strong or incapable of overpowering the prisoner or of successfully resisting his attack. *S. v. Heavener*, 156.

19. *Appeal and Error — Fragmentary Appeals — Directing Verdict "Not Guilty"—Order Striking Out Entry—Mistrial—Discretion of Court—Interpretation of Statutes.*—Where the judge has ordered the entry to be made by the clerk of a verdict of not guilty on the trial of a criminal case, for a variance between the offense charged in the indictment and the proof, but conceiving his action to be erroneous, he then, in the presence of the jury, still sitting on the case, directs the clerk to strike out the entry and, withdrawing a juror, directs a mistrial, *it is held* that the order of the judge striking out the verdict of not guilty left the case in exactly the same attitude it was before the entry of such verdict, and the withdrawal of a juror and order of mistrial, being in the discretion of the court, except in capital cases, are not reviewable. *S. v. Ford*, 165.

20. *Intoxicating Liquor—Unlawful Sale—Evidence—Trials—Defense—Good Faith—Questions for Jury.*—Evidence that the defendant delivered intoxicating liquor to another in North Carolina and received money for it is evidence of his guilt, upon a trial for an illegal sale of such liquors, requiring that the case be submitted to the jury; and while the defense is open to him that he had ordered it from beyond the borders of the State, where such transactions are lawful, in good faith, and not as a subterfuge to evade the law, but solely for accommodation and without profit, it is for the jury to determine the truth of the matter upon the evidence under proper instruction from the court. *S. v. Burchfield*, 149 N. C., 541, and that line of cases, cited and distinguished, and the Webb-Kenyon law is held inapplicable to the facts of the case. *S. v. Bailey*, 168.

21. *Homicide—Trials—Argument to Jury—Extrinsic Matters—Appeal and Error.*—Where on a trial for homicide with a pistol the defendant has testified as to the place and relative positions of himself and the deceased, and expert witnesses introduced by the State have testified as to the range of the bullets and their effect, etc., it is not error for the trial judge not to permit the defendant's attorney, in addressing the jury, to demonstrate by any disinterested witness in the courtroom that the expert witnesses introduced by the State corroborated the defendant's testimony; for while counsel should comment on the evidence, it does not include the right to introduce new elements into the trial, which rests largely in the sound discretion of the trial judge. *S. v. Williams*, 191.

TRIALS—*Continued.*

22. *Trials—Evidence—Nonsuit.*—Upon a motion to nonsuit, the defendant's evidence favorable to him cannot be considered, but only that which is favorable to the plaintiff. *Guano Co. v. Mercantile Co.*, 223.

22a. *Master and Servant—Children—Negligence—Trials—Nonsuit.*—In an action to recover for the death of a child 5 years of age, caused by drowning in a reservoir of the defendant cotton manufacturing plant, there was evidence tending to show that the reservoir contained 7 or 8 feet of water, coming within a few inches of the top, and that the intestate fell in while endeavoring to get a drink of water, and met his death; that the reservoir was situated near the mill and the tenement houses of the defendant's employees, in one of which lived the father of the intestate, and where their children usually played, upon a grassy place shaded by trees; that a fence 3½ or 4 feet high had been placed around the reservoir, which had rotted in places, causing openings therein large enough to admit of the passage of the children, through one of which the intestate had gone, upon this occasion, to get water, and that to the top of the wall on which the fence was situated was a gradual upward slope from the children's playground. *Held:* Sufficient to be submitted to the jury upon the issue of defendant's actionable negligence. *Starling v. Cotton Mills*, 229.

23. *Contributory Negligence—Children—Trials—Questions of Law.*—Under the circumstances of this case *it is held* that a 5-year-old boy is too young to be guilty of contributory negligence. *Ibid.*

24. *Judgments—Nonsuit—Res Judicata.*—A judgment of nonsuit is not *res judicata* in a subsequent action brought on the same subject matter. *Ibid.*

25. *Trials — Nonsuit — Motion Before Verdict.*—Where no counterclaim is pleaded or proved the plaintiff may take a voluntary nonsuit at any time before verdict rendered. *Cahoon v. Brinkley*, 257.

26. *Trials — Nonsuit—Counterclaim—Pleadings—Notes—Payment—Chattel Mortgage.*—In an action upon a note with chattel mortgage security, where payment of the note is alleged in defense, the effect of the allegation of payment is not one setting up a counterclaim, or raising an issue thereof, the payment of the note automatically canceling the mortgage security, and plaintiff's motion for voluntary nonsuit should be granted when made in time. *Ibid.*

27. *Estates — Waiver — Trials — Questions for Jury—Courts—Matters of Law.*—The question as to the waiver of the forfeiture of an estate granted upon a condition subsequent, where there has been a breach thereof, which is generally one of intention, may sometimes be declared as a matter of law, but it is usually an inference of fact for the jury. *Brittain v. Taylor*, 271.

28. *Appeal and Error—Trials—Rejection of Evidence—Collateral Matters.* In an action for damages for injuries received in a personal assault, the evidence was conflicting as to whether the injury was inflicted in consequence of the plaintiff's endeavor to protect his sister, the defendant's wife, from the defendant's assault on her with a pistol, or whether the plaintiff and defendant engaged in an assault and the plaintiff was shot in self-defense. The rejection of defendant's evi-

TRIALS—*Continued.*

dence that the defendant's wife made a different statement on the trial as to her husband's conduct towards her from that she theretofore made is not erroneous, the evidence proposed being on a collateral matter. *Lewis v. Fountain*, 277.

29. *Assault — Personal Injuries—Self-defense—Trials—Evidence—Instructions.*—Where in an action to recover damages for a personal injury received by the plaintiff in a fight the defendant resisted recovery on the ground that he was acting in self-defense, that he fired upon the plaintiff and inflicted the injury to protect himself or his children from death or bodily harm, it is necessary for the defendant to show that he acted upon a reasonable apprehension; and the charge of the court in this case *is held* to have been favorable to the defendant, of which he cannot complain. *Ibid.*

30. *Gifts—Delivery—Trials—Evidence—Questions for Jury.*—Where there is evidence tending to show that the grandmother indorsed certain certificates of corporate stock to her granddaughter and requested the latter's father to hold them for his daughter until after her death, which he refused to do, deeming it better for the donor to so hold the stock; that she put the certificates in her Bible and afterwards stated that she had given them to her granddaughter, the evidence raises more than a conjecture of the delivery necessary to the validity of the gift; and the certificates not having been found after her death in the place the alleged donor had put them, the question of a valid gift is one for the determination of the jury in an action against the administrator and the corporation to compel the issuance of a certificate to the alleged donee to supply the place of the lost one. *Zollicoffer v. Zollicoffer*, 326.

31. *Adverse Possession—Acts and Declarations—Questions for Jury.*—Where one claiming title to lands has bought in outstanding titles thereto and claims by adverse possession under his first deed, it is competent to show his acts and declarations as evidence of the character of his possession, and it is for the jury to determine upon all the evidence whether his possession continued to be adverse under the first deed and sufficient to ripen his title into a good and sufficient one during the period fixed by the statute. *Lumber Co. v. Cedar Works*, 344.

32. *Fraternal Orders—Trials—Evidence—Prima Facie Case—Rules of Order—Burden of Proof.*—Where in an action brought by the beneficiaries under a certificate of life insurance in a fraternal order, the plaintiffs offer evidence of a demand and proof of death of the assured, and introduce the certificate sued on, which upon its face and the evidence entitles the plaintiffs to the relief sought, they make out a *prima facie* case, and place the burden of proof upon the defendant to show the defense of nonpayment of dues or other matter to avoid the policy, if such is relied upon. *Harris v. Jr. O. U. A. M.*, 357.

33. *Master and Servant—Railroad—Brakeman—Obstructions Near Track —Contributory Negligence—Trials—Evidence—Nonsuit.*—Where there is evidence that a railroad company has failed to provide a ladder at the end of a box car on its freight train, ordinarily used by its employees to reach the top of its box cars, and its brakemen, in the course of his employment, is prevented from climbing to the top of

TRIALS—*Continued.*

the car by the overhanging eaves of a car shed, from the position he was in after boarding the train; and that after passing from the shed at a speed of 10 or 12 miles an hour, and while climbing from his position towards the top of the car in the manner left open to him, the act of climbing requiring him to look upward, he was struck from the car by a shanty 7 feet high, 200 feet from the car shed and so close to the track as to render his passage between the car and the shanty impossible; and that the shanty could readily have been previously moved or placed by the defendant so as to have permitted the plaintiff to pass in safety. *Held:* Sufficient to be submitted to the jury upon the issue of the defendant's actionable negligence in not providing the plaintiff a safe place to work; and that the courts would not hold as a matter of law that the plaintiff was guilty of contributory negligence. *Williams v. R. R.*, 360.

34. *Evidence—Nonsuit—Interpretation of Statutes.*—In an action by an employee of a railroad company for damages for a personal injury alleged to have been negligently inflicted, a motion to nonsuit upon the evidence on the ground that the plaintiff was guilty of contributory negligence, since the enactment of chapter 6, Public Laws of 1913, cannot be sustained. *Ibid.*

35. *Carriers of Passengers—Passenger Depots—Lights at Night—Contributory Negligence—Trials—Questions for Jury.*—Under the circumstances of this case, the mere fact that a passenger attempted to board defendant's train at night from an insufficiently lighted platform cannot be held to bar his recovery as a matter of law, on the question of his contributory negligence. *Beard v. R. R.*, 143 N. C., 136; *Darden v. Plymouth*, 166 N. C., 492, cited and applied. *Leggett v. R. R.*, 366.

36. *Negligence—Wrongful Death—Cause of Death—Trials—Questions for Jury.*—In an action by an administrator to recover damages for the negligent killing of his intestate, when the evidence is conflicting as to whether the injury complained of caused the death, the issue of fact therein raised is for the determination of the jury. *Ibid.*

37. *Trials — Nonsuit — Joint Tort-Feasors—Release of One—Release Pro Tanto.*—In an action against two defendants, A. and B.—against A. for wrongfully cutting timber on plaintiff's land and against B. for receiving a part of it and not paying therefor—it is error for the trial judge to enter judgment of nonsuit in A.'s case, because the case of B. had been compromised and nonsuit entered as to him, for a release of that demand could only be a release of A. *pro tanto. Mason v. Stephens*, 370.

38. *Mortgages—Voidable Sales—Waste—Accord and Satisfaction—Trials—Questions for Jury.*—The question of accord and satisfaction by the mortgagor's accepting a reconveyance of the land by the mortgagee in possession, under the circumstances of this case, was properly submitted to the jury under conflicting evidence and a correct instruction from the court. *Owens v. Mfg. Co.*, 397.

39. *Water and Water-courses—Permanent Damages—Limitations of Actions—Trials—Questions for Jury.*—In an action for permanent damages to land alleged to have been caused by a wrongful diversion of the

TRIALS—*Continued.*

natural flow of surface waters by the upper proprietor, the statute of limitations runs within five years next before the commencement of the action from the time of the commission of the act complained of, which issue is to be determined by the jury, upon conflicting evidence. *Clark v. R. R.*, 415.

40. *Bills and Notes—Delivery—Intent—Trials — Evidence — Questions for Jury.*—In order to make a valid delivery of a note, the act of delivery and the intent must concur, and where there are no intervening rights, the question is ordinarily one for the jury. *Foy v. Stephens*, 438.

41. *Deeds and Conveyances—Trials—Evidence—Contracts to Convey—Timber—Tender of Deed.*—In an action to compel a defendant to perform his contract to purchase timber on certain lands of the plaintiff it is competent for the plaintiff to introduce in evidence his deed, which he has previously tendered, purporting to convey the timber, for the purpose of showing he was ready and willing to perform his part of the contract. *Timber Co. v. Lumber Co.*, 454.

42. *Deeds and Conveyances— Contracts to Convey Timber — Trials — Defective Title—Parties—Evidence.*—Where the title to lands of the plaintiff, in controversy, depends upon a judgment in certain former proceedings for their sale, and defendant introduces evidence that a party to that proceeding had filed in the clerk's office a petition to set aside the sale on the ground that he had been made a party thereto without his authority, which was not served and which is relied on as evidence of a defective title, it is competent to show by witnesses, who were present when the petition was prepared and knew its contents, that the petitioner had authorized his joinder as a party to the proceedings for the sale of the lands. *Ibid.*

43. *Appeal and Error — Trials — Damages—Evidence—Deeds and Conveyances—Tender of Deed.*—Where the plaintiff has tendered his deed under his contract to convey standing timber, and demands damages in his action for the burning of timber on the lands, the rejection of evidence upon the question of the damages, without showing that they occurred prior to the tender of the deed, is not erroneous. *Ibid.*

44. *Bills and Notes — Execution — Payment — Trials—Burden of Proof.*— Where the plaintiff proves the execution by the defendant of a note, the subject of the action, he is entitled to recover thereon unless payment is shown by the defendant, the burden of showing payment resting on the latter. *Swan v. Carawan*, 472.

45. *Courts—Expression of Opinion—Interest of Witness—Trials.*—In proceedings by an administrator to sell lands of deceased to make assets to pay debts, the execution of the note was testified to by the plaintiff, and a witness for the defendant testified that the note had been paid and that he had a mortgage on the land in question. *Held:* It was error for the court to charge the jury that the defendant's witness was not interested in the result of the action, such being an expression of his opinion upon the weight of the evidence prohibited by statute, which was exclusively for the determination of the jury. *Ibid.*

TRIALS—*Continued.*

46. *Trials—Issues Sufficient—Appeal and Error.*—The refusal of the court to submit the issues tendered by the appellant will not be held as erroneous when the issues passed upon by the jury have afforded the parties opportunity to introduce all pertinent evidence as to the matter in controversy arising under the pleadings. *Bank v. Roberts*, 473.

47. *Bills and Notes—Banks and Banking—Holder in Due Course—Deposits—Trials—Instructions—Verdict, Directing.*—Where all the evidence in an action brought on a note by a bank claiming to be a holder in due course of an instrument regular upon its face tends only to show that the note was indorsed to the bank by the payee, the money placed to his credit and drawn out by him before maturity; that there was no arrangement between the depositor and the bank by which this or other unpaid notes were charged back to him in event of nonpayment, it is proper for the trial judge to charge the jury that if they should find the facts to be as testified they should answer the issue in the plaintiff's favor. *Ibid.*

48. *Trials—Instructions — Statement of Contentions—Objections and Exceptions—Appeal and Error.*—Objection to the statement by the trial judge of the contentions of the parties, in his charge to the jury, must be called to his attention at the time, so that it can be corrected and conformed to the evidence, and exception thereto taken after judgment will not be considered on appeal. *Nevins v. Hughes*, 477.

49. *Trials — Conflicting Evidence — Questions for Jury—Instructions.*—In this case it is held that the evidence is conflicting and the issues were properly submitted to the jury under proper and approved instructions from the court. *Ibid.*

50. *Railroads—Negligence—Pedestrians—Helpless Condition—Trials—Evidence—Questions for Jury.*—In an action against a railroad company to recover for the wrongful death of plaintiff's intestate (Revisal, sec. 59), there was evidence that the intestate was last seen, intoxicated, going towards his home on the defendant's railroad track, on a bright moonlight night, and that the defendant's train thereafter passed going the same direction, with its engine equipped with an old-fashioned headlight and without ringing the bell or giving other warning of its approach, though its track at that place was through a populous portion of a town and customarily used by pedestrians; that from the injuries to the body of the deceased, etc., and from flesh and blood along the track, the body had been rolled along under the train across a 40-foot trestle, the severed head being at one end of the trestle and the body at the other end, and articles he had been carrying home being strewn along the side of the track; that the engine was equipped with a V-shaped cowcatcher, the bottom of which was about 8 inches from the ground. *Held:* Evidence sufficient to be submitted to the jury upon the question of whether the intestate at the time he was killed was down and helpless upon the track, and the actionable negligence of the defendant's engineer in not seeing him in time to have avoided killing him in the exercise of proper care. *Barnes v. R. R.*, 512.

51. *Railroads—Electric Headlights—Negligence—Pleadings—Trials — Burden of Proof—Interpretation of Statutes.*—It is negligence for a rail-

TRIALS—*Continued.*

road company not to equip its locomotives with electric headlights (Pell's Revisal, sec. 2617, a), with the burden on the company to plead and prove that it had one in use at the time complained of or that its use was excepted by the statute, when relevant to the inquiry. *Ibid.*

52. *Deeds and Conveyances — Mortgages — Foreclosure Sales—Purchasers for Value—Trials—Evidence—Verdict, Directing—Burden of Proof.*— The plaintiff claims a one-half interest in the lands in dispute from the ancestor of both parties to the action, who acquired title by deed given at a foreclosure sale which was not registered, the mortgage appearing of record to have been canceled, but the time not stated; and the defendant claims by a subsequent deed from the mortgagor, as a purchaser for value; and it is held for error that the trial judge charged the jury upon the evidence to answer the issue in defendant's favor, the burden of proof being on the defendant to show he was such purchaser by the preponderance of the evidence, and the character of his testimony being inconsistent and improbable under the circumstances narrated by him; and it is further held that the registration of the deed obtained at the foreclosure sale was not necessary to the title to the lands, as between the parties. *Hughes v. Fields,* 520.

53. *Malicious Prosecution — Vendor and Vendee — Mortgaged Property — False Pretense — Probable Cause — Trials — Evidence—Questions for Jury.*—Where the defendant in a criminal action has three separate times been indicted upon as many charges in separate indictments alleged to have arisen from the defendant's having disposed of mortgaged property, in this case, a horse, and the defendant has been acquitted or found not guilty of all of the offenses charged against him, and brings his civil action for damages for malicious prosecution, introducing several affidavits and warrants in the criminal prosecution alleging false representations as to the encumbrances, which is denied by the defendant in this action, the prosecutor in the criminal one, with further evidence in his behalf that he was only acting as the agent of another in making the sale and was unaware of the existence of the mortgage. *Held:* The evidence as to probable cause is conflicting and leaves the question for the determination of the jury. *Motsinger v. Sink,* 548.

54. *Trials — Immaterial Issues — Instructions—Appeal and Error.*—Where the answer by the jury to one of the issues submitted to them makes their answer to another immaterial, a charge of the judge upon the immaterial issue, if erroneous and applicable to that alone, will not be held for reversible error. *Bank v. Wilson,* 557.

55. *Trials—Instructions—Contentions—Objections and Exceptions—Appeal and Error.*—An exception to the charge of the court is not held for reversible error in this case, the portion objected to being susceptible of the interpretation that it was a statement of the contentions of the appellee. *Ibid.*

56. *Trials—Nonsuit—Evidence—Questions for Court—Questions for Jury.* The court is confined to the single inquiry, upon a motion to nonsuit upon the evidence, whether there is any legal evidence upon which the jury may render their verdict in the plaintiff's favor; and if

TRIALS—*Continued.*

there is, it is for the jury to pass upon its weight and sufficiency under the rule that the evidence must be interpreted most favorably to the plaintiff. *McRainey v. R. R.*, 570.

57. *Electric Companies—Supervision—Negligence—Trials—Evidence—Nonsuit.*—The plaintiff was employed in a foundry, and for the purpose of seeing how to clean out molds, which was a part of his employment, he was required to hold in his hand an electric light or bulb, connected with the current of electricity furnished by the defendant over its wires and equipment to his employer, and though he had been accustomed to doing this for several years without harm or injury to himself, on the occasion complained of he was suddenly and without warning shocked into insensibility and permanently injured, with evidence that the shock was far in excess of the voltage contracted for by his employer, and caused by a defect in a transformer on defendant's pole on the outside of the building used for lessening the voltage before supplying it to the employer; that the company owned and had sole management and control of the lighting, wiring, and appliances on the outside of the building, and that it had failed in its duty to properly inspect the same and keep them in proper condition. *Held:* Upon a motion to nonsuit, considering the evidence in the most favorable view for the plaintiff, the issue as to defendant's actionable negligence was for the determination of the jury. The charge in this case is approved. *Shaw v. Public Service Corporation*, 611.

58. *Carriers of Passengers — Freight Trains — Negligence — Contributory Negligence — Trials — Evidence.*—Evidence that a passenger on a freight train seated himself upon a seat provided for passengers and was violently thrown from his seat by the sudden and unexpected movement of the train is insufficient upon the issue of contributory negligence; and as the defendant is held to a high degree of care consistent with the operation of trains of this character, the fact that the injury occurred in the manner stated affords sufficient evidence of defendant's actionable negligence to sustain a verdict in plaintiff's favor on that issue. *Barnes v. R. R.*, 667.

59. *Negligence—Proximate Cause—Trials—Instructions.*—In an action to recover damages arising from the defendant's negligence, and the questions in dispute involve only those of whether the act complained of was negligently done. and if it caused the injury, the judge charged the jury that they must find that the defendant was negligent and that the negligence caused the injury, in order to answer the issue in plaintiff's favor. *Held:* The charge was not objectionable as leaving out the element of proximate cause. *Ibid.*

TRUSTS. See Wills; Mortgages.

TRUSTS AND TRUSTEES. See Mortgages.

1. *Trusts and Trustees—Deeds and Conveyances—Beneficiaries—Execution—Married Women.*—Where in a deed in trust to lands the title is conveyed absolutely and in fee to the trustee, the deed of the trustee will pass the title to the lands, without the execution of the instrument by the beneficiaries or others, and is competent evidence of the grantee's title; and objection that the wives of the beneficiaries had

TRUSTS AND TRUSTEES—*Continued.*

not also joined in the conveyance is untenable, especially when it appears from the deed that the husbands executed the deed for the sole purpose of saving the trustee harmless. *Power Corporation v. Power Co.*, 219.

2. *Wills — Interpretation — Estates—Beneficiaries' Death — Limitations—Contingent Remainder—Trusts.*—A testator who died seized and possessed of a large estate consisting in real and personal property, devised his home place to his wife for life, with limitation over to his children in fee simple, share and share alike, and by a later item provided that his wife and children "shall share equally in both real and personal property, the division not to be final until my youngest child, Virginia, is 21, if living, and if either die without children, their property is to be equally divided between their brothers and sisters." *Held:* The last words of the quotation refer to the death of the children of the testator and are inconsistent with the construction that the whole property should be held by the executors, as trustees, such construction applying equally to the wife, who takes her life estate in the home place absolutely. *Bank v. Johnson*, 304.

3. *Wills, Interpretation—Executors and Administrators—Passive Trusts—Possession and Use—Statute of Uses.*—Executors named in a will "to all intents and purposes to execute this my last will and testament; to have entire control thereof so long as may be necessary for the fulfillment of this will," etc., if construed to hold as trustees, they are, upon the terms of the will being construed, trustees only of a passive trust, and the devisees and legatees will be entitled to the present possession and use of the property they derived by the will, under the statute of uses. *Ibid.*

4. *Principal and Surety—Judgments—Payment—Assignment of Judgment —Uses and Trusts.*—A surety may preserve the lien of judgment against the principal and himself by paying the judgment creditor and having the judgment assigned to a third person for his own benefit; and this also applies to a judgment against his cosureties and himself in enforcing an equality of obligation between them. *Fowle v. McLean*, 537.

5. *Partnership—Trusts and Trustees—Deeds and Conveyances—Misrepresentation by Partner—Fraud—Intent—Evidence.*—Where two persons enter into a partnership for the purchase of lands, and one of them, acting for both, purchases at a less price than he had represented to the other, who in ignorance thereof pays his part, the acts of the purchasing partner are fraudulent upon the other and entitle him to recover the amount in excess of his obligation which he has been called upon to pay; and testimony as to a fraudulent intent is immaterial. *Chilton v. Groome*, 639.

UNLAWFUL ARREST. See Criminal Law.

UNUSUAL PUNISHMENT. See Constitutional Law, 2.

USES AND TRUSTS. See Estates, 4, 7; Trusts and Trustees; Husband and Wife.

Usury—Principal and Agent—Amount of Money Received.—In an action to recover a certain sum of money alleged to be due the plaintiff by

USES AND TRUSTS—*Continued.*

reason of an usurious rate of interest charged him for a loan of money by the defendant, it appears that this money was received by the attorney of the plaintiff, out of which he paid an indebtedness of the plaintiff to another, and it does not appear how the balance of the money was used or applied. *Held:* It is the amount of money received by plaintiff's agent from the defendant that controls the question of usury, and as the defendant in this case appears to have paid over to the plaintiff's agent such an amount as frees the transaction from the taint of usury, a recovery was properly denied. *Barefoot v. Lee*, 89.

VENDOR AND PURCHASER. See Contracts.

1. *Vendor and Purchaser—Breach of Warranty—Tort—Election—Waiver.* Where upon breach of the seller's warranty of goods, the purchaser agrees with him that he may take them and make them come up to the quality and kind they were warranted to be, and the seller accordingly and for the purpose takes the goods into his possession, the purchaser, by the new agreement, waives his right of action upon the breach of the warranty. *Hanes v. Shapiro*, 24.

2. *Same—Inconsistent Remedies.*—One who is put to his election to choose between inconsistent remedies is bound by his choice of one of them to relinquish his right of action upon the other. *Ibid.*

3. *Vendor and Purchaser—Breach of Warranty—New Consideration—Bailment—Negligence.*—The purchaser of a sideboard received and paid for it, and thereafter, discovering defects therein, agreed with the seller that the latter should take the property back and make it as warranted, and while the article was in the possession of the seller for that purpose it was destroyed by fire. *Held:* The title to the property remained in the purchaser, and its return to the seller made the latter a bailee for hire, upon a mutual consideration moving between the parties in adjustment of the matters in dispute arising from an alleged breach of the seller's warranty of the sideboard, making him liable to the purchaser for ordinary negligence in not taking care of the article, under the rule of the ordinarily prudent man. The law relating to the mutual rights of bailor and bailee, with respect to negligence, benefits received, and the care required by the latter under varying circumstances, discussed by WALKER, J. *Ibid.*

4. *Vendor and Purchaser—Trials—Fraud—Issues of Fact—Evidence—Instructions.*—In this action to recover the price of certain jewelry sold and delivered, fraud in the procurement of the sale was alleged, and the controversy presented is one of facts, determined by the jury in defendant's favor, with the burden of proof properly placed upon him. *Jewelry Co. v. Jones*, 82.

5. *Vendor and Purchaser—Sale Not Consummated—Trials — Evidence — Verdicts—Mortgages.*—In an action to recover the possession of two mules, where the evidence was conflicting whether the defendant bought them on trial or on credit, the controversy presented an issue of fact, which being found in the plaintiff's favor, the title to the mules did not pass to the defendant or to his vendee; and hence there

VENDOR AND PURCHASER—*Continued.*

were no features of a conditional sale presented, requiring registration as to third persons. *Land Co. v. Bostic*, 99.

6. *Vendor and Purchaser—Evidence of Sale—Acceptance of Check—Trials —Questions for Jury.*—In this action to recover the possession of certain mules, which is resisted on the ground that the defendant had purchased them on a credit, a letter written by the defendant to the plaintiff was introduced in evidence by the former, saying that it inclosed a check for $25 which was "a payment on the mules bought." *Held:* The statement in the letter is not sufficiently definite to be controlling on the question, and only afforded relevant evidence on the issue. *Ibid.*

7. *Vendor and Purchaser—Contracts—Certain Quantity "or More."*—A contract to purchase a certain quantity of guano, "or more," by a fixed date, to be shipped out by the seller as ordered, is not too indefinite in its terms to be enforcible by the seller as to the quantity definitely agreed upon. *Guano Co. v. Mercantile Co.*, 223.

8. *Vendor and Purchaser—Personal Property—Implied Warranty—Bank Stock—Assessment.*—One who offers personal property to another for sale impliedly warrants that there are no liens or encumbrances on the title which will affect its value; and the acceptance of an offer of sale of National bank stock cannot be enforced when the proposed purchaser was unaware at the time that the comptroller of the currency had ordered an assessment made upon the shares for the purpose of making up a deficiency in the capital stock of the bank. *Martin v. McDonald*, 232.

9. *Vendor and Purchaser — Contract — Delivery — Measure of Damages— Evidence—Market Quotations.*—In an action against the seller of several hundred barrels of potatoes, for a breach of contract in failing to deliver them, it is competent, upon the measure of damages, for the plaintiff, as a witness, to give his opinion of the price of the potatoes, based on information delivered from competent sources, such as market reports published in newspapers relied on by the financial world, etc., and his testimony that the potatoes were worth at least $3 or more a barrel is competent as to the value definitely stated. *Ferebee v. Berry*, 281.

10. *Vendor and Purchaser—Corporations—Reorganization—Certificates of Stock—Corporate Name.*—Where a corporation has practically reorganized under a different name, the fact that persons in negotiating for the sale of shares of stock in the reorganized corporation used the former name is immaterial, it appearing that the purchaser received the certificates he had contracted to purchase, and held them without objection, and must have known of the fact. *Pritchard v. Dailey*, 330.

11. *Vendor and Purchaser—Possession of Purchaser—Payment Upon Condition—Libel—Other Liens—Title—Liability of Purchaser.*—A sale of a boat having been made upon agreement that the purchaser take immediate possession and the check for purchase price be retained in the hands of a third person until the seller had canceled of record a certain mortgage on the property. *Held:* The title to the boat passed to the purchaser upon his taking possession, and upon the cancella-

VENDOR AND PURCHASER—*Continued.*

tion of the mortgage the seller was entitled to the purchase price, notwithstanding the boat had been libeled in the meanwhile and a lien thereon for damages to its cargo, while in the purchaser's possession, had been established by judgment of the court. *Brinn v. Steamboat Line*, 390.

12. *Vendor and Purchaser—Contracts—Goods Sold—Conditional Credit.*—A contract consists of the coming together of the minds of the parties into an agreement upon the subject matter, and not what either of them independently supposed the agreement to have been; and in the sale of an engine, wherein the seller took the note of the purchaser, and it was agreed that an allowance would be made on the note for an old engine belonging to the purchaser in such sum as the former, in his discretion, would fix, and the latter refused the amount thus named, there is no evidence of an agreement upon the amount of the credit to be allowed for the old engine. *Leffel Co. v. Hall*, 407.

13. *Vendor and Purchaser—Contracts — Fertilizers — Dealers — Breach of Warranty — Damages — Express Warranty—Parol Evidence.*—In the sale of personal property the law will not imply a warranty at variance with that agreed upon between the parties, or permit parol evidence to vary or contradict the warranty expressed in a written contract of sale; and a written warranty in the sale of fertilizers by a manufacturer to a dealer therein, guaranteeing the fertilizer to be in accordance with the analysis printed on the sack, but not as to results from its use; that verbal promises conflicting with the terms of the contract were unauthorized, and would not be recognized, is held to restrict the warranty within the stated terms and to exclude parol evidence tending to show the warranty to have been otherwise. *Guano Co. v. Live Stock Co.*, 442.

14. *Vendor and Purchaser—Contracts—Fertilizers—Dealers—Express Warranty—Implied Warranty.*—Where a seller of fertilizer to a dealer warrants the goods only to be according to a given analysis, but not as to results, the law will not imply a further warranty that the fertilizers should be good for the purposes for which they were sold. *Ibid.*

15. *Vendor and Purchaser—Contracts—Dealers—Fertilizers—Express Warranty of Analysis—Evidence—Effect on Crops—Interpretation of Statutes.*—Where fertilizers sold to a dealer are warranted only to contain ingredients according to a certain analysis, but not as to results, evidence of the effect of the fertilizer upon the crop is competent in an action upon the breach of warranty of sale when properly limited to the inquiry as to whether, under relevant and proper conditions, the ingredients of the fertilizers were according to the formula guaranteed, notwithstanding our statutes, Revisal, secs. 3445, 3957, making the analysis of fertilizers certified by the Department of Agriculture *prima facie* evidence of their contents. *Ibid.*

16. *Vendor and Purchaser—Dealers—Contracts—Fertilizer—Express Warranty of Analysis—Measure of Damages.*—In an action upon a warranty in the sale of fertilizer to a dealer, that the fertilizers should contain ingredients according to an agreed formula, the damages, when recoverable, are limited to the difference between the value of

VENDOR AND PURCHASER—*Continued.*

the article delivered and its value or market price if it had been such as it was warranted to be. *Ibid.*

17. *Vendor and Purchaser—Contracts—Dealers—Fertilizers—Effect on Crop—Substantive Evidence.*—Where in an action for damages upon a breach of warranty in the sale of fertilizer it is competent to show the use of the fertilizer upon lands and its effect upon crops, the evidence is substantive and not limited merely to purposes of corroboration. *Tomlinson v. Morgan*, 166 N. C., 557, cited and approved. *Ibid.*

18. *Vendor and Purchaser—Fertilizer—Warranty as to Analysis—Dealers—Warranty as to Results.*—Where a dealer purchases fertilizers under a contract containing a warranty as to the analysis only, and sells them to users thereof with further warranty as to results, express or implied, his further warranty is made upon his own responsibility, and cannot affect the warranty under which he has purchased them. *Ibid.*

19. *Vendor and Purchaser—Fertilizers—Breach of Warranty—Effect Upon Crop—Trials—Evidence.*—A breach of warranty in the sale of fertilizers to be used by the purchaser in the cultivation of his crop may be shown by evidence that the crop was not beneficially affected by its use, provided a proper foundation for its admission is first laid by evidence tending to show that the land was adapted to the growth of the contemplated product, had been properly cultivated and tilled, with propitious weather or seasons, so as to exclude any element which would render the evidence uncertain as to the cause of the loss or the diminution of the crop, and rid it of its speculative character. *Carter v. McGill*, 507.

20. *Same—Chemical Analysis—Appeal and Error.*—In an action on breach of warranty of grade in the sale of fertilizer to a consumer, a chemical analysis of the fertilizer is not the indispensable, though, perhaps, the better test, and it is reversible error for the trial judge to exclude an answer to a question, when it is stated by the attorney for the appellant that he would show by this and other witnesses that the fertilizer was worthless; and his further statement, "that it had no beneficial effect on the crop," was merely a logical deduction to be made from its worthless character. *Ibid.*

21. *Vendor and Purchaser—Fertilizer—Breach of Warranty—Damages—Penalty of Statutes.*—A user of fertilizer is not deprived of his right to recover general damages for a breach of warranty of its grade by Revisal, sec. 3945, which penalizes the violation of its provisions. *Ibid.*

22. *Vendor and Purchaser—Breach of Warranty—Counterclaim—Issues.*—On a trial to recover the purchase price of fertilizer sold to a user thereof, where a counterclaim is set up seeking damages for a breach of warranty, separate issues should be submitted, and the issue of damages should exclusively relate to that subject. *Ibid.*

VENDOR AND VENDEE. See Malicious Prosecution; Contracts.

VERDICT, DIRECTING. See Trials.

VERIFICATION. See Pleadings.

WAIVER.

1. *Vendor and Purchaser—Breach of Warranty—Tort—Election—Waiver.* Where upon breach of the seller's warranty of goods, the purchaser agrees with him that he may take them and make them come up to the quality and kind they were warranted to be, and the seller accordingly and for the purpose takes the goods into his possession, the purchaser, by the new agreement, waives his right of action upon the breach of the warranty. *Hanes v. Shapiro*, 24.

2. *Same—Inconsistent Remedies.*—One who is put to his election to choose between inconsistent remedies is bound by his choice of one of them to relinquish his right of action upon the other. *Ibid.*

3. *Judgment Suspended—Appeal—Trial de Novo—Waiver.*—When it appears that a defendant convicted in a criminal action has consented that the judgment be suspended against him, it will be considered a waiver of his right of appeal on the principal issue of his guilt or innocence; and, where this has been done in a court inferior to the Superior Court, of his right to a trial *de novo*, under the statute. *S. v. Tripp*, 150.

4. *Estates—Forfeiture—Acts of Grantor—Waiver.*—The mere silence of a grantor remaining in possession of the lands conveyed by him, after the breach by the grantee of a condition subsequent, or any indulgence then granted by him to the grantee, will not have the effect of a waiver of his right, when such has not prejudiced the grantee or induced him to do something which will work to his detriment if the forfeiture is enforced, though his acts and conduct may be evidence of an agreement not to take advantage of the forfeiture, or of an affirmation of the continuance of the estate in the grantee. *Brittain v. Taylor*, 271.

5. *Insurance, Life — Premiums—Payment—Waiver—Evidence.*—The payment of a premium on a life insurance policy, according to its terms, is necessary to keep the insurance in force; and this requisite is not waived when the insurer receives the money for the premium when it is past due, in ignorance of the sickness of the insured, resulting in his death, without issuing a receipt, requests a statement of good health from the insured, and returns the money after his death, shortly thereafter occurring. *Clifton v. Insurance Co.*, 499.

6. *Evidence — Letters — Originals—Notice to Produce—Carbon Copies.*—When the opposing party has been notified to produce the original letters, in his possession, at the trial, carbon copies thereof are admissible as evidence when the original ones would be, and when duly proven by the person who wrote them. *Ibid.*

7. *Municipal Corporations — Torts — Damages—Compensation.*—Where a municipal corporation has taken the lands of a private owner for street purposes under an unauthorized attempt to acquire it by condemnation, the latter may waive the tort and resort to his common-law action for compensation. *Lloyd v. Venable*, 531.

8. *Same—Tort—Waiver.*—Where a municipal corporation has assumed to take lands of a private owner for street purposes without his consent or legislative authority for condemnation, the latter may waive the tortious entry and want of power to condemn, and recover upon an

WAIVER—*Continued.*

implied assumpsit, on the part of the town, to pay a just and reasonable compensation. *Ibid.*

9. *Burning of Woods—Statutory Notice—Tenants in Common—Waiver—Verdict—Appeal and Error.*—Where, contrary to the provisions of Revisal, sec. 3346, the owner sets fire to the woods on his own lands and injures the adjoining lands of tenants in common, without having given them prior written notice of two days required by the statute, and relies upon the waiver of one of the tenants, in possession and control, as binding upon them all. *Semble:* The waiver of notice by this tenant would be binding upon them all; but this question does not arise for decision in this case, the jury having found upon conflicting evidence that there had been no waiver of the notice by him. *Stanland v. Rourk*, 568.

10. *Waiver — Special Appearance — Grounds Stated.*—Where a defendant enters a special appearance for the purpose of moving to dismiss an action, and states his ground therefor, and upon his motion being denied appears and answers to the merits of the cause, he will be deemed to have waived all other objections than those set out in his special appearance. *Mills v. Hansel*, 651.

WARRANTS. See Criminal Law.

WARRANTY. See Vendor and Purchaser; Bailment.

WASTE. See Mortgages, 7, 8.

WATER COMPANY. See Corporations.

WATERS.

1. *Waters—Lateral Ditches—Insufficient Culvert—Diversion of Water.*—Where the water from the lateral ditch along the right of way of a defendant railroad overflows the lands of the plaintiff because of a culvert under the roadbed insufficient to carry off the flow from the ditch, the issue presented is one of fact as to the diversion of the water from its natural flow, and if the damages are thus caused, the defendant is answerable. *Savage v. R. R.*, 241.

2. *Same—Permanent Damages—Continuous Damages—Limitations of Actions.*—The five-year statute of limitations [Rev., 394 (2)] does not apply to damages for the diversion of water from a lateral ditch along the roadbed of a railroad company, caused by an insufficient culvert to carry it under the roadbed, until the culvert became insufficient. *Ibid.*

3. *Waters—Upper Proprietor—Diversion—Drainage Ditches—Irrelevant Evidence—Condemnation—Drainage Act.*—Where the upper proprietor of lands has diverted the natural flow of the water thereon to the damage of the lower proprietor, the latter may then recover his damages caused thereby, and it is no defense to show that he might have reduced his damages by cutting drainage ditches on his own land or by agreeing that the upper proprietor should cut them. The defendant's remedy, if any, was by proceedings for condemnation under the Drainage Act. *Waters v. Kear*, 246.

WATERS—*Continued.*

4. *Waters—Upper Proprietor—Diverting Flow—Damages.*—An upper proprietor can increase and accelerate the flow of water from his lands without liability to the lower proprietor for damages; but when the flow of water is diverted to the detriment of the lower proprietor, he may recover for the damages consequently caused to his lands. *Barcliff v. R. R.*, 268.

5. *Same — Swamp Lands — Drainage — Insufficient Culvert.*—Where the track of a railroad company passes through a large area of low, boggy, and undrained land, and to drain the same the company cuts ditches through the rim of the basin, to carry off the water to an existing ditch, which empties the water into a ditch along the county road, carrying it further along to where the last ditch crosses the road through a culvert; and thereafter enlarges the various ditches so as to carry off more of the water, but fails to enlarge the culvert, whereby the increase of water finds an insufficient outlet and ponds water back upon the plaintiff's land, to his damage. *Held:* The drainage of the lands by the defendant, in this manner, and diverting its flow with an insufficient culvert, caused an injury to the plaintiff's land for which the defendant is responsible in damages. *Ibid.*

6. *Same—Limitations of Actions.*—Where an upper proprietor has drained, by the use of ditches ultimately emptying through a culvert, under a railroad embankment, an area of his low, swampy lands, and thereafter enlarges the ditches so as to carry such additional quantity of waste as to render the culvert inadequate and pond water upon the lands of the lower proprietor, the latter's cause of action did not accrue until the ditches were so enlarged, and the statute of limitations did not commence to run till then. *Ibid.*

7. *Same—Continuing Damages—Presumption of Grant—Permanent Damages.*—Where the upper proprietor has caused damages to the lands of the lower proprietor by diverting the surface waters from their natural flow, the latter, in his action, is entitled to recover such damages as accrued within three years prior to the commencement of the action, unless there is a presumption of a grant from twenty years acquiescence, or permanent damages in an action brought within five years after the act complained of. *Ibid.*

8. *Waters—Upper Proprietor—Diverting Water—Rights of Lower Proprietor—Diminishing Damages.*—The lower proprietor, upon whose lands the upper proprietor has diverted the flow of water to his damage, is not required to avoid the damage by digging drainage ditches to carry off the water. *Ibid.*

9. *Water and Water-courses—Permanent Damages—Limitations of Actions —Trials—Questions for Jury.*—In an action for permanent damages to land alleged to have been caused by a wrongful diversion of the natural flow of surface waters by the upper proprietor, the statute of limitations runs within five years next before the commencement of the action from the time of the commission of the act complained of, which issue is to be determined by the jury, upon conflicting evidence. *Clark v. R. R.*, 415.

10. *Surface Water—Drainage—Negligence—Evidence—Appeal and Error—Harmless Error.*—Where damages to goods stored in a warehouse

WATERS—*Continued.*

located in a basement, in a damp, soggy place, are sought in an action alleging it was caused by a wrongful diversion of the flow of surface waters, it cannot be considered for error on appeal that a witness, not having qualified as an expert, was permitted to testify that the water would rise in a basement of this character unless built with concrete floor and walls, as such would naturally be inferred by an intelligent jury from their own knowledge of such conditions, and especially where the question was undisputed in the evidence of both parties at the trial. *Brinkley v. R. R.*, 428.

11. *Surface Waters — Drainage — Negligence—Evidence—City Engineers—Due Care.*—In an action against a city and a *quasi*-public corporation for damages to goods from the rising of water in a basement wherein they were stored, alleged to have been caused by an improper or insufficient sewer constructed by the defendant, etc., to carry the water off, with evidence that the defendant city had put in a 24-inch pipe, under a street, and the defendant corporation had continued the same drain across its property below, the minutes of the defendant city, showing the appointment of engineers to construct the drainage of the town, are competent to be shown upon the question of the exercise of due care. *Ibid.*

12. *Surface Waters—Drainage — Negligence—Evidence—Ordinary Rainfall —Appeal and Error—Harmless Error.*—Where damages are sought upon the grounds that they were caused to plaintiff's goods by water rising in his cellar, occasioned by insufficient drainage constructed by the defendant and heavy rains, it cannot prejudice the plaintiff that a witness was permitted to testify that the drainage was sufficient to carry off the water in an ordinary rainfall, when that fact is not controverted on the trial. *Ibid.*

13. *Surface Waters — Drainage—Ordinary Care—Negligence—Anticipated Rainfalls—Trials—Instructions.*—In this action against a city and a *quasi*-public corporation to recover damages to plaintiff's property alleged to have been caused by the negligence of the defendants in providing an insufficient drain for carrying the water off from his lands from rainstorms which should reasonably have been anticipated in that locality, it is held that the instructions of the court to the jury correctly imposed upon the defendants the duty of exercising ordinary care and correctly charged upon the question of their liability for their negligence in not doing so. The charge is approved. *Ibid.*

WIFE'S ESTATE. See Husband and Wife.

WILLS.

1. *Parent and Child—Services—Compensation—Wills—Consideration by Devise — Breach of Contract — Quantum Valebat.*—Where an adult child renders services in the care and support of her aged parent under an agreement between them that the parent should, in consideration thereof, devise certain lands to the child, and the services are accordingly rendered by the child until the parent voluntarily leaves the home of the child, and renders it impossible to perform his part of the contract, by conveying the lands to others, a right of

WILLS—*Continued.*

action presently accrues to the child, who has performed his part of the contract, and he may recover for the reasonable value of the services rendered. *Patterson v. Franklin*, 75.

2. *Wills—Caveat—Laches.*—The right to caveat a will may be lost by laches of the caveators in failing for a number of years to file the caveat, as where they knew of the probate of the will, lived in the same county or adjoining county to that of the probate, that the beneficiaries of the will had promptly entered into possession of the property as rightful claimants and had continued therein for twenty-six years. *In re Bateman's Will*, 234.

3. *Same—Married Women—Interpretation of Statutes—Limitations of Actions.*—The laches which will defeat the right of an heir at law of the deceased to file a caveat to his will will now also defeat the right of such who is a married woman, for she is put to her action by Revisal, sec. 408, though the statute of limitations was not repealed as to married women until 1899 (ch. 78). Under the seven-year statute of 1907 (Pell's Revisal, sec. 3135) a married woman is required to bring her action or file her caveat within three years after becoming discovert. *Ibid.*

4. *Wills—Interpretation—Trusts.*—While no particular words are necessary in a will for the creation of a trust, the intention of the testator as gathered from the whole instrument, and not from parts of it, must be clear and manifest for the courts to declare that one has therein been created. *Bank v. Johnson*, 304.

5. *Same—Executor and Administrator—"Entire Control."*—A devise to the wife of the testator of the home place for life and at her death to his children in fee, share and share alike, with further provision, in a later item, that his wife and children "shall share equally in both real and personal property, the division not to be final until my youngest child, Virginia, is 21, if living, and if either die without children, their property is to be equally divided between their brothers and sisters," does not create a trust merely by the appointment of executors, stating that they were for the purpose "to execute this my last will, and to have entire control thereof so long as may be necessary for the fulfillment of this will," and to act as guardian for minor children of the testator, the powers given the executors being only such as they would otherwise have had as a matter of law and the appointment of a guardian being unnecessary to a trust estate. *Ibid.*

6. *Wills — Interpretation — Estates—Beneficiaries' Death—Limitations — Contingent Remainder—Trusts.*—A testator who died seized and possessed of a large estate consisting in real and personal property, devised his home place to his wife for life, with limitation over to his children in fee simple, share and share alike, and by a later item provided that his wife and children "shall share equally in both real and personal property, the division not to be final until my youngest child, Virginia, is 21, if living, and if either die without children, their property is to be equally divided between their brothers and sisters." *Held:* The last words of the quotation refer to the death of the children of the testator and are inconsistent with the construction that the whole property should be held by the executors, as trustees,

WILLS—*Continued.*

such construction applying equally to the wife, who takes her life estate in the home place absolutely. *Ibid.*

7. *Wills—Interpretation—Executors and Administrators—Passive Trusts —Possession and Use—Statute of Uses.*—Executors named in a will "to all intents and purposes to execute this my last will and testament; to have entire control thereof so long as may be necessary for the fulfillment of this will," etc., if construed to hold as trustees, they are, upon the terms of the will being construed, trustees only of a passive trust, and the devisees and legatees will be entitled to the present possession and use of the property they derived by the will, under the statute of uses. *Ibid.*

8. *Wills—Interpretation—Contingent Remainders—Final Distribution.*—A devise and bequest of the testator's real and personal property to his wife and children, "the division not to be final until my youngest child is 21 years, and if either die without children, their property is to be equally divided between their brothers and sisters." *Held:* The wife presently takes her share of the property devised to her; and the children presently take a determinable fee to their whole interest in the property, to be defeated upon the happening of the contingency of dying without children, the final division to take place when the youngest child is 21 years of age. *Ibid.*

9. *Wills—Interpretation—"Lend"—Words and Phrases.*—In the construction of a will, the word "lend" will be taken to pass the property to which it applies in the same manner as the words "give" and "devise," unless it is manifest that the testator intended otherwise. *Robeson v. Moore*, 388.

10. *Wills—Intent—Interpretation.*—In construing a will, the word "or" will be given the meaning of the word "and" when from the language employed in the paper writing it appears that such was the testator's intent. *Ham v. Ham*, 486.

11. *Same—"Or" as "And"—Estates—Contingent Remainders.*—In a devise of lands to the testator's four sons, "but should either of them die before arriving at the age of 21, or without children surviving him," the word "or" should be read as "and," so as to require both contingencies to occur before the limitation over should take effect, and thus save the inheritance to the child or children of any of the sons who should die under age. *Ibid.*

12. *Same—Vested Interests.*—A devise of lands to the testator's four sons, with provision, "but should either of them die before arriving at the age of 21, or without children surviving him," vests in each of the sons the title to his interest in the lands upon his becoming 21 years of age, without regard to his having or not having children. *Ibid.*

13. *Same—Survivorship.*—A devise to the testator's four sons, with provision that the lands be partitioned when they attain the age of 21 years, and upon the death of each of the sons his share "shall go to the others that are living, but not to any of my other children," it appearing that the testator had other living children for whom he had also made provision, does not include within the intent and meaning of the limitation over the surviving child or children of a

WILLS—*Continued.*

deceased son, the words "shall go to the others that are living" refering only to the testator's four sons who are named in the devise. *Ibid.*

14. *Same—Ultimate Survivor.*—It appearing from a devise of lands to the testator's four sons that he intended successive survivorships, by directing that at the death of each under age, or without leaving children to survive him, then his or their share "shall go to the others that are living," the question whether the last surviving son, or the last two of the surviving sons, would take the estate, is, under the facts of this case, immaterial, one of the last two having acquired the share of the other by purchase. *Ibid.*

15. *Wills — Separate Clauses — Interpretation—Intent—Phraseology—Substance.*—A testator in separate items of his will devised different tracts of land to certain of his sons, with words having substantially the same meaning, but with slightly different phraseology, the first clause providing, by interpretation, a succession of interests in the sons, contingent upon their living longer than the others. Construing the will to ascertain the intent of the testator, it is held, under the facts of this case, that the difference in the phraseology used in the subsequent clause is immaterial. *Ibid.*

16. *Same—Contingent Limitations—Rule in Shelley's Case.*—A devise of lands to the four sons of the testator upon contingency that "should either of the sons die before arriving at the age of 21, or leaving children surviving him, then and in that case his or their share shall be taken and equally divided between those who are living" is construed, under the circumstances of this case and in connection with another and relevant clause of the will, as if it had read "before" or "without leaving children surviving him," and the child of a deceased devisee may only inherit from his own father, and not take as purchaser under the will of the testator. *Ibid.*

17. *Wills—Devises—"Children"—Interpretation—Grandchildren.*—A devise and bequest of the residue of real and personal property to the "wife and children" of the testator will not include therein his grandchildren, unless the contrary intent is shown by necessary implication from the terms or expressions used in the will; and in interpreting the will under consideration it is held that the testator used the word "children" in its ordinary sense. *Thompson v. Batts*, 530.

WRIT OF REVIEW. See Appeal and Error, 24.